INTELLIGENCE OVERSIGHT AND CONGRESS: PRACTICAL AND CONSTITUTIONAL IMPERATIVES

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For over a year, congressional oversight of intelligence operations has been a much discussed subject. This is attributable to two interrelated developments. First, the Iran-Contra Affair and its attendant investigations as well as the media spotlight on the ongoing insurgencies from Afghanistan to Southern Africa and Central America have reawakened public and congressional interest in, and scrutiny of, covert operations. Second, Congress is readying a dizzying array of new intelligence-related statutes.[1] This effort has prompted considerable criticism from the executive branch and numerous intelligence professionals. Overall, it is indeed a propitious time to review how well the existing strictures of congressional intelligence oversight are operating, whether the proposed new legislation in this area is the right way to go, and last, but not least, whether any additional reforms are required.

As in any review of congressional regulation of executive branch functions, two questions readily present themselves. They are: (1) whether the congressional activities involved are constitutionally proper, and (2) whether the statutory scheme, and the way it is being administered by the relevant congressional committees, are operating well, or whether they unduly burden the executive endeavors they purport to oversee.

To determine the proper constitutional parameters of congressional intelligence oversight one should begin by examining a somewhat

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1. In addition to new intelligence oversight statutes, Congress has been wrestling with bills which would create the post of an independent Inspector General at the Central Intelligence Agency (CIA) and would increase the power of the General Accounting Office to conduct audits of CIA operations. Another bill suggested restructuring the intelligence community, by creating an intelligence czar to head it and to serve as the President's principal intelligence advisor.

broader issue—the current executive-congressional tensions over the prerogative of conducting U.S. foreign policy. With increasing frequency, members of Congress and academic commentators have been proclaiming that the executive and Congress should function as coequal partners in the foreign policy arena, producing what has been termed a codetermination of American foreign policy. In my view, such assertions are based on a fundamentally erroneous reading both of the Constitution, and of some two hundred years of actual governmental practice and judicial determinations. A fair reading of the constitutional text, of the statements of the Founding Fathers, and of the writings of the political philosophers who shaped their thinking, clearly indicate that the executive branch possesses vast plenary powers in the foreign affairs field.[2] In contrast, congressional foreign affairs powers are limited, and specifically delineated as such in the Constitution.[3]

Congress, as a whole, has express constitutional powers to "regulate commerce with foreign nations," "provide for the Common Defense and general welfare of the United States," "declare war," "make Rules for the Government and Regulation of the land and naval forces," and to "make all laws which shall be necessary and proper for carrying into Execution . . . all Powers" vested by the Constitution in the United States government.[4] The Senate is given the right to provide "advice and consent" to treaties negotiated by the executive branch. And last, but not least, Congress has the power of the purse, providing it with a broad check on all executive activities.[5]

The President, however, primarily by the virtue of the grant of executive powers specified in article II of the Constitution, possesses the entire plethora of foreign affairs power. This fact had been recognized and acknowledged by the Supreme Court. For example, in the leading case of *United States v. Curtis-Wright Export Corp.*,[6] the Court described the nature of the President's foreign affairs powers as follows:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He

2. These included Locke, Montesquieu and Blackstone, all of whom argued that the control of foreign affairs was inherently an executive function. *See, e.g.*, E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1785-1957 415-16 (1957) [hereinafter CORWIN].

3. Within the first years after the Constitution was ratified, the debate about the extent of the executive power to manage U.S. foreign policy pitted Hamilton (Pacificus) against Madison (Helvidius). However, intellectual merits of the Pacificus arguments about Presidential supremacy aside, practical exigencies of international relations ensured executive preeminence. *See* CORWIN, *supra* note 2, at 171-79.

4. U.S. CONST. art. I, § 8.

5. *Id.*

6. 299 U.S. 304 (1936).

> makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation, the Senate cannot intrude and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the Nation in its external relations, and its sole representative with foreign nations." The Senate committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows: "The President is the constitutional representative of the United States with regard to foreign nations and must necessarily be most competent to determine when, how, and upon what subjects, negotiation may be urged with greatest prospect of success."[7]

Commenting on the same matter, Thomas Jefferson stated: "The transaction of business with foreign nations is executive altogether. It belongs then to the head of that department, *except as to such portions of it that are specifically submitted to the Senate. Exceptions are to be construed narrowly.*"[8]

It was precisely the Framers' understanding that the foreign affairs powers were inherently executive in nature that resulted in the relatively austere elaboration of the President's foreign affairs function. In their view, the general grant of executive power contained in article II, was perfectly sufficient to convey the notion of the President's constitutional supremacy in the foreign affairs field. We would also do well to recall that in those days contracts often contained general clauses, which under then existing rules of construction were interpreted broadly, and also specific provisions which usually were construed narrowly.[9] Overall, the argument that somehow because the Constitution devotes a lot more words to Congress' foreign affairs powers, than to the President's constitutional prerogative, the Congress is a coequal partner in the foreign policy field, entirely mistakes the original meaning of the Constitution.

Many scholars also believe that there is another reason why the President's authority in foreign affairs is described with such brevity in the Constitution. This view was eloquently articulated in Justice Sutherland's majority opinion in the *Curtis-Wright* case.[10] Sutherland argued that, upon declaration of independence, the totality of American sovereignty, originally vested in the British Crown, devolved to the Colonies in their collective capacity, rather than to individual thirteen States.

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7. *Id.* at 319 (citations omitted).
8. 5 T. JEFFERSON, WRITINGS 161 (P. Ford ed. 1985) (emphasis added).
9. *See generally* Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885 (1985).
10. *Curtis-Wright,* 299 U.S. at 304.

Subsequently, the sovereignty vested in the Confederation of American States, embodied by the Continental Congress, passed to the "more perfect Union" established by the Constitution.[11]

The Federal government's powers, carved out of the powers previously held by the States, were carefully delineated. In contrast, the Framers of the Constitution did not foresee any need to detail foreign affairs powers available to the Federal government, since they were complete, and vested fully in the executive, except for such specific and limited powers as were delegated to Congress. This argument, in my view, has merit, and further bolsters the claim of the President's preeminence in the foreign affairs field.

Specific foreign affairs powers delegated to Congress and the executive aside, persistent congressional efforts to micromanage executive branch functions are unconstitutional in their own right. The main constitutional defect of such efforts is that intrusion by any one of the three coordinate branches of the Federal government into the core functions of another branch, which disrupts the ability of that branch to conduct its constitutionally prescribed functions, violates the separation of powers principle.

This principle is the very bedrock of our constitutional order, and underlies the system of checks and balances embodied in the Constitution. Violation of the separation of powers principle is both unconstitutional and potentially antidemocratic. In that regard, as James Madison noted: "no political truth is . . . of greater intrinsic value . . . than that . . . the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."[12] Operating upon this premise, the Supreme Court, on numerous occasions, has struck down congressional efforts to regulate the executive's conduct in the foreign affairs area as being repugnant to the separation of powers principle.[13]

In *Nixon v. Administrator of General Services*, the Court devised a careful framework for addressing the constitutionality of statutes, which, on their face, appear to run afoul of the separation of powers principle:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the disruption is present must we then determine

11. *Id.*
12. THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).
13. *See, e.g.*, Chicago S. Air Line v. Waterman S.S. Corp., 333 U.S. 103 (1948).

> whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[14]

Congressional attempts at micromanagement of foreign policy certainly fail the above-referenced muster. They unquestionably interfere with the ability of the executive branch to accomplish its constitutionally prescribed duties; yet, it is difficult to see what legitimate congressional interests such micromanagement might serve, or even to what constitutional functions of Congress it might relate. Lest we forget this fundamental fact in the current congressional "anything goes" atmosphere, let me remind you that, as the Court noted in *Bowsher v. Synar,* the Constitution does "not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[15]

All of the above are fairly fundamental constitutional basics, which ordinarily do not merit a lengthy exposition. Nevertheless, the developments of the last several years clearly demonstrate that Congress has lost sight of some fundamental constitutional maxims, and, as an institution, sees nothing wrong with seeking to micromanage American foreign policy. To be sure, many of the more far-sighted members of Congress themselves have criticized this pattern of conduct. Unfortunately, however, enough congressional members remain unrepentant to continue with their constitutional mischief.

The essential facts are not in dispute. As Vice President George Bush stated in his Charleston speech: "On foreign policy today Congress is fractured and fractious. Leadership is rare; partisanship is common. Some twenty-three committees and eighty-four subcommittees claim some jurisdiction over international affairs, each of them jockeying for a piece of the action, each of them trying to be Secretary of State."[16]

A very similar point was made by Senator John Tower, then the Chairman of the Senate Armed Services Committee:

> The 1970's were marked by a rash of congressionally initiated foreign policy legislation that limited the President's range of options on a number of foreign policy issues. The thrust of the legislation was to restrict the President's ability to dispatch troops abroad in a crisis, and to proscribe his authority in arms sales, trade, human rights, foreign assistance, and intelligence operations. During this period, over 150 separate prohibitions and restrictions were enacted on Executive Branch authority to formulate and implement foreign policy. Not only was much

14. Nixon v. Administrator of Gen. Serv., 443 U.S. 425, 443 (1977) (citations omitted).
15. Bowsher v. Synar, 478 U.S. 714, 722 (1986).
16. Speech given by Vice President George Bush, Charleston, South Carolina (Feb. 29, 1988).

> of this legislation ill conceived, if not actually unconstitutional, it has served in a number of instances to be detrimental to the national security and foreign policy interests of the United States.[17]

It is because of developments like these that fundamental constitutional maxims about the proper role of the Executive and Congress merit repetition, even before erudite audiences.

Unquestionably, the idea of executive-congressional codetermination of U.S. foreign policy is constitutionally deficient and flawed as a practical guide to successful policymaking. Yet, what is worse is that, having gone ahead and imposed some modicum of codetermination on the Executive, Congress has failed to act accordingly, and assume some share of responsibility for its actions. Instead, Congress has been playing a game of "hide and seek," ready to pounce on the Executive for any real or perceived transgression; yet, it has been unwilling to admit any mistakes of its own. The Majority Report of the congressional Iran-Contra committee is a perfect example of this trait.

Interestingly enough, while deriding the executive branch for misusing the venerable concept of plausible deniability, Congress has been perfectly willing to utilize this concept. On innumerable occasions, congressional attitudes during closed sessions have been exactly the reverse of those displayed in open hearings. This occurs particularly frequently when politically controversial issues, such as aid to the Nicaraguan freedom fighters, are involved.

Furthermore, some congressional members, evidently dissatisfied even with the genuine sharing of power between the Executive and Congress, seem ready to move toward an even more extreme position—"if we have not authorized a given executive action, it is illegal." The natural corollary of this view is the proposition that the Executive is a ward of Congress.

To justify congressional encroachment on the executive branch functions, supporters of this view have promulgated two ideological myths—the myth of the Imperial Presidency[18] and the allegation that Congress is somehow more democratic and populist than the Executive, and consequently, as a surrogate for American people, has a right to oversee executive functions.

Both of these assertions are fundamentally false. Instead of the alleged threat of the Imperial Presidency, the main danger confronting our

17. Tower, *Congress versus the President: The Foundation and Implementation of American Foreign Policy*, FOREIGN AFF., 229, 234 (1982).

18. For an exposition of this view, see generally A. SCHLESINGER, THE IMPERIAL PRESIDENCY (1973).

democracy is that of an Imperial Congress, arrogating to itself all of the vast powers of the Federal government. This congressional conduct is not altogether too surprising, since, as Madison prophetically observed, the Legislature is inherently the most expansionist and unruly branch of government because:

> [T]he legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength, which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribe; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.[19]

As far as the respective degrees of democracy associated with each branch are concerned, arguably it is the President, who, having been elected by all of the people, represents the popular will of the country. Congress, by contrast, seems to be unduly swayed by vocal special interests—a development perhaps inevitable in a democracy, but hardly entitling the Congress to pose as the best representative of the American people.

All in all, congressional micromangement of executive functions is violative of the fundamental constitutional principles. On practical grounds, due to such factors as leaks, breakdown of the congressional seniority system, and excessive responsiveness to lobbies and pressure groups, Congress is also clearly ill-suited for genuine codetermination of American foreign policy. A discernible tendency to avoid hard choices by opting invariably for a compromise solution, whatever its conceptual merits, also greatly hampers congressional ability to contribute effectively to the conduct of American foreign policy. An excellent example is congressional hand-wringing over the United States reflagging of Kuwaiti tankers. Most members of Congress did not have the courage either to oppose the initiative outright, or to support it unequivocally, calling instead for further delays and studies. This problem is not entirely new. The ineptness of the Continental Congress in dealing with national security matters was among the primary influences contributing to the convocation of the Constitutional Convention and the drafting of the Constitution.[20]

Congressional micromanagement has not only harmed the executive branch, it has damaged the Congress as well. By spending inordinate

19. THE FEDERALIST No. 48 (J. Madison).

20. F. MARX, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF A CONSTITUTION 3-51 (1948).

amounts of time constantly second guessing the executive, Congress has jeopardized its ability to attend to its proper constitutional duties—the business of enacting sensible legislation.

The authority to conduct intelligence operations is not specifically mentioned in the Constitution. However, the President's authority to conduct such operations can be naturally extrapolated from the grant of the executive powers vested in the President by article II of the Constitution, the President's power as the Commander in Chief, his powers to execute the laws faithfully, and to conduct diplomacy.

Both the value of intelligence operations and the requirement of secrecy were recognized early in American history. As noted by George Washington, "[t]he necessity of procuring good intelligence is apparent and need not be further urged—all that remains for me to add, is that you keep the whole matter as secret as possible."[21] This view of intelligence was shared by the other Founding Fathers, who, by their behavior, clearly demonstrated their belief that the business of intelligence required the utmost secrecy and was largely unsuited for congressional involvement.[22] For example, when presented with a need to conduct intelligence operations during the Revolutionary War, the Continental Congress set up, in 1775, the Committee of Secret Correspondence, which oversaw such operations, and kept all information about them from the rest of the congressional members.

Perhaps, not surprisingly, the evolution of congressional attitudes rather closely tracked the development of the overall executive-congressional relations. For example, in the early post-World War II period, Congress fully shared the concern of the executive branch about the threat posed by the Soviet Union. Robust intelligence capabilities, including covert action, were perceived as a vital first line of American defense. Accordingly, Congress displayed almost unanimous support for intelligence activities.

What passed for congressional oversight of intelligence in those days was rather informal, and consisted of occasional briefings given to senior congressional leaders.[23] Efforts to create a more formal oversight system were routinely defeated, as was, for example, the 1955 legislation introduced by Senator Mansfield to create a joint congressional intelligence

21. Letter from General George Washington to Colonel Elias Kayton (July 26, 1777), *quoted in* THE INTELLIGENCE COMMUNITY 3 (T. Fain, K. Plant & R. Milloy eds. 1977).

22. *See, e.g.*, H. WRISTON, EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS (1929); THE FEDERALIST No. 64, at 432, 433-35 (J. Jay) (J. Cooke ed. 1961) (the President ought to be left free "to manage the business of the intelligence in such manner as prudence might suggest.").

23. SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, SUPPLEMENTARY DETAILED STAFF REPORTS ON FOREIGN AND MILITARY INTELLIGENCE, S. REP. No. 755, 94th Cong., 2d Sess., pt. 4, at 39 (1976).

oversight committee. Instead, jurisdictionally, intelligence matters came to be handled by special Intelligence Subcommittees of the Armed Services and Appropriations Committees, and intelligence budgets were hidden in appropriations made for other government agencies. The overall style of congressional oversight remained characterized by the hands off attitude. This situation remained essentially unchanged until the early 1970's.[24]

Some of the intelligence professionals came to regard this era as the "Golden Age" of intelligence oversight. It is far from clear, however, whether this was correct. In retrospect, one can say that the lack of congressional knowledge of intelligence was disadvantageous to the maintenance of the long-term congressional consensus on this issue. Even more importantly, the congressional abstinence from involvement in intelligence matters was a function of a particular geopolitical alignment in the aftermath of World War II and the strong dosage of bipartisanship espoused by a generation of remarkable congressional leaders.

This situation was too good to last, and, indeed, by the late 1960's, it began to disintegrate—a process hastened by domestic political divisions stemming, in part, from the Vietnam War. This led to the enactment of numerous congressional restrictions on the executive branch intelligence operations including the 1974 Hughes-Ryan amendment.[25] Now, any expenditure of funds for covert operations launched by the CIA required a formal Presidential determination, dubbed the finding, that the operation was necessary to United States national security. This finding, in turn, had to be reported in a timely fashion to "appropriate committees of Congress."[26] Such appropriate committees came to number as many as eight.

Almost overnight, the United States went from what was perhaps insufficient congressional oversight of intelligence, to what became an excessive congressional oversight. Not surprisingly, the U.S. intelligence capabilities in general, and covert operations in particular, were decimated. Information about an overwhelming percentage of covert operations, briefed to congressional committees, leaked literally within minutes of its transmission.

In addition, a virtual orgy of congressional investigations of the intelligence community, spearheaded by the Church (Senate Select Committee to Study Governmental Operations with Respect to Intelligence

24. For a discussion of the early congressional attitude toward intelligence oversight, see C. CRABB & P. HOLD, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY (1980).

25. Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (codified as amended at 22 U.S.C. § 2422 (1982)).

26. *Id.*

Activities) and Pike (House Select Committee on Intelligence) committees, ensued. As a result, valuable intelligence assets were compromised, the reputation of U.S. intelligence agencies was unjustly sullied, and the myth of the "rogue CIA" was born.

To be sure, the executive branch was not blameless either. Throughout the post-war years, the intelligence community functioned as the loyal executor of the Presidential edicts. All of the more controversial projects carried out by the CIA, including operations against Castro or Allende, were explicitly authorized by the President or by his assistants. Yet, when the time of political reckoning came, the intelligence community was "left out in the cold." This turn of events ensured that things would never be the same again, and that, in the future, the intelligence community would have to look out for itself. An essential bond of trust was broken.

After giving thought to some further regulation of the intelligence community, including the proposal to outlaw all covert operations,[27] Congress opted to inject more responsibility in the process. The number of congressional committees, with which intelligence data had to be shared, was reduced from eight to two.[28] The 1980 Intelligence Oversight Act streamlined congressional oversight of central intelligence to keep these committees "fully and currently informed concerning intelligence activities."[29] The Act, however, by its terms expanded the scope of oversight as compared with the Hughes-Ryan amendment by requiring reporting on covert operations conducted by any U.S. intelligence agency, and not just by the CIA. In the early 1980's, a series of other practical improvements in the congressional oversight process ensued. In short, things were getting better.[30] This positive trend, however, did not last.

This brings us to the matter of the Boland amendments—a subject widely discussed in the last two years. I would not belabor you with a detailed exposition of what these amendments did, how they were enacted, and how they ought to be properly interpreted. I am sure this task was accomplished over the last two years, and, given the presence of

27. Such a bill, for example, was introduced by Sen. Abourezk as an amendment to the 1974 Foreign Assistance Act. This proposal was defeated by a vote of 68 to 17. 120 CONG. REC. 33,482 (1974).

28. The House Permanent Select Committee on Intelligence was established by H.R. Res. 658, 95th Cong., 1st Sess. (1976); the Senate Select Committee on Intelligence was brought into being by S. Res. 400, 94th Cong. 2d Sess. (1975).

29. Title V — Accountability for Intelligence Activities, Pub. L. No. 96-450, § 501(a)(1), 94 Stat. 1981 (1980) (codified at 50 U.S.C. § 413(a)(1) (1982)) (amendment to the National Security Act of 1947, 50 U.S.C. § 401).

30. For a generally positive assessment of congressional oversight of intelligence, see Goldwater, *Congress and Intelligence Oversight,* WASH. Q. (Summer 1983). *But see* Karalekas, *Intelligence Oversight: Has Anything Changed?,* WASH. Q. (Summer 1983).

most of the Iran-Contra lawyers in this room, there is not much "new thinking" that can be generated on the subject.

It would be desirable, however, to place this issue in a broader context. What these amendments represented was a perversion of the oversight process. Having started with the conception of the oversight process as a purely information gathering exercise, as soon as the matters involved began to generate sufficient political controversy, Congress swiftly moved to impose substantive restrictions on the intelligence operations. Yet, in placing these restrictions through the use of its power of the purse, Congress was careful to preserve plausible deniability for itself. Essentially, Congress wanted to place itself on the record as being opposed to the Contra aid and desirous of curtailing executive support for the Contras. At the same time, Congress did not want to curtail such operations entirely, lest this provokes a constitutional confrontation, or results in Congress being saddled with the responsibility for having lost Nicaragua.

As a result, an uneasy compromise emerged. Congress blocked most of the regular channels for executive support of the Contras, but left some loopholes open. This bargain fell apart, however, when the news about the Iran-Contra Affair exploded in the media. At that time, Congress proved unable to suppress its partisan instincts and unleashed a barrage of attacks against the executive branch. Many of these criticisms went beyond attacking the specific facts of United States support for the Contras.

One of the rallying cries of Congress became the condemnation of the so-called privatization of United States foreign policy. Any use of private funds and channels to conduct U.S. foreign policy was derided as illegal. Nearly all of these arguments are without merit. Nothing in the Constitution or statutes precludes the executive from enlisting private individuals to carry out discrete foreign policy and intelligence assignments. Such has been the practice of many U.S. Presidents, beginning with George Washington. In fact, congressional micromangement of U.S. foreign policy, and the ossification and inflexibility of the regular policy channels it produces, greatly contribute to the Executive's incentives to seek help from private individuals and third parties.

For example, it was congressional insistence that no foreign aid funds be reprogrammed without congressional approval that forced President Carter to turn to the Saudis to supply money for Somalia during the 1978 Ogaden War. Though Congress did not oppose the aid to Somalia, its ponderous legislative machinery simply did not permit a response in timely fashion. And, without doubt, attempted congressional micromanagement of U.S. covert operations during the 1980's was the

key factor prompting certain officials of the Reagan administration to consider unorthodox approaches to running such covert operations, eventually culminating in the Iran-Contra Affair. Congress, however, has evidenced no intention to accept any share of the blame for this debacle.

The proponents of the "broad" reading of the Boland amendment, who argue that the Amendment proscribed all U.S. efforts in support of the Contras, also have ignored the rather startling constitutional implications of their views.

Clearly, even assuming *arguendo* that the Amendment precluded the expenditure of any funds appropriated by Congress, it did not forbid the solicitation of funds from foreign or private sources. In fact, the congressional debate leading to the enactment of the so-called Pell amendment amply demonstrated that the Congress understood that the Boland amendments only applied to certain specific funds appropriated by Congress, and did not proscribe raising or soliciting of third-party funds for the Contras.

Moreover, specifics of the Boland language aside, to argue that Congress can ever preclude the President or his agents from lobbying third countries on behalf of a particular cause, implies that Congress can prescribe an entire U.S. foreign policy agenda. Unquestionably, such an outcome would be constitutionally deficient. Whether or not one agrees with the claim of Presidential preeminence in foreign affairs, no responsible commentator can countenance a situation where the President would become a ward of Congress. Yet, this is precisely the implication of the preferred congressional interpretation of Boland.

This brings us to the current intelligence oversight bills pending before the Congress. As you well know, both the Senate bill and its House counterpart prominently feature the so-called forty-eight hour rule. In essence, they prescribe prior congressional notification of all covert operations. In exceptional cases, notification can be given after the inception of the covert operation in issue, but no later than forty-eight hours from its inception. This provision has been criticized by every executive branch witness who testified on this subject before Congress.

But why make such a fuss? After all, what is so wrong about a reporting requirement, even if it is somewhat onerous on the executive branch. The problem with this provision, however, is that it is fundamentally unconstitutional. To begin with, any mandatory reporting of information by the executive branch to Congress, with no exceptions provided, violates the long-standing principle of the executive privilege.[31] In

31. The concept of executive privilege stems ultimately from the separation of powers

fact, a careful review of the preamble to the 1980 Intelligence Oversight Act indicates the existence of some deliberate ambiguity over the issue of whether, under exceptional circumstances, the President could withhold information from Congress.[32] Most lawyers know that, while clarity in legal documents is generally preferable, sometimes ambiguity is essential. The Intelligence Oversight Act of 1988, if enacted by Congress,[33] would destroy this ambiguity, in favor of mandatory no-exceptions reporting by the President.

Those pundits who assert that any information sharing with Congress is constitutionally unobjectionable are quite wrong. To begin with, in my view, the extent of Congress' right to obtain information is properly determinable by reference to its substantive powers. To put it differently, one is hard pressed to justify how Congress can legitimately compel the executive branch to produce information on an issue or matter where Congress lacks substantive regulatory power. Intelligence operations fit precisely in this category. Moreover, to claim that reporting to Congress is nothing more than information sharing is highly disingenuous. Knowledge is power, and Congress has proved to be quite willing to utilize oversight statutes, which, on their face, feature nothing more than reporting requirements, as vehicles for *de facto* substantive regulation. Such regulation has taken either the form of leaks, an art of which Congress is the leading practitioner,[34] although in all fairness, the executive branch has not shied away from it either, or an outright congressional proscription of certain types of intelligence operations, *e.g.*, the Boland amendments.[35]

Having criticized so much the trends in intelligence oversight, let me

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principle and holds that the executive has a strong claim to protect from disclosure any sensitive executive branch communications. *See, e.g.*, Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 B.Y.U. L. REV. 231. Other commentators, however, vigorously dispute the constitutionality of the executive privilege. *See, e.g.*, R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974). Yet, while the academic debate had been going on, in practice, for over two hundred years, American Presidents successfully utilized the concept of executive privilege to protect from disclosure national security information. The validity of the executive privilege in the national security context also was explicitly acknowledged by the Supreme Court in the leading case of United States v. Nixon, 418 U.S. 683, 707 (1974).

32. *See* 50 U.S.C. § 413 (1982).

33. The Senate passed its version of the Act, and the House was on the verge of passing a similar bill. However, the prospects of its enactment, at least in the foreseeable future, have been dealt a heavy blow by the recent disclosure of classified information on U.S. operations in Nicaragua by the House majority leader Jim Wright.

34. In recent years alone, Congress is credited with leaking details about alleged U.S. efforts to oust Khadaffi, and support to Angolan and Nicaraguan rebels. S. 1721, 100th Cong., 2d Sess., 134 CONG. REC. S1844 (daily ed. Mar. 3, 1988).

35. Congress has also periodically attempted to pass statutes, which would have given it the explicit right to approve or disapprove all covert operations. Such legislation, for example, was considered in 1983 by the House Select Committee on Intelligence.

close with what I hope are some constructive suggestions. Clearly, the best options for producing a superior oversight system are to restore congressional bipartisanship, and to improve the overall executive-congressional relationship in the area of foreign affairs. This approach ought to be pursued, and hopefully we can devise some new concepts for a productive executive-congressional partnership. Progress in this area, however, is likely to be gradual at best. Thus, we should concentrate on improving the existing oversight structure.

The most imperative tasks are to insulate intelligence oversight from political pressures and to restore the trust between the two political branches. To accomplish this, the Congress should explore the idea of creating a single intelligence oversight committee, composed solely, or at least mostly, of the members of the Senate. Arguably, from the constitutional standpoint, the Senate's entitlement to the involvement in intelligence oversight is much stronger than that of the House of Representatives, which has no constitutional powers in this area. This committee should have a small professional staff, and all of its members, including the members of Congress, should be subject to regular security checks and background investigations.

One of the first orders of business of such a committee should be the development of rigorous safeguards against leaks of classified information. Congress should also focus more on the broad intelligence policy issues; for example, how to improve the quality of analysis performed by United States intelligence agencies, how to allocate scarce budgetary resources among different collection methods, and last, but not least, how best to integrate the multitude of information gathered by the United States intelligence community into a picture, relevant to the needs of U.S. policymakers. These questions have been already addressed by the congressional Intelligence Committees; yet, an inordinate emphasis on congressional micromanagement of covert operations and the attendant executive-congressional tensions, have greatly hampered the ability of Congress to contribute an informed debate on these vital national security issues.[36]

Finally, the present congressional reporting requirements should be retained. The Executive should have the flexibility to withhold notifying Congress about certain extremely sensitive matters. In my view, it is the present micromanagement and the semi-adversarial intelligence oversight system which breed mistrust. Thus, paradoxically, a more streamlined and flexible approach to intelligence oversight would not only be

36. For a discussion of Congress' role in developing broad intelligence policies, see Madison, *Committee Leaders Prod Intelligence Chief to Develop National Strategy,* 18 NAT'L J. 79 (1986).

constitutionally adequate and would safeguard our national security; it is also likely to improve executive-congressional cooperation and enhance information sharing.