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Covert Operations

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partly mirrors the arguments about the wisdom of first-use doctrine in general. But to the extent that it rests on concern for the credibility of the threat of first use, it is undermined by the facts that even proponents of the first-use doctrine now caution against early first use and presuppose full consultation among the NATO allies.[52] In any event, the burden of persuasion should rest on proponents of the argument that necessity justifies the bending of constitutional principles.

This identification of alternatives and, indeed, this entire essay doubtless will recall for many the aphorism that Americans tend to make questions about the existence of power out of questions about its wise use. But in our political system, law supplies the common vocabulary for interbranch policy discussions, and questions about the existence of power and about its use are never wholly distinct. Congress has surely been in equal measure uninterested, uninformed and unduly dependent on the Executive in the control and planning of nuclear war. Perhaps questions about the existence of the presidential nuclear war power will help recall the first branch to the more critical question of its wise use.

COVERT OPERATIONS

*By Lori Fisler Damrosch**

As the Constitution begins its third century, the system of congressional oversight of covert action is only in its second decade. In the ancient history of covert action—before the intelligence oversight reforms of the 1970s—Congress did not involve itself in covert operations. After giving the Central Intelligence Agency standing authority to "perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct,"[1] Congress paid little attention to what the Executive did under this authority. The era of congressional noninvolvement came to an end with the Watergate disclosures of intelligence activities that many Americans found reprehensible, the ensuing investigations into assassination attempts and other controversial covert actions,[2] and the adoption of a new statutory framework for congressional oversight of the intelligence agencies.

Today, the issue is not the legality of executive operations in a congressional vacuum. Rather, Congress has become engaged in covert operations, primarily through a procedural framework for monitoring executive actions and occasionally through the adoption of specific policies. Since Congress now affirmatively participates in oversight, for all practical purposes it legitimizes the covert actions that are reported to it under the oversight

[52] *See* Kaiser, *supra* note 5, at 1169–70; G. ALLISON, A. CARNESALE & J. NYE, JR., HAWKS, DOVES AND OWLS 227, 236 (1985).

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[1] National Security Act of 1947, 50 U.S.C. §403(d)(5) (1982).

[2] *See generally* S. REP. NO. 755, 94th Cong., 2d Sess. (1976) [hereinafter CHURCH COMM. REPORT].

legislation. Covert operations carried out by executive agencies in accordance with congressionally approved procedures and policies do not raise any serious separation of powers issues and may be viewed as presumptively constitutional.[3] Constitutionally questionable covert operations thus fall into two categories: (1) those that the Executive fails to report to Congress under the oversight legislation, such as the Iran-contra dealings, and (2) those that Congress blocks through denial of funds or specific legislative prohibition, such as the contra aid that was restricted by the Boland amendments.[4]

To be sure, the Executive has not always complied with the letter or spirit of Congress's directives. The most notorious deviations in recent years have been the mining of Nicaragua's harbors[5] and the Iran-contra events.[6] Without in any way minimizing the seriousness of these apparent violations of law, I believe the transgressions need to be seen in perspective. Even if all the laws had been scrupulously followed, executive authority to embark upon controversial and potentially dangerous covert actions is still quite broad. The laws as they now stand do not significantly constrain most executive covert actions but rather legitimize them.

Much recent writing focuses on ways that the Executive has undermined or circumvented constitutional and congressional policies applicable to covert action.[7] While I fully agree that this has happened too often, I put the emphasis elsewhere. My aim is to show the extent to which Congress has authorized, approved, acquiesced, and sometimes even applauded. I will examine some of the procedures and policies that Congress has in fact adopted concerning covert action, so as to demonstrate that in both warlike and nonviolent operations, Congress has chosen to give the Executive a relatively free hand.

I. COVERT ACTION AND WAR POWERS COMPARED

The debate over the constitutionality of executive covert operations echoes the war powers controversy, since at least some covert actions have been nothing other than clandestine warfare. But not all covert operations are warlike: they include, in addition, political action, propaganda, disinformation and any other "activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly."[8]

[3] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[4] For a compilation of the Boland amendments, see *Legislation relating to Nicaragua*, 26 ILM 433, 440 (1987) [hereinafter *Legislation*].

[5] *See* S. REP. NO. 665, 98th Cong., 2d Sess. 4–12 (1985).

[6] *See* S. REP. NO. 216 and H.R. REP. NO. 433, 100th Cong., 1st Sess. (1987) [hereinafter IRAN-CONTRA REPORT].

[7] *See, e.g.*, Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988).

[8] Exec. Order No. 12,333, §3.4(h) (1981), *reprinted in* 50 U.S.C. §401 (1982) (definition of "special activities").

Forcible covert actions are subject to regulation under Congress's war powers to the same extent as overt uses of force;[9] the constitutional basis for Congress to regulate nonforcible covert operations is principally its nonenumerated foreign affairs power[10] and secondarily the possibility that some nonforcible covert operations might violate international law[11] or lead to war. Congress has asserted a constitutional claim to regulate both forcible and nonforcible covert operations, by creating a statutory structure for oversight of *all* intelligence operations in foreign countries, "other than activities intended solely for obtaining necessary intelligence."[12]

Paramilitary Activities

Congress has deliberately decided to deal with paramilitary covert operations differently from overt war, and in an indisputably more permissive manner. The War Powers Resolution of 1973[13] does not apply to covert actions: Congress made a conscious choice to exclude them from the Resolution's coverage.[14] There were at least two reasons for this choice. First, at the time it adopted the Resolution, Congress was only beginning its investigations into controversial covert actions and had not yet determined what sorts of legislative reforms would be appropriate. Second, the Resolution contemplates public legislative decision making on whether to authorize a war,[15] and plenary congressional consideration of "covert" options under the procedures established by the Resolution would necessarily bring the operation into the light of day. Congress was not then prepared to forswear the use of covert action—nor has it done so since—hence, it had to settle for forms of congressional involvement that would allow secrecy to be preserved.

The effect of the congressional choice to exclude covert operations from the War Powers Resolution is that the Executive is free to conduct such operations, subject only to the less onerous conditions of the intelligence legislation that took shape shortly after enactment of the Resolution. The

[9] U.S. CONST. Art. I, §8, cls. 11–16.

[10] *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 74–76 (1972); *see also* U.S. CONST. Art. I, §8, cl. 3 (foreign commerce power). The power of the purse is a further source of congressional authority over both forcible and nonforcible covert actions.

[11] *Cf.* U.S. CONST. Art. I, §8, cl. 10.

[12] Intelligence Oversight Act, 50 U.S.C. §413(a)(1), (b) (1982); *see also* Hughes-Ryan amendment to the Foreign Assistance Act, 22 U.S.C. §2422 (1982). Ironically, some of the most sensitive or intrusive intelligence operations are collection activities—for example, aerial reconnaissance and submarine penetrations of territorial waters. Although Congress has opted to treat intelligence collection differently from covert action, Congress does regulate intelligence collection in various ways, without constitutional complaint from the Executive. *See, e.g.*, Foreign Intelligence Surveillance Act, 50 U.S.C. §§1801, 1808 (1982).

[13] Pub. L. No. 93-148, 87 Stat. 555 (1973) (50 U.S.C. §§1541–1548) (1982)) [hereinafter Resolution]. The Resolution applies to "United States Armed Forces."

[14] *See generally* Bentley, *Keeping Secrets: The Church Committee, Covert Action, and Nicaragua*, 25 COLUM. J. TRANSNAT'L L. 601, 618–19 n.78 (1987) (discussing rejection of amendment that would have expanded coverage of Resolution to include covert action).

[15] Resolution, *supra* note 13, §§5–7.

two major elements of that legislation are the 1974 Hughes-Ryan amendment and the 1980 Intelligence Oversight Act.[16] Under the 1974 law, the President must "find" that each covert operation is "important to the national security of the United States,"[17] and must report such operations to Congress.[18] The 1980 Act streamlined and strengthened the reporting requirement, by providing for notification to the Senate and House Select Committees on Intelligence (or to certain designated leaders) and by insisting that the committees be kept "fully and currently informed of all intelligence activities . . ., including any significant anticipated intelligence activity."[19]

A comparison of the War Powers Resolution and the intelligence legislation shows that the latter gives the President considerably more leeway. Procedurally, the Resolution requires the President to "consult with Congress" before commencing hostilities and regularly thereafter, and to report to Congress within 48 hours of the commencement of hostilities.[20] In contrast, the instruction under the intelligence legislation to keep the congressional intelligence committees "fully and currently informed" is a notification rather than consultation requirement, and the statutory language on the timing of interbranch communications is considerably murkier than in the Resolution,[21] its effect being to give the President an argument that he has flexibility in deciding when to notify the committees.

Most important, the two statutory schemes differ dramatically with respect to the view Congress has of its own role in authorizing or terminating hostilities. The War Powers Resolution expresses the view that unless Congress has affirmatively declared war or granted specific statutory authorization, the armed forces may engage in hostilities only to defend against attack;[22] the intelligence legislation takes no position on what presidential uses of force are constitutionally permissible. Under the Resolution, moreover, Congress insists that any conflict that it has not affirmatively authorized must cease after 90 days, or sooner if it so directs.[23] The Intelligence

[16] *Supra* note 12.

[17] 22 U.S.C. §2422. The "finding" process requires the President to take personal responsibility for authorizing a covert operation.

[18] *Id.* As originally enacted, this law required reporting "to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives." The 1980 Act allocated the oversight function to the intelligence committees, in lieu of the unwieldy multiple committee participation under the 1974 Act.

[19] 50 U.S.C. §413(a)(1).

[20] Resolution, *supra* note 13, §§3, 4(a)(1).

[21] *Compare id.* §§3, 4(a), *with* 50 U.S.C. §413(a), (b). In the Iran-contra affair, the Executive deferred notice for some 11 months. While this long deferral was undoubtedly inconsistent with the legislative intent, the statute is far from clear on when notice must be given. The congressional argument is that most or all notifications should be given "prior" to initiation of the activity, but there are nonfrivolous arguments to the contrary. Concerning the prior notice issue, see generally IRAN-CONTRA REPORT, *supra* note 6, at 414–15 (maj. rep.), 543–46 (min. rep.).

[22] Resolution, *supra* note 13, §2(c).

[23] *Id.* §5(b), (c). The concurrent resolution feature of §5(c) is, of course, in jeopardy after INS v. Chadha, 462 U.S. 919 (1983).

Oversight Act is almost exactly the opposite in import. By providing that the Act does "not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity,"[24] Congress explicitly disclaimed any responsibility for deciding whether to authorize specific covert operations. Nor has Congress purported to set a time limit on covert operations or to subject them to anything like the provisions on automatic termination in the Resolution. Thus, covert operations may commence and continue indefinitely upon presidential decision alone. Apart from persuasion (or leaking), the only ways for Congress to stop a covert action are to cut off funding or to legislate publicly, subject of course to presidential veto.

Considering these marked legal differences between two modes of U.S. involvement in a foreign conflict, it is not surprising that the Executive might well prefer to use the intelligence structure rather than the armed forces even for large-scale paramilitary operations, which can hardly be "covert" in any meaningful sense. The details of these "overt-covert" operations are trumpeted not only in the press, but also in published government documents.[25] There is considerable force to the view that when the nature or scale of an operation makes it impossible for secrecy to be preserved, the matter does not belong under the intelligence oversight procedures but should be publicly debated in the same manner as any other important foreign policy issue.[26] The proponents of this view, however, have not mustered support for basic change in the intelligence legislation, which in its current form serves as a powerful tool for keeping most covert actions off the general legislative agenda. That is an ideal situation for the Executive, and there is as yet little indication that Congress wants it otherwise.

Weapons Supply

The arms-for-hostages dealings with Iran and the long-running controversy over lethal aid to the Nicaraguan contras have focused attention on the legal aspects of covert arms transfers. The mere supply of weapons to a foreign force does not trigger the War Powers Resolution,[27] but most such transfers are governed by the Arms Export Control Act (AECA),[28] which embodies a "report and wait" requirement and certain substantive prohibitions, including a ban on exports to countries supporting terrorism. In the

[24] 50 U.S.C. §413(a)(1).

[25] Thus, the World Court in the *Nicaragua* case could condemn the United States for "covert" paramilitary support of the contras on the basis of an evidentiary record drawn largely from official statements and U.S. government documents. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 39–44 (Judgment of June 27) [hereinafter *Nicaragua*].

[26] Bentley, *supra* note 14, at 644–45.

[27] Under the Resolution, it is participation of U.S. armed forces rather than supply of weapons that brings its provisions into play.

[28] The provisions of the Arms Export Control Act arguably relevant to covert operations are discussed in Scheffer, *U.S. Law and the Iran-Contra Affair*, 81 AJIL 696 (1987).

Iran-contra affair, the administration's legal position was that by making a finding under the intelligence legislation, the President could authorize arms sales outside the requirements of the AECA.[29] The attitude of the congressional Iran-contra committees toward this position was necessarily colored by the obduracy of the administration in claiming justification for having withheld notice from Congress under both the AECA and the intelligence legislation.[30] Assuming compliance with oversight,[31] the burden would be on Congress to reverse the presumption of legitimacy of covert arms transfers, as it has done in a few extraordinary instances.[32] Just as important as its exceptional restrictions is the fact that Congress has granted affirmative authorization for extensive covert arms supply programs when it has been persuaded of their rationale, effectiveness and political acceptability.[33]

Assassination

Contrary to what many believe, Congress has *not* acted to prohibit assassination as an instrument of U.S. policy. The Church Committee, after thoroughly investigating various allegations of U.S. complicity in assassination attempts prior to the mid-1970s, recommended a statutory prohibition on assassination, but none was enacted as such.[34] The U.S. "law" now prohibiting assassination is nothing more than an executive order,[35] which stands as an important public statement of U.S. policy against assassination, but one that the President could countermand on his own authority.[36] Temptations to eliminate hostile foreign leaders have seemed almost irresistible on more than one occasion in the recent past,[37] and there is no

[29] *See* IRAN-CONTRA REPORT, *supra* note 6, at 380, 418.

[30] *Compare id.* at 380–81, 418–19, 425–26 (maj. rep.), *with id.* at 539–47 (min. rep.).

[31] Transactions falling below certain dollar thresholds are exempt from most of the requirements of the AECA, but different thresholds apply to transfers made by intelligence agencies under the intelligence oversight legislation. *See generally* Scheffer, *supra* note 28, at 703–04, 708–09.

[32] *See* Clark amendment (Angola), 22 U.S.C. §2293 note (repealed 1985), and Boland amendments (Nicaragua), *supra* note 4.

[33] Thus, the Executive has obtained congressional approval for massive support to the Afghan resistance. From time to time in the checkered history of the Nicaraguan program, funds have been appropriated for vast quantities of lethal aid. *See generally Legislation, supra* note 4, at 440–78.

[34] *See* 1 CHURCH COMM. REPORT, *supra* note 2, at 160, 448; *see also* S. REP. NO. 465, 94th Cong., 1st Sess. (1975). *But see* 18 U.S.C. §§112, 878, 1116, 1201 (1982).

[35] Exec. Order 12,333, *supra* note 8, §2.11 ("No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination").

[36] As a matter of constitutional *power*, the President may countermand any constraints embodied in executive orders that he or his predecessors may have issued. Whether an executive order should be rescinded in accordance with the same procedures used to promulgate it, e.g., through publication in the *Federal Register*, is an issue of procedural nicety rather than constitutional power. *Cf.* IRAN-CONTRA REPORT, *supra* note 6, at 542 n.** (min. rep.) (citing Justice Department memorandum arguing that presidential authorization can create an exception to an executive order).

[37] In addition to the several episodes examined by the Church Committee, *supra* note 34 (involving Fidel Castro, Patrice Lumumba, General René Schneider of Chile, and others),

assurance that future Presidents will be less susceptible to this temptation than their predecessors. Should a President be drawn in this direction, his calculation of costs and benefits would not include a clear congressional expression of policy. Indeed, the deliberate congressional decision *not* to prohibit assassination might well be interpreted by some future executive legal counsel as implicit authority for the President to retain this particularly odious policy option.

Counterterrorism

Certain aspects of the U.S. counterterrorist program, such as the bombing of terrorist targets in Libya, have been carried out overtly,[38] but others have been covert. The clandestine collection of information for counterterrorist purposes is not directly covered by the intelligence oversight legislation;[39] only when the information becomes the basis for overseas action does Congress expect to be notified. It appears that Congress not only has acquiesced in counterterrorist actions by the Executive, but also has affirmatively authorized the creation of a special operations force for covert counterterrorist activities[40] and has prodded the administration to be vigorous in its counterterrorist efforts. The interception of the plane carrying the *Achille Lauro* hijackers and the seizure of alleged terrorist Fawaz Yunis for prosecution in the United States are examples of counterterrorist actions that most in Congress have endorsed and that few would expect Congress to micro-manage.[41]

Covert Political Actions

As with military and paramilitary operations, overt and covert political programs coexist under separate legal frameworks. Once again, Congress

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incidents during the Reagan Presidency have raised questions of consistency with the policy against assassination. The CIA produced a "Psychological Warfare Manual" for the use of the Nicaraguan contras, some passages of which could have been interpreted to call for assassination. *See generally Nicaragua*, 1986 ICJ REP. at 65–69; H.R. REP. NO. 1196, 98th Cong., 2d Sess. 15–16 (1985); S. REP. NO. 665, *supra* note 5, at 12–13. There has also been speculation that Colonel Muammar Qaddafi was a target of the April 1986 air strike against Libya, in which Qaddafi's adopted daughter was killed. The CIA General Counsel has reportedly advised that preemptive raids against terrorist bases and military actions taken in "self-defense" do not constitute assassination, even if foreign officials die in the attack. B. WOODWARD, VEIL 362, 394 (1987).

[38] The U.S. air strike against Libya was reported to Congress "consistent with the War Powers Resolution." *See* 22 WEEKLY COMP. PRES. DOC. 499 (Apr. 16, 1986); *Self-Defense against Terrorism*, 80 AJIL 636, 643 (1986) (testimony of Abraham Sofaer) [hereinafter Sofaer].

[39] *See* note 12 *supra*. Collection of information about international terrorism by means of electronic surveillance is governed by the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §1801 (1982).

[40] *See* Sofaer, *supra* note 38, at 643 (citing §1453 of the 1986 Department of Defense Authorization Act).

[41] *See, e.g.*, Senate debate on the Terrorist Prosecution Act, 132 CONG. REC. S1382–87 (daily ed. Feb. 19, 1986) (statement of Sen. Specter urging abduction of terrorists from sanctuary countries for prosecution in United States).

has elected not to subject covert programs to the statutory constraints that govern their overt counterparts. An overt analogue of the CIA's covert political action programs is the National Endowment for Democracy, a federally funded organization with the mandate to support prodemocratic programs in foreign countries. Less than 2 years after the NED began functioning, Congress learned that NED funds had been used in a close election in Panama. The congressional response was a flat ban on the use of NED money to fund any campaign for public office.[42] This policy choice goes part way toward the proposals of eminent figures in the mid-1970s that the United States stop taking sides in foreign elections.[43] But all that Congress has done is to block the *NED's* involvement in partisan campaigns: it has deliberately left the covert option open.[44] As long as the CIA notifies Congress under the oversight legislation,[45] covert political funding is consistent with U.S. domestic law.

II. CLASHES BETWEEN THE BRANCHES

As has been shown, covert actions generally proceed on executive initiative pursuant to the oversight structure that Congress has established, and they thus enjoy every presumption of constitutional validity. Clashes between the two branches have arisen (1) when the Executive has attempted an end run around the oversight committees (as with the mining of Nicaragua's harbors and the Iran-contra affair), or (2) when Congress has attempted to block some activity that the Executive strongly wishes to pursue. The first kind of clash does not, in my view, raise a serious constitutional problem, because there seems little basis to doubt the constitutionality of laws under which Congress asks to be *kept informed of actions* that the Executive is taking. The oversight legislation does not, in general, seek to intrude upon intelligence collection, analysis and planning, or deliberations or other functions internal to the executive branch. Nor does Congress's demand for information[46] unduly constrain the President in taking any action that he believes to be important to the national security. Indeed, since the oversight legislation specifically provides that he may act without obtaining advance approval, it facilitates rather than constrains covert actions and offers the additional

[42] National Endowment for Democracy Act, 22 U.S.C. §4414(a)(1) (Supp. V 1987). *See generally* Damrosch, *Politics Across Borders*, 83 AJIL 1, 17–21 (1989).

[43] *See, e.g.*, Katzenbach, *Foreign Policy, Public Opinion and Secrecy*, 52 FOREIGN AFF. 1, 15–16 (1973).

[44] A proposal that would have banned the use of covert techniques to undermine any government was rejected at the time of adoption of the Hughes-Ryan amendment. *See* 1 CHURCH COMM. REPORT, *supra* note 2, at 502–03.

[45] It goes without saying that oversight of the CIA is carried out secretly: the NED, in contrast, must justify its programs publicly. The NED is subject to the Freedom of Information Act, while the CIA enjoys a special exemption from the Act. *Compare* National Endowment for Democracy Act, 22 U.S.C. §4415 (Supp. V 1987), *with* Central Intelligence Information Act, 50 U.S.C. §431 (Supp. IV 1986).

[46] Congress is required to preserve any secrets confided in it by the Executive. 50 U.S.C. §413(d) (1982).

benefit of allowing the President to share the political risks of controversial operations with the members of Congress who participate in the oversight process. The legal issues involved in this first kind of clash center on statutory interpretation, compliance and legislative policy: Does the poorly drafted Intelligence Oversight Act require "prior" notice or not? Who should be held accountable for failures of notification, and what mechanisms of accountability—administrative discipline, congressional investigation, judicial trial—are appropriate? Should the legislation be amended to eliminate the loopholes on which the Executive relied in the Iran-contra affair? These issues are "constitutional" only in an attenuated sense.[47]

The second kind of clash raises a somewhat more substantial constitutional problem, but again I do not think that the problem is difficult to resolve on the facts of the cases that have come to light to date. In the measures to which the Executive has raised constitutional objection, Congress has asserted its powers—principally the power of the purse—to prevent the Executive from carrying forward a covert action that the President has found to be important to the national security. Since Congress, as well as the President, enjoys constitutional responsibility in the field of national security, congressional measures (whether through substantive legislation or control over the purse strings) prompted by Congress's own assessment of national security enjoy a presumption of constitutional validity. A President who seeks to violate such measures finds his powers at their "lowest ebb,"[48] and an executive branch official who acts without explicit presidential authorization finds *his* powers even lower than that. Perhaps some day we will see a case where the "remainder of executive power after subtraction of such powers as Congress may have over the subject"[49] leaves something greater than zero in the President's favor, but neither the Boland amendments nor any legislation of their ilk has yet presented that case.

Surely his admittedly broad powers over national security do not allow the Executive to fix national policy on export of arms in derogation of Congress's foreign commerce powers, on paramilitary activities in derogation of Congress's war powers, on overthrow of a foreign government in derogation of Congress's power to define whether international law prohibits such an act. Nor can he appropriate funds for such purposes when Congress has exercised its constitutionally explicit power to deny them.[50] The Iran-contra events do not present any question of an act of Congress that purported to prevent the President from defending against armed attack, or communicating with foreign governments, or obtaining counsel from his advisers or appealing to the American people to support his policies. A fertile imagina-

[47] The Intelligence Oversight Act, for example, qualifies the notification requirement with the words "To the extent consistent with all applicable authorities and duties, *including those conferred by the Constitution* upon the executive and legislative branches of the Government" (emphasis added). Executive branch lawyers have argued that notification was not *statutorily* required if the executive branch had a *constitutional* duty that would be impaired by notification. While resolution of this argument requires a theory of the Constitution, the issue nonetheless boils down to one of statutory interpretation.

[48] *Youngstown* concurrence, 343 U.S. at 637 (Jackson, J.).

[49] *Id.* at 640.

[50] U.S. CONST. Art. I, §9, cl. 7.

tion can conceive of variants on these and other measures that might unconstitutionally intrude upon prerogatives of the executive branch, but Congress has done nothing like this in its legislation on covert operations. The rare occasions when Congress has overcome its general tolerance of executive covert action have involved paramilitary activities that posed a serious risk of escalation, possibly even of U.S.-Soviet confrontation. These exceptional circumstances cried out for congressional attention, and the policy choices made in the Boland amendments and similar legislation fell well within Congress's powers.

III. UNWILLINGNESS OF CONGRESS TO STRENGTHEN ITS CONTROL

In the wake of the Iran-contra affair, Congress considered various proposals to reform the intelligence oversight legislation.[51] What is especially notable about most of these proposals is their timidity. The most prominent bill would have ended the uncertainty over the time frame for notification of covert operations by requiring the Executive to report such operations to the intelligence committees within 48 hours of commencement. This bill passed the Senate with overwhelming support, but the President threatened to veto the measure and the 100th Congress adjourned without enacting it.[52] In view of all the ballyhoo that surrounded the Iran-contra hearings, it is amazing that Congress could not muster the votes to overcome executive opposition to such a trivial change. But even if the bill had become law, it would have been at best a marginal clarification of existing legislation. Adjustment of the timing of notice would work no significant change in the basic structure of congressional-executive relations. Most important, congressional *approval* of covert actions would still not be needed, and Congress would still have only limited means for effecting *dis*approval, through cutting off funds or enacting specific prohibitions, with all the problems of inertia, presidential veto power, and so on, that make resort to these means so difficult and exceptional.

I do not argue that a profound change in the intelligence oversight structure would be advisable at present. I tend to agree with the congressional Iran-contra committees that the basic structure is sound but does require some modest strengthening of accountability and elimination of loopholes. My point is simply to underscore that both under existing law and under the only proposals to amend it that have stood any chance of passage, Congress has not put the Executive on a short leash: free rein would be the better metaphor. Those who oppose activist executive uses of covert techniques must recognize the extent to which Congress shares responsibility.

IV. CONCLUSION

The Framers of the Constitution doubtless contemplated that the President and the Congress would be partners in foreign policy decisions that

[51] *See generally* IRAN-CONTRA REPORT, *supra* note 6, at 423–27.

[52] *See* W. COHEN & G. MITCHELL, MEN OF ZEAL 279–88 (1988); Koh, *supra* note 7, at 1272 n.77, 1339 n.388.

could lead to war. Two hundred years later, the forms of the partnership have changed, but the concept of congressional involvement has not. The main difference is that Congress has opted to be the silent partner. It has deliberately decided to be involved remotely, partially, through a select few of its members who may offer advice but have few means to change a presidential decision. Congress might have chosen differently; it might some day in the future be pressed to greater involvement; but even the Iran-contra fiasco has not yet offered sufficient inducement or provocation. To paraphrase John Hart Ely: Suppose Congress wanted an Intelligence Oversight Act that worked?[53] The congressional choice to stick with an executive-driven model tells us quite a lot about Congress, and about ourselves.

JUDICIAL DEFERENCE IN FOREIGN RELATIONS

*By Jonathan I. Charney**

Disputes with foreign policy implications have often been brought to the federal courts. These cases call attention to the tension between the authority of the political branches to conduct the foreign relations of the United States and the authority of the courts to render judgments according to the law. How this tension is resolved, in turn, bears directly on the commitment of the United States to the rule of law.

The courts have responded in various ways when U.S. foreign policy has been implicated in cases before them. In some circumstances, courts have accorded complete deference to the position expressed by the executive branch. In others, that position has been given great weight, has been treated as particularly persuasive evidence or has been considered as merely relevant evidence. In still other cases, courts have disregarded the Executive's position completely. Sometimes courts have abstained from deciding such issues. Cases have been dismissed outright without prejudice to the merits, and judgments have been rendered without addressing the foreign policy questions. Finally, through the application of conflicts-of-law rules, courts have relied upon foreign determinations. This variety may reflect a purely political approach by the courts or the application of a normative rule derived from the constitutional relationship between the courts and the political branches—but it most likely reflects a combination of the two. This essay summarizes and critiques the principal arguments with respect to the propriety of judicial deference and abstention in such cases.

While lengthy and highly reasoned judicial opinions have addressed this question, no consensus has been reached on the appropriate role for the judiciary in cases relating to U.S. foreign relations. Neutral constitutional

[53] Ely, *Suppose Congress Wanted a War Powers Act That Worked?*, 88 COLUM. L. REV. 1379 (1988).

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