Restoring Congress's Proper Role in Oversight of Covert Intelligence Operations

*James E. Gauch

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One former director of central intelligence has called the terrorist attacks on the World Trade Center and the Pentagon "the largest intelligence and law enforcement failure in U.S. history." Because the Central Intelligence Agency was born out of another deadly intelligence failure, the Pearl Harbor attack, it is a particularly fitting time to reconsider how best to equip the CIA to help fight the war on terrorism. History will judge what more, if anything, the intelligence community might have done to prevent al Qaeda's heinous attacks. This paper instead examines one facet of the CIA's role going forward: the structural restraints on covert operations abroad.[1]

There are, of course, a host of other factors that affect the CIA's ability to fight the war on terrorism, and this paper is not meant to suggest changing restrictions on covert operations as a panacea. Among other things, historic reductions in staffing and funding at the CIA and other intelligence agencies and an emphasis on intelligence sources having "clean hands"[2] may have an equally or more significant role. But the culture of suspicion that has arisen around covert intelligence activities certainly makes using such operations in the fight on terrorism more difficult. Restoring the appropriate constitutional balance would help the Executive Branch to coordinate all of its assets – military, intelligence and law enforcement – in the unconventional war we now face and would give the President maximum flexibility to work with foreign governments, as the Constitution intended, to protect America's interests.

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[1] This paper is restricted to the use of covert operations as distinct from military force. For recent analysis of the President's constitutional authority to use military force against terrorism, see Delahunty and Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 Harv. J. L. & Pub. Pol. 487 (2002), and Robert Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to "Declare War,"* 25 Harv. J. L. & Pub. Pol. 519 (2002).

[2] For a discussion of CIA recruitment of so-called "dirty assets" and other restraints on specific CIA powers, *see* Hitz, *Unleashing the Rogue Elephant*, *supra*, note 2.

I. A Brief History of Congressional Oversight Over Covert Operations

The National Security Act of 1947 established the Central Intelligence Agency under the authority of the National Security Council and authorized the Director of Central Intelligence to coordinate the United States' far flung intelligence activities.[3] The move was in part motivated by the intelligence failures that led to the lack of warning of the Japanese attack on Pearl Harbor.

The National Security Act did not expressly authorize the conduct of covert operations apart from intelligence gathering, and critics have debated to what extent such operations were contemplated. It did, however, authorize the Central Intelligence Agency to "perform such other functions" as the NSC may direct,[4] which is sometimes cited as authority for covert operations. During the CIA's first 25 years, even after the famously disastrous Bay of Pigs affair, Congress took little interest in formal oversight of covert operations. Appropriations that were used for covert operations were generally concealed within those of other agencies, such as the Department of Defense. That changed, however, in the Watergate era.

Beginning in 1974 and 1975, a series of congressional investigations, most notably those led by Senator Frank Church and Representative Otis Pike, raised questions about the Executive Branch's conduct of covert operations. Intense partisan divisions over the Vietnam War and Watergate, coupled with revelations about CIA covert operations abroad and at home, prompted calls for a more active congressional role. Among the most controversial foreign operations were those that attempted to destabilize or overthrow the governments of Chile and other

[3] Pub. L. No. 80-253, § 102, 61 Stat. 495, 497-99 (1947).

[4] National Security Act of 1947, § 102(d)(5) (codified at 50 U.S.C. §403-3(d)(5)).

countries and plots to assassinate foreign leaders such as Fidel Castro.[5] Revelations about the CIA's connections with domestic groups generated additional controversy.[6]

Congress's first major step was the Hughes-Ryan Amendment in 1974,[7] which for the first time imposed substantive and procedural restrictions on the conduct of covert operations. The Hughes-Ryan Amendment forbid the expenditure of funds by or on behalf of the CIA for covert operations – that is, CIA operations in foreign countries "other than activities intended solely for obtaining necessary intelligence" – unless the President first determined that the "operation is important to the national security of the United States." The Amendment further required the President to report "in a timely fashion, a description and scope of such operation to the appropriate committees of Congress."

Next, Congress created new oversight structures that served to institutionalize congressional suspicion of covert activities. The work of the Church and Pike Committees was continued with the creation of the Senate and House Select Committees on Intelligence in 1976 and 1977, respectively. Then in 1978, Congress placed intelligence agencies on the same authorization and appropriation process as other executive agencies.[8] More comprehensive changes to the reporting regime followed in 1980.

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[5] *See* 120 Cong. Rec. 26432 (1974) (listing various covert activities directed against foreign governments); *Covert Action in Chile 1963-1973: Staff Report of the Church Comm.*, 94th Cong., 1st Sess. (Comm. Print 1975); *Alleged Assassination Plots Involving Foreign Leaders: Interim Report of the Church Comm.*, S. Rep. 465, 94th Cong., 1st Sess. (1975).

[6] *See* F. Hitz, *Unleashing the Rogue Elephant: September 11 and Letting the CIA be the CIA*, 25 Harv. J. L. & Pub. Pol. 765, 770 (2002). The National Security Act expressly prohibited the CIA from exercising any "police, subpoena, law-enforcement powers, or internal security functions." NSA, § 102a, 50 U.S.C. § 403.

[7] Foreign Assistance Act of 1974, Pub. L. No. 93-559, §32, 88 Stat. 1804 (1974) (codified at 22 U.S.C. §2422; repealed 1991). For a more comprehensive discussion of history of congressional oversight before and after the Hughes-Ryan Amendment, *see* Americo Cinquegrana, *Dancing in the Dark: Accepting the Initiation to Struggles in the Context of "Covert Action," the Iran-Contra Affair and the Intelligence Oversight Process*, 11 Hous. J. Intl. L. 177, 182-205 (1988).

[8] *See* Pub. L. 95-370, 92 Stat. 626 (1978).

Although the CIA was already obligated to provide notice of its covert activities "in a timely fashion," in 1980, Congress extended the reporting obligation to any agency conducting intelligence operations and, more importantly, specified that the intelligence committees were to be "fully and *currently* informed of all intelligence activities . . . including any significant anticipated intelligence activity."[9] The 1980 Act also specified that notification was to be in advance except when the President determined that "it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States."[10] Even then, the President was to report to the so-called "gang of eight" – the senior leaders of the House and Senate and of the intelligence committees. Moreover, if prior notice was not given, the President was to notify the intelligence committees, again "in a timely fashion," about the operation and the reasons for not notifying them in advance.[11]

What constitutes notification in "a timely fashion" became a flash point during the Iran-Contra affair in 1985-1986. There, although President Reagan made the required findings to support Iranian arms sales, he ordered the CIA not to report the operations immediately to Congress, which did not learn about the operation until months later. The Department of Justice defended the President's decision not to immediately notify Congress based not only on the terms of the statute but also on the President's constitutional authority:

> The vague phrase 'in a timely fashion' should be construed to leave the President wide discretion to choose a reasonable moment for notifying Congress. This discretion, which is rooted at least as firmly in the President's constitutional authority and duties as in

[9] 1980 Intelligence Authorization Act, Pub L. No. 96-450, tit. IV, §407, 94 Stat. 1981 (codified at 22 U.S.C. § 2422 (repealed) and 50 U.S.C. § 413) (emphasis added). The Act streamlined the process in one respect by reducing the number of committees to which such activities were reported from eight to two (*i.e.*, the Intelligence Committees). The Act also increased the quantity of the information provided. § 501(a)(2) (requiring the agencies to provide any information the committees requested).

[10] *Id.*, § 501(a)(1)(B) (codified at 50 U.S.C. § 413).

[11] *Id.*, § 501(b).

> the terms of any statute, must be especially broad in the case of a delicate and ongoing operation whose chances for success could be diminished as much by disclosure while it was being conducted as by disclosure prior to its being undertaken.[12]

The opinion concluded that "the 'timely fashion' language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification."[13] Congress vehemently disagreed with that interpretation and so amended the reporting requirements again in 1991.[14]

In 1991, although Congress left the vague "timely fashion" language unchanged, it stiffened other requirements to inject itself more firmly into the planning and approval of covert operations.[15] Congress made three key changes. First, to the requirement that any covert operation be important to U.S. national security interests, Congress added the requirement that the President find that it is "necessary to support identifiable foreign policy objectives."[16] Second, Congress required that the finding be in writing or, if made orally, that it be reduced to writing within 48 hours, and expressly prohibited retroactive findings.[17] Third, Congress specified that the President must report that finding "as soon as possible" and "before initiation

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[12] *The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160 (1986).

[13] *Id*. at 173-74.

[14] *See* S. Rep. No. 85, 102nd Cong., 1st Sess. 37-39 (1991) , *reprinted in* 1991 U.S. Code Cong. & Admin. News 193, 232-34.

[15] *See* Fiscal Year 1991 Intelligence Authorization Act , Pub. L. No. 102-88, 105 Stat. 429 (codified at 50 U.S.C. §§ 413-413b). The year before, Congress also established an independent Inspector General at the CIA who is subject to Senate confirmation and in some cases reports directly to the Intelligence Committees. *See* 50 U.S.C. § 403q.

[16] 50 U.S.C. § 413b(a).

[17] *Id.* § 413b(a)(1)-(2).

of the covert operation."[18] Congress also made clear that the covert operations of all government agencies, not just the CIA, were covered by these restrictions.[19] It did, however, expressly exclude "traditional military operations" from the requirements.[20]

With respect to the hotly debated issue of timely notice, Congress extracted from President Bush the commitment that "in almost all instances, prior notice will be possible," and that "[i]n those rare instances where prior notice is not provided, I anticipate that notice will be provided within a few days."[21] That position was largely consistent with the Reagan Administration's policy of providing notice within two working days unless the President expressly directed otherwise.[22] While committing to provide prompt notice in almost all cases, however, President Bush carefully preserved the full measure of his constitutional authority: "Any withholding beyond this period will be based upon my assertion of authorities granted this office by the Constitution." The committee report grudgingly accepted the "in a few days" interpretation, and while it noted its disagreement on the extent of the President's constitutional

[18] *Id.* § 413b(c)(1). The 1991 Act retained the provision allowing the President to notify only the "gang of eight" if he "determines it is essential to meet extraordinary circumstances affecting vital interests of the United States." 50 U.S.C. § 413(c)(2).

[19] *Id.*, § 413b(a). The 1980 Intelligence Authorization Act had placed its new reporting requirements, which were applicable to all intelligence agencies, in a different title than Hughes-Ryan's substantive restriction on covert operations, which applied only to funds spent "by or on behalf of" the CIA.

[20] *Id.*, § 413b(e)(2). The original Hughes-Ryan Amendment did not include such an exclusion. It did, however, expressly exempt operations undertaken pursuant to a declaration of war or congressional authorization pursuant to the War Powers Resolution. *See* 22 U.S.C. § 2422(b) (repealed).

[21] Letter from George Bush to Chrmn. of the House Intell. Comm., (Oct. 30, 1989), *quoted in Intelligence Authorization Act, Fiscal Year 1991*, S. Rep. No. 88, 102nd Cong., 1st Sess. 40 (1991), *reprinted in* 1991 U.S. Code Cong. & Admin. News 193, 233.

[22] *See Approval and Review of Special Activities*, National Security Directive 286, (Oct. 15, 1987) (requiring that the Intelligence Committees be notified in advance in all but "extraordinary circumstances," and that in those instances the congressional and committee leadership be notified, and further requiring notification unless President directs otherwise within two working days).

authority, it acknowledged that "Congress cannot diminish by statute powers that are granted by the Constitution."[23]

II. Understanding Constitutional Authority Over Foreign Affairs

The conflicts between the two branches ultimately stem from fundamentally different views of Congress's role in foreign affairs. The Executive Branch has long adhered to the principle of executive primacy in foreign affairs, subject to Congress's limited, express powers in that regard. Since at least the 1970s in this context, however, Congress has instead pushed a view of "shared powers" in foreign affairs that warrant it engaging in advice and discussion with the Executive Branch on covert operations.

Article II, section 1's grant of "executive power" is the principal source of President's broad power in foreign affairs.[24] Unlike Congress's enumerated powers, the President's executive power is plenary. Article II provides broadly that "[t]he executive Power shall be vested in a President of the United States of America." Article I, on the other hand, limits Congress to "[a]ll legislative Powers herein granted." Congress possesses a number of powers that touch on foreign affairs, including the authority to declare war, to grant letters of marque and reprisal, to raise armies and navies, and to provide for the calling forth of the militia to execute the law, suppress insurrection, and repel invasion, as well as the Senate's veto over ambassadors and treaties. But these are express powers that do not, by their terms, give Congress a greater role in matters left to the President. Thus, while the Senate has a role in making treaties through

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[23] S. Rep. No. 88 at 41, 1991 U.S. Code Cong. & Admin. News at 234.

[24] *"Timely Notification,"* 10 Op. O.L.C. at 160; *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 260 (1989); *see also* Prakash and Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L. J. 231 (2001)

its advice and consent function, it has no role whatsoever in the negotiation of treaties; each has specific, defined functions.[25]

The Founders generally considered the conduct of foreign affairs a natural part of executive power.[26] Thomas Jefferson, for example, wrote that "[t]he 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 as are specially submitted to the senate. Exceptions are strictly to be construed. . . ."[27] Similarly, if more elliptically, Alexander Hamilton explained that "[t]he essence of the legislative authority is to enact laws, ... [w]hile the execution of the laws and the employment of the common strength, either for this purpose or for the common defence, seem to comprise all the functions of the executive magistrate."[28] While acknowledging the Senate's role in approving treaties, John Jay noted that under the Constitution the President "will be able to manage the business of intelligence in such manner as prudence may suggest."[29] In 1800, future Chief Justice John Marshall declared that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[30]

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[25] *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *see also Hearings on H.R. 3822 Before the Subcommittee on Legislation of the House Select Committee on Intelligence*, 100th Cong., 2d Sess. 234 (Mar. 10, 1988).

[26] *See* "*Timely Notification,"* 10 Op. O.L.C. at 160-70; Robert Turner, *The Constitution and the Iran-Contra Affair*, 11 Hous. J. Int'l L. 83, 93-95 (1988).

[27] 5 *Writings of Thomas Jefferson* 161 (Ford ed. 1895), *quoted in* 10 Op. O.L.C. at 161, n.5.

[28] *The Federalist No. 75* at 504 (Cooke ed. 1961); *see also The Federalist No. 74* at 500 (Hamilton) (Cooke ed. 1961) ("The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an usual and essential part in the definition of the executive authority.").

[29] *The Federalist No. 64* at 435 (Cooke ed. 1961); *see also Durand v. Hollins,* 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (holding that regarding "the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president"). In *Durand*, Justice Samuel Nelson, riding circuit, rejected a claim for damages against a naval officer who bombarded a Nicaraguan port on the order of the President.

[30] *Annals of Cong.*, 6th Cong. 613-14 (1800).

Although the Supreme Court has had little occasion to address these issues, the guidance it has provided also supports this view of the President's broad and largely exclusive powers in foreign affairs. The Court has acknowledged that beyond whatever powers Congress confers by statute, the President also possesses "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress."[31] The Court has emphasized that the constitutional division of power and responsibility was much different in the foreign than the domestic realm:

> "Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. 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."

Id. at 319. Following these principles, the Department of Justice has on several occasions opined that various notification requirements would be unconstitutional, including a proposed requirement of prior notice for operations funded out of CIA contingency fund and a mandatory requirement of 48-hours notice for all covert activities.[32]

Congress, on the other hand, has, like some scholars, rejected this understanding of its role in foreign affairs in favor of the notion that it has shared powers and responsibilities for foreign affairs.[33] As noted above, Congress's powers in that regard are expressly enumerated in

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[31] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

[32] *See Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 261 (1989); Letter from John R. Bolton, Assistant Attorney General, Office of Legislative Affairs, to Rep. Matthew F. McHugh (June 8, 1987), reprinted in *H.R. 1013, H.R. 1371 and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to the Congress: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 100th Cong., 1st Sess. 227 (1987).

[33] *See* S. Rep. No. 276, 100th Cong., 2d Sess. 20 (1988); H.R. Rep. No. 705, 100th Cong., 2d Sess., pt. 1, 16-27 (1988); Final Report of Church Comm., S. Rep. No. 755, 94th Cong. 2d Sess. 289 (1976) ("intelligence

Article I. The Constitution does not give it a share of any residual foreign affairs power. The Constitution does give Congress the power to appropriate money for the government's activities, presumably including intelligence operations. That does not, however, as the intelligence committees have claimed, give Congress carte blanche to "restrict[] or condition[] the use of appropriated funds."[34] Congress may not do indirectly through appropriations what it cannot do directly: Congress cannot "us[e] its power over the appropriation of public funds to attach conditions to executive branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs."[35]

Congress also has broad oversight and investigatory powers. But that power "is not unlimited. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of Congress."[36] Therefore, exercises of oversight power must relate to a specific legislative function, not merely an attempt to intrude on executive power. As the Supreme Court noted in *Bowsher v. Synar*, "[t]he Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts."[37] Under current reporting requirements, however, that is exactly the role Congress has taken. In the 1980s, then-Deputy Director of Central Intelligence Robert Gates observed that "[t]he oversight process has

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activities have undermined the constitutional rights of citizens and . . . they have done so primarily because checks and balances designed by the framers of the Constitution to assure accountability have not been applied").

[34] S. Rep. No. 276, 100th Cong., 2d Sess. 20 (1988).

[35] *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 261 (1989); *accord* Memorandum from Walter Dellinger, AAG, Office of Legal Counsel, to Alan J. Kreczko, Spec. Asst. to the President and Legal Adviser to the NSC, 1996 WL 942457 (O.L.C. May 8, 1996).

[36] *Watkins v. United States*, 354 U.S. 178, 187 (1957); *see also President's Compliance with "Timely Notification,"* 10 Op. O.L.C. at 168 ("Th[e] power of oversight is grounded on Congress' need for information to carry out its legislative function").

[37] 478 U.S. 714, 722 (1986).

also given Congress – especially the two intelligence committees – far greater knowledge of and influence over the way the CIA and other intelligence agencies spend their money than *anyone in the executive branch* would dream of exercising."[38] Similarly, former White House Counsel Boyden Gray noted that during Iran-Contra the intelligence committee staff met with the CIA's general counsel and other CIA staff "on a weekly or monthly basis . . . and actually oversaw what was going on in Central America."[39] Although issues have arisen about what the Executive Branch failed to disclose, it cannot be denied that Congress's overall scrutiny of covert operations goes far beyond the oversight to which executive branch officials are normally subject. The Senate Intelligence Committee has conceded as much:

> [T]he primary purpose of prior notice is to permit the intelligence committees, on behalf of Congress, to offer advice to the President. . . . It is important to remember that discussion with and advice from the intelligence committees must, in the case of covert actions, substitute for the public and congressional debate which normally precedes major foreign policy actions of the U.S. Government.[40]

This is not, however, a function that is either expressly or implicitly assigned to Congress by the Constitution.

III. Problems With the Current Reporting Regime

For the reasons summarized above and addressed more comprehensively in other sources, Congress's continuing encroachment into the conduct of covert operations raises serious constitutional concerns. It also, however, presents a number of important practical problems that

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[38] Robert M. Gates, *The CIA and American Foreign Policy*, 66 Foreign Aff. 214, 229 (1988).

[39] C. Boyden Gray, *Remarks*, 11 Hous. J. Int'l L. 263, 269 (1988).

[40] S. Rep. No. 85, 102nd Cong., 1st Sess. 39 (1991) , *reprinted in* 1991 U.S. Code Cong. & Admin. News 193, 232.

directly impact on the CIA's role in the war on terrorism. Among them are the way in which the current regime: (1) creates an effective legislative veto in some cases; (2) heightens the risk to secrecy; (3) impairs the ability to secure the cooperation of foreign governments; and (4) impairs coordination with the military and skews the CIA's own choice of tactics.

Potential Legislative Veto. As explained above, Congress has consciously adopted prior notice requirements in order to offer the President "advice" on covert operations and to substitute for public discussion or debate on such matters. Requiring advanced or contemporaneous notice of such activities seems particularly calculated not to assist Congress in its legislative function but to actively supervise the conduct of executive officers, in a way *Bowsher* said the Constitution does not contemplate. It also creates a situation in which members of the intelligence committees can effectively veto planned covert missions with which they do not agree simply by threatening to disclose them. Although the statute states that congressional approval is not required,[41] requiring notice "before initiation of the covert operation" serves no other purpose but to give the members of the intelligence committees an opportunity to prevent them. There is no proper legislative function that would depend on notice prior to initiation of the action. By threatening to disclose or by actually disclosing the plan, members of the committee can stop a particular mission as effectively as if they voted it down in committee.

This is not a fanciful scenario. Professor Turner reports one incident in 1985 in which the chairman and vice chairman of the Senate Intelligence Committee threatened to go public on an anti-terrorism operation against Qadaffi that they opposed. The operation leaked to the press shortly thereafter, after which it could not go forward because other countries refused to

[41] 50 U.S.C. § 413(a)(3).

participate.[42] Similarly, intelligence committee member Joseph Biden reportedly "boasted that he had twice threatened to disclose covert action plans by the Reagan administration that were 'hairbrained' [*sic*]."[43]

Increased Risk of Disclosure. Apart from intentional disclosures done specifically to scuttle particular operations, extensive reporting requirements, especially when emphasis is placed on contemporaneous reporting in all circumstances, creates a greatly increased risk of disclosure. The two branches have hotly debated which one of them poses the greater risk of leaks. One study suggests that during the 1980s "a cleared person in Congress [was] 60 times more likely than his [executive branch] counterparts to engage in unauthorized disclosures."[44] Whether true or not, however, it is undeniable that risk of disclosure grows with wider dissemination, and that reporting to Congress has resulted in leaks in the past.[45] The Founders knew this. In *The Federalist*, John Jay noted that "there are doubtless many . . . who would rely on the secrecy of the president, but who would not confide in that of the senate, and still less in that of a large popular assembly."[46] When it really counted, the Founders took no chances: After France agreed to provide covert aid during the American Revolution, Benjamin Franklin and Robert Morris agreed that they must "keep it a secret, even from Congress."[47]

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[42] Turner, 11 Hous. J. Int'l L. at 85, n.4 (citing Gertz, *2 Senators Threaten to Leak Covert Scheme: Anti-Quaddafi Plan Scuttled After Story is Published*, Washington Times A1, A8 (July 21, 1987)).

[43] Bruce Fein, *The Constitution and Covert Action*, 11 Hous. J. Int'l L. 53, 57 (citing an article in *The New Republic*)

[44] Report of the Congressional Comm. Investigating the Iran-Contra Affair, S. Rep. No. 216, H. Rep. No. 433, 100th Cong., 1st Sess. 575 (1987) (Minority Report).

[45] *See, e.g.,* incidents discussed in M. Silverberg, *The Separation of Powers and Control of the CIA's Cover Operations*, 68 Tex. L. Rev. 575, 615-17 (1990).

[46] *The Federalist No. 64* at 435 (Cooke ed. 1961).

[47] Turner, 11 Hous. J. Intl. L. at 101 (quoting Sayle, *The Historical Underpinnings of the U.S. Intelligence Community*, 1 Int'l J. Intelligence and Counterintelligence 5 (1986)).

Obstacle to Cooperation with Foreign Governments. This secrecy risk, whether real or perceived, also impairs the United States' ability to secure the cooperation of foreign governments – an essential part of successfully waging the war against terrorism. As Secretary of Defense Frank Carlucci explained in testimony before the Senate Intelligence Committee:

> Now I can't tell you how much cooperation will be lost. Because we never know. All I could do is cite concerns that have on occasion been expressed to me, both in my intelligence hat and subsequently, that you people in the U.S. Government cannot keep a secret. . . . And if you are going to let our participation be known to the Congress, we don't think we can cooperate. That happens.[48]

A former Chief Counsel of the Senate Intelligence Committee also acknowledged that foreign governments have imposed such conditions:

> From time to time in particularly sensitive operations when they request our assistance or we request theirs, foreign countries require, as the price of cooperation, no notification be given to anyone outside the executive branch agencies necessary to the mission.[49]

More recent changes to the reporting requirements have made that a difficult price to pay. The 1991 Act, for example, includes an express requirement that the President's finding disclose any "third party" who will participate in the operation.[50]

The most famous example of a foreign government refusing to cooperate if Congress were notified occurred at the beginning of the Iranian hostage crisis in 1979. Six Americans took refuge in the Canadian embassy in Tehran, unbeknownst to the Iranians. Working with the Canadians, the U.S. government devised a covert operation to extract them. Fearing that its embassy might be seized and its personnel taken hostage if the Iranians found out, the Canadian

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[48] Proposed Oversight Legislation: Hearings Before the Senate Select Comm. on Intelligence, 100th Cong., 2d Sess. 198-99, 217-18 (1988)

[49] Victoria Toensing, *Congressional Oversight: Impeding the Executive Branch and Abusing the Individual*, 11 Hous. J. Int'l L. 169, 170 (1988).

government conditioned their cooperation on President Carter's agreement not to disclose the operation to the intelligence committees or congressional leadership.[51] Ultimately, President Carter delayed notifying Congress for three months in order to safely remove the six Americans. Such delay would not be possible under the intelligence committees' interpretation of "timely" notice to mean no more than "a few days." Were this situation to arise again, therefore, the reporting requirements may "ultimately force future Presidents to choose between becoming 'lawbreakers' in the eyes of Congress or abandoning American lives and interests to international terrorists."[52]

Impaired Cooperation Between Intelligence Agencies and the Military. The extensive reporting requirements for covert intelligence operations also impede cooperation with the military, which is generally not subject to such restrictions. Although reporting requirements apply to all agencies, the statute excludes from the definition of covert actions "traditional . . . military activities" and "routine support" for such activities.[53] According to the legislative history, this is meant to "encompass almost every use of uniformed military forces," including military missions to rescue hostages or apprehend terrorists.[54] The line between "routine support" and covert action is less clear. Under the Committee's view, covert actions would include a variety of clandestine operations that might be undertaken to support military

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[50] *See* 50 U.S.C. § 413b(a)(5).

[51] *See Oversight Legislation, 1987: Hearings on S. 1721 and S. 1818 Before the Senate Select Comm. on Intelligence,* 100 Cong., 2d Sess. 209 (1988) (testimony of Secretary of Defense Frank Carlucci, former DDCI under Stansfield Turner) ("the Canadians indicated that if the Congress was to be informed, they wouldn't cooperate"); McClure, A 48-Hour Rule For Covert Operations? No, Wash. Post, Sept. 26, 1988, at A11 (stating that "[t]he Canadians said they would not help unless the administration promised not to notify Congress").

[52] Turner, 11 Hous. J. Intl. L. at 123-24.

[53] 50 U.S.C. § 413b(e)(2).

operations. The ambiguity creates a problem, because the CIA's support will often provide vital support that is much more clandestine than the logistical support that the committee placed within this exception. It has been reported, for example, that CIA units were the first Americans on the ground in Afghanistan after September 11, even before the Special Forces.[55] The disparate reporting requirements between the military and intelligence services create a powerful incentive for the military to avoid utilizing the CIA in joint operations that may trigger the latter's reporting obligations.

Indeed, even the CIA itself seeks to devise operations that do not require congressional reports. More than two years before the World Trade Center attack, CNN reported that the CIA was using a new strategy against terrorism that involved not direct action against terrorist groups but rather indirect efforts to "disrupt" their operations, often by providing evidence to foreign governments to enable them to make arrests. That approach was perceived as having "the advantage of utmost secrecy, hiding the had of the United States and *avoiding the cumbersome congressional reporting requirements that go with CIA-directed covert operations*."[56] Disruption is doubtless an important weapon in the anti-terrorism arsenal, but reporting requirements should not be so onerous that they play a part in part determining how the war is fought.

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[54] S. Rep. No. 85, 102nd Cong., 1st Sess. 46-47 (1991) , *reprinted in* 1991 U.S. Code Cong. & Admin. News 193, 239.

[55] Bob Woodward, *Secret CIA Units Playing a Central Combat Role,* Wash. Post A1 (Nov. 18, 2001). The CIA maintains a Special Activities Division, previously known as Military Support Program that provides paramilitary support including non-uniformed fighters, pilots, language specialists and the like to the U.S. armed forces as well as to allies such as the Northern Alliance. The CIA's role has been especially important in the unconventional war in Afghanistan because so much of its success depends on accurate intelligence and targeting information. *See id.*

[56] *CIA Tries New Strategy to Deter Terrorism*, CNN (Mar. 1, 1999) (available on the internet at http://www.cnn.com/US/9903/01/cia.terrorism) (emphasis added).

IV. Restoring Appropriate Constitutional Roles

To make the most effective use of our intelligence resources – and especially our covert capabilities – Congress and the Executive Branch should take steps to restore the traditional constitutional balance in the conduct of covert intelligence activities. Despite the structures now in place that institutionalize suspicion of the CIA and other intelligence agencies, the intelligence committees and agencies can make some changes without legislation. Much of the shift over the past several decades stems simply from Congress's greater demands for information and its desire to provide "advice" and facilitate some substitute for public "discussion" on covert intelligence operations. The intelligence committees should instead view their role in the context of normal legislative oversight. They should focus on general matters of intelligence policy rather than becoming involved in operational details. A useful guide is the degree of oversight to which they subject military antiterrorist operations.

The intelligence committees should also recognize that there will be occasions when the safety of those involved in covert operations and the success of the mission depends on absolute secrecy, and they should recognize that in some circumstances it is best for the President and the CIA not to report contemporaneously on the missions it is undertaking. Ideally, the statutory reporting requirements should expressly and unequivocally preserve the President's constitutional authority in this regard, but there is sufficient room in the language of the current statute for the intelligence committees to adopt a more flexible standard. Congress has an important oversight role with regard to intelligence appropriations, but that role should not be allowed to compromise individual missions. Although it may seem facially implausible that "timely notice" could only come weeks or months after the fact, less controversial examples than

Iran-Contra demonstrate that immediate notice can entail great risks. There is no better example real-world than that of the six Americans took refuge in the Canadian embassy, discussed above. Not every covert operation is as controversial as Iran-Contra, and it is dangerous to legislate only for the worst case. Congress should adopt a flexible attitude and ultimately, flexible legislation, that preserves its oversight ability without making it a co-equal branch in the planning and approval of covert operations – a role the Constitution neither contemplates nor permits.

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*James E. Gauch. Mr. Gauch is a partner at the Washington, D.C., office of Jones, Day, Reavis & Pogue. He was an attorney-adviser in the Office of Legal Counsel, U.S. Department of Justice, from 1991 to 1993. The views expressed here are only his own.

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THE FEDERALIST SOCIETY
for Law and Public Policy Studies
1015 18th Street, NW, Suite 425
Washington, D.C. 20036

Phone (202) 822-8138
Fax (202) 296-8061

www.fed-soc.org

The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would be the substitution of their pleasure for that of the legislative body."

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