

THE “FULL ACCESS DOCTRINE”: CONGRESS’S CONSTITUTIONAL ENTITLEMENT TO NATIONAL SECURITY INFORMATION FROM THE EXECUTIVE

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INTRODUCTION

Students of U.S. government are taught that there has been a decades-long trend of American presidents successfully claiming more and broader powers for the executive branch, particu-

larly when faced with threats from abroad.¹ Since World War II, we have lived through years of war and years of presidential assertions that only they can truly keep us safe. Proponents of expansive executive power have made these arguments more aggressively since September 11, 2001, claiming that the Framers gave the President vast plenary powers to protect the nation, some of which were inchoate and only fully revealed themselves after the 9/11 attacks.² Perhaps skeptical of its own ability to protect the American people in times of danger, and paralyzed by the political optic of seeming to object to the use of "strength against our enemies," Congress has acquiesced in the area of national security even if, as has often been the case, it has meant compromising its own core Article I powers.³

Is it true that the Framers strongly favored executive power, and expected Congress to yield its own expressed and implied powers whenever our country is faced with a dangerous world? In a charming quip in *Federalist* No. 69,⁴ Alexander Hamilton, the leading proponent among the Framers of a strong executive, reassured his readers that the President would not have overly broad power, and scoffed at the notion that his "unitariness" would serve to enhance that power:

[T]he executive authority, with few exceptions, is to be vested in a single magistrate. This will scarcely, however, be considered as a point upon which any comparison can be grounded; for if, in this particular, there be a resemblance to the king of Great Britain, there is not less a resemblance to

1. See, e.g., JAMES MACGREGOR BURNS ET AL., *GOVERNMENT BY THE PEOPLE* 312 (20th ed. 2004).

2. See Memorandum from the Office of Legal Counsel, Dep't of Justice, to William J. Haynes, Gen. Counsel, Dep't of Defense, Military Interrogation of Alien Unlawful Combatants Held Outside the United States (Mar. 14, 2003).

3. See, e.g., Authorization for Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)). John Bellinger, legal advisor to the National Security Council during the Bush Administration, recently argued that the "sparely worded" AUMF led to a significant increase in executive power. See John B. Bellinger III, Op-Ed, *A Counterterrorism Law in Need of Updating*, WASH. POST, Nov. 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html>.

4. Richard Epstein said that *Federalist* No. 69 demonstrates that the Bush Administration's legal theory is incompatible with originalism. See Charlie Savage, *Recommended Reading: Scholars Are Split on the Bush Administration's Use of the Federalist Papers To Justify Its Position on Presidential War Powers*, BOS. GLOBE, June 11, 2006, at E1. A former Administration official later addressed the incompatibility and dismissed *Federalist* No. 69 as "rhetorical excess." *Id.*

the Grand Seignior, to the khan of Tartary, to the Man of the Seven Mountains, or to the governor of New York.⁵

And James Madison, in *Federalist* No. 48, observed that each branch should jealously guard its own authority:

After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem to be solved.⁶

Nevertheless, a debate about the Framers' intent regarding the proper balance of power among the branches has become little more than an amusing academic parlor game, for the shift in power from the second half of the twentieth century until today is easily observable, and shows no signs of abating.⁷ This shift has never been sanctioned in law, however. The Supreme Court has not expressly approved the drift of power to the executive, and, when given the opportunity, has sometimes rejected it.⁸ Although the President and Congress must initially make judgments about the constitutionality of their own powers, in our republic the Court has the final word on the proper balance between the branches.⁹

If courts, humble about their own limitations under Article III, are rarely in a position to mediate between the President and Congress,¹⁰ the two squabbling branches should, as a practical matter, heed Madison's warning and protect their own constitutional authorities. Presidents have been good at protecting their branch's prerogatives, but Congress has not. Con-

5. THE FEDERALIST NO. 69, at 415 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

6. THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 308.

7. See BURNS ET AL., *supra* note 1, at 312 (stating that a number of historical, societal, and institutional factors have and will lead to expanded executive power). Professor Calabresi noted that "[p]residents do get some strange ideas about presidential power from time to time, and it is vital that Congress and the courts push back to the extent they can when that happens." Steven G. Calabresi, *Concluding Thoughts*, 12 U. PA. J. CONST. L. 651, 658 (2010).

8. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). One need only look as far as the Court's most recent constitutional decision for further proof.

10. Sometimes courts will specifically mandate negotiation between the political branches themselves. See *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 130 (D.C. Cir. 1977).

gress's occasional attempts to do so have often been ineffective.¹¹ As political realists, the Framers would not be surprised by the grabs for power made by many of our presidents.¹² But they likely would be disappointed that there has not been an equal and opposite reaction by Congress. To paraphrase James Madison in *Federalist* No. 51: Ambition has not been countered with ambition, or at least not very well.¹³

The purpose of this Article is to examine the failure of Congress to defend or even assert its expressed and implied powers under the Constitution against executives determined to expand their own authority. More specifically, this Article examines the willingness, perhaps even the misguided and irresponsible desire, of Congress to demand only a portion of the information from the executive branch relating to the intelligence policies and activities of the U.S. government, or to limit access to such a degree as to render the information useless for its intended purpose. That purpose is to acquire information without which Congress cannot perform its Article I duties, and to which it is entitled under the Constitution.

I argue that, under the Constitution, Congress is entitled to seek and receive any information from the executive branch that it needs to carry out its core responsibilities to make laws, appropriate funds, and investigate all matters relating to the intelligence functions of our government. Furthermore, the congressional power and obligation to obtain information, although strong in all areas where it is needed to support law-making, is at its zenith in the areas of intelligence policies and the activities of the President and the agencies of the intelligence community. The executive, quite simply, has no legitimate basis under our system of separation of powers upon which to refuse to provide any and all information requested by Congress on these matters.¹⁴ The only constitutionally valid

11. *E.g.*, War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (2006)). See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1297-1305 (1988).

12. See, *e.g.*, THE FEDERALIST NO. 51 (James Madison).

13. See *id.*

14. Oddly, some presidents have asserted that their power to hold back information is greater, not weaker, in national security matters. See, *e.g.*, Statement on Signing the Intelligence Authorization Act for Fiscal Year 2002, 2 PUB. PAPERS 1555 (Dec. 28, 2001). But see, *e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988) (limiting executive power

restraint or limitation on legislative access are the laws and rules Congress itself puts in place, not the fears, whims, or political calculations of the President seeking to withhold information. And yet, Congress has enacted laws or made informal deals that have let the President run the show.

A word is necessary at the outset regarding the protection of secrets that are, without question, critical to our national security. This Article addresses the importance of secret-keeping, and recognizes that processes are, and must continue to be, in place to prevent leaks. But in their zeal to keep secrets, Presidents have favored the trustworthiness of executive officials over our elected members of Congress. In doing so, they have, first, ignored empirical evidence that most leaks have come from the executive branch; second, disregarded the constitutional principles of the Full Access Doctrine; and, finally, cut off the American people from their ability to have a full voice, through their representatives in Congress, in the clandestine activities of the United States government.

I. CONGRESS MUST HAVE BROAD ACCESS TO INFORMATION FROM THE EXECUTIVE

The courts have recognized repeatedly that in order to perform its basic constitutional responsibilities, Congress can and must acquire information from the President and the departments and agencies of the executive branch.¹⁵ The structure of checks and balances rests on the principle that Congress has a right to know everything¹⁶ that the executive is doing, includ-

by upholding judicial review of constitutional claims against the CIA); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) (discussing congressional power over intelligence information and decision-making); *United States v. Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980) (limiting executive foreign intelligence exceptions to the Fourth Amendment to only “those situation in which the interests of the executive are paramount”). These cases, however, do not apply to the issues examined here, where Congress seeks to acquire information that it has pledged to keep in classified channels.

15. *See, e.g.*, *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (noting that the power of Congress to inquire is “as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution”); *see also* *McGrain v. Daugherty*, 273 U.S. 135, 174–75 (1927) (remarking that the legislature has all necessary power under the Constitution to perform the legislative function, including compelling appearance or testimony).

16. The only legitimate basis for a President to withhold any information from Congress is the narrow doctrine of executive privilege, discussed *infra* Part III.

ing all of its policy choices and all of its successes and failures in the implementation of those policies.¹⁷ The Supreme Court has more than once stated the obvious by explaining that Article I presupposes Congress's access to information so that it can responsibly exercise its obligations to make laws requiring or limiting executive conduct, to fund the programs supporting the executive policies of which it approves, to deny funds to those policies of which it disapproves, and to pursue investigations of executive behaviors that raise concerns.¹⁸ Without knowledge of the policy choices and activities of the executive branch, which is often unavailable unless provided by the executive, Congress cannot perform those duties the Framers envisioned, or at least not well. One may safely assume that the Framers did not expect mediocrity from Congress, our most democratic branch, nor did they create a recipe for congressional failure.

Often, the courts have enunciated these principles in situations in which Congress, exercising its investigative function, is met with refusals by the executive to provide information or witnesses.¹⁹ The backdrop of most, if not all, of these cases is that the executive is seeking to withhold information from a congressional investigation out of concern that the information will be made public. That is, in fact, often Congress's intent, and rightly so, because exposing executive branch failures to the American people is an important part of Congress's job.²⁰ Significantly, however, the access to information at issue here concerns only information that Congress has already pledged

17. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 300–01 (2010).

18. See, e.g., *Barenblatt*, 360 U.S. at 111; *Watkins v. United States*, 354 U.S. 178, 187 (1957); *McGrain*, 273 U.S. at 174. The power of Congress to seek information has never been seriously questioned historically and judicially. See William P. Marshall, *The Limits on Congress's Authority To Investigate the President*, 2004 U. ILL. L. REV. 781, 788–803.

19. See, e.g., *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977); MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30319, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 7–10 (2008), available at <http://www.fas.org/sgp/crs/secrecy/RL30319.pdf>.

20. One does not have to be too cynical to speculate that the executive also would prefer not to provide documents and witnesses that will be used against the executive's interests. Thus, there is a built-in bias to withhold information from Congress if the executive can make a colorable justification for its actions.

to keep secret.²¹ Thus, to the extent that there is any sympathy with the President reflected in the courts' opinions that national security information should not be exposed to the public, that sympathy holds no sway here, for it is not a factor.²²

With respect to requests for witnesses and documents for congressional investigations, the Supreme Court has explained that the power of inquiry lies at the heart of the legislative function, vested by the Constitution exclusively in Congress.²³ It is "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."²⁴ For Congress to fulfill the responsibility to investigate the executive branch, and to bring its conduct to the attention of the American people, the acquisition of information from the executive is imperative. Woodrow Wilson, no fan of overzealous congressional committees, observed that a "discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration."²⁵

Accordingly, in our system of government, the written Constitution imposes on members of Congress, as the elected representatives of the American people, the obligation to be the eyes and ears of the citizenry by closely watching over the policies and activities of the President and executive officials.²⁶ Ultimately, Congress does not truly do anything directly. Congress passes laws telling the executive to take action, passes laws telling the executive to refrain from taking action, provides or withholds funding for things it wants the executive to do or stop doing, and performs investigations to expose the executive's policies and conduct to the people so they can react

21. S. Res. 400, 94th Cong. § 7 (1976) (enacted). Section 8 of that resolution allows the Senate, against the will of the executive, to disclose information as it deems necessary, *id.* § 8, but it has never done so.

22. The issue of the "sensitivity" of the information as a reason to keep it from Congress is discussed *infra* Part II.

23. See, e.g., *Barenblatt*, 360 U.S. at 111; *United States v. Bryan*, 339 U.S. 323, 327 (1950); see also ROSENBERG, *supra* note 19, at 19–20 (2008) (explaining that courts have limited presidential privilege claims, allowing Congress to investigate executive action).

24. *Barenblatt*, 360 U.S. at 111.

25. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303 (Transaction Publishers 2002) (1900).

26. See *Watkins v. United States*, 354 U.S. 178, 187 (1957).

as they see fit.²⁷ These are Congress's primary functions, its *raison d'être*, and it must have broad access to information from the executive in order to perform them successfully.

In most areas, Congress has help watching over the executive, and the Framers anticipated that.²⁸ The media, trade unions, corporations, public interest groups, lobbyists, and the American people can observe governmental policies and programs, seek publicly available information, and then take action to influence executive behavior. Congress wisely has taken steps to empower those entities to help with the daunting task of keeping track of the thousands of executive branch policies and activities that need scrutiny. By enacting the Freedom of Information Act²⁹ and dozens of other laws mandating public disclosure of information by the executive,³⁰ Congress can rest more easily knowing that a vast amount of executive conduct that requires its attention will have lots of sun shining upon it from outside sources. If members of the media—including legions of internet bloggers—pick up on a problem that our citizens find troubling, then Congress can investigate, conduct hearings, and perhaps legislate.³¹

But in the area of intelligence oversight, Congress's job is a lonely one. By their nature, most of the policies of the President and the activities of the intelligence agencies, both domestically and abroad, cannot be made available to the media or to the American people. Without question, public disclosure of these sensitive programs would put lives at risk, render expensive technologies useless, and undermine the ability of the execu-

27. Congress makes laws, but Congress is dependent on the executive to implement those laws. The Senate provides advice and consent on appointments and treaties, if the President appoints individuals or enters into treaties. Ultimately, though, Congress has no power to implement any policies or to expend any funds for the country unless the President "takes Care that the Laws be faithfully executed," as he is required to do under Article II. U.S. CONST. art. II, § 3.

28. See THE FEDERALIST NO. 48 (James Madison), *supra* note 5, at 309.

29. 5 U.S.C. § 552 (2006).

30. See, e.g., Ethics in Government Act of 1978, 5 U.S.C.A. §§ 101-111, 401-408, 501-505 (2006).

31. *Talkingpointsmemo.com* (TPM) reported on the U.S. Attorney firing scandal for months, resulting in congressional testimony and ending Attorney General Gonzalez's tenure. See, e.g., Steve Benen, *This Could Get Ugly*, TALKING POINTS MEMO (July 1, 2007, 4:46 PM), <http://www.talkingpointsmemo.com/archives/014936.php>. TPM received a journalism award for its relentless efforts. See *2007 George Polk Awards*, LONG ISLAND UNIVERSITY, <http://www.liunet.edu/About/News/Polk/Previous.aspx#2007> (last visited Feb. 10, 2010).

tive branch to perform its most critical obligation: to keep U.S. citizens safe from those who wish us harm.³²

So our representatives in Congress are the only external (non-executive) means by which the intelligence policies and activities of the executive can be policed routinely.³³ Congress performs a critical proxy function, unlike in any other area, requiring it to find out what the executive is doing (in the name of the American people) in its clandestine activities at home and overseas. An effective legislature is necessary to scrutinize the executive, and Congress must ask hard questions on behalf of the American people, such as: What are the programs? Why are we conducting them? Will they work? Are they working? How much do they cost? Are they worth the money? What are the risks? Are the programs constitutional and permitted under existing U.S. law? Are they consistent with American values? Would the people I represent want me to support these activities? Quite simply, except for the President's private conversations, Congress must know all of the executive's secrets, because the American people cannot.

The stakes are high. If the President makes poor choices in his agricultural or environmental policies, or implements them badly, it is less likely that our core American values will be placed in jeopardy or that our citizens' safety will be compromised. Particularly in the post-9/11 era, the aggressive intelligence programs of the Bush and Obama Administrations—secret detention; “enhanced” interrogation of detainees; warrantless electronic surveillance inside the United States; and targeted killing of suspected terrorists, including American citizens, outside war zones—may be highly dangerous, of debatable value, potentially unlawful, harmful to our foreign policy objectives, and, possibly, not in accord with the values and desires of the American people. If Congress does not have

32. See THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . .”).

33. There are, however, “internal” means by which the executive self-polices. For example, the President's Intelligence Advisory Board, through its Intelligence Oversight Board, advises the President on the legality of intelligence policy decisions. In addition, the intelligence agencies have inspectors general and offices of general counsel, as well as the ability to consult the Office of Legal Counsel at the Department of Justice on difficult legal questions.

meaningful access³⁴ to all of the information in the possession of the executive branch about the existence of these programs and the nature of the operations implementing them, then the American people are dispossessed of their absolute entitlement under our Constitution to ensure that the executive branch is not abusing its powers or using those powers poorly.

In sum, when the actions of the executive are secret and the stakes are exceptionally high, Congress serves as the only safeguard against the excesses of the President and his intelligence agencies, both abroad and inside the United States. In accordance with our democratic principles, Congress acts as our proxy in those areas, as we have no other legal means of oversight.³⁵ Under these circumstances, Congress's constitutional power—and its solemn obligation—to acquire information from the executive is at its zenith.³⁶

II. CONGRESSIONAL ACCESS TO CERTAIN TYPES OF INTELLIGENCE

A startled reader might now be thinking that it is neither possible nor desirable for all intelligence information to flow to Congress from the executive branch. It is true that such a complete cascade of information would be disruptive and unwieldy, and could place lives and operations at risk. As such, although technically available to Congress as a constitutional matter, it would be undesirable on practical, administrative, and security grounds for Congress to require the executive to provide every type and piece of intelligence information in its possession.³⁷ A wise Congress will draw the proper line, and will not behave irrationally in its demands for information.³⁸

34. As we will see in Part II, some statutory limitations on access to information render the information useless for its legislative purposes.

35. Leaks are an illegal alternative. See Pozen, *supra* note 17, at 337 n.311 (“[T]here is nothing like an old-fashioned leak for exploding a deep secret.”).

36. The Bush Administration's argument that national security gives the executive a stronger basis to withhold information from Congress is exactly wrong: Congress has a greater need for, and right to, this information than in any other area. See *infra* Part V.

37. There are three formal methods by which Congress may acquire intelligence information from the executive branch: (1) Require by law that Congress receive a notification whenever something occurs (e.g., an “intelligence failure”); (2) require by law that the executive provide reports it has in its possession (e.g., “give us your report on ‘enhanced interrogation techniques’”); and (3) require by law that the

A. Complete Access to the “Analytic Products”
of the Intelligence Agencies

In terms of the sheer volume of information, the sixteen agencies of the intelligence community churn out enormous numbers of “analytic products” for policymakers every year. These products, often highly classified, are the analysts’ best estimate of the meaning and significance of the intelligence information collected worldwide through the use of the human and technical assets at the disposal of the U.S. government. The President, cabinet secretaries, and thousands of senior executive branch officials rely on these analyses to make policy choices for the United States in a wide variety of areas. Of course, as policymakers and consumers of intelligence, members of Congress also are entitled to these products, either by special request, or on a regular basis.³⁹

Congress’s exercise of its lawmaking and appropriations functions cannot proceed without access to the information, of its own choosing, collected and analyzed by the federal government. To the extent that Article I of the Constitution gives Congress shared responsibility over foreign affairs,⁴⁰ the notion that vast sums of money may be spent by the executive to inform its own policy decisions, but that Congress would not have equal entitlement to the fruits of the expenditures—funds

Intelligence Community create an analytic report for Congress on various topics, either on one occasion or on a regular basis (e.g., “biannual reports on the efficacy of counternarcotics programs”). Of course, members and staff request and receive informal briefings on a regular basis from intelligence officials.

38. One must acknowledge that our elected officials do not always act as “wisely” as one might hope. But our Founders had faith in representative democracy. See, e.g., THE FEDERALIST NO. 10 (James Madison).

39. For a discussion of Congress’s role as a consumer of intelligence, see ALFRED CUMMING, CONG. RESEARCH SERV., RL 40136, CONGRESS AS A CONSUMER OF INTELLIGENCE INFORMATION (2010), available at <http://www.fas.org/sgp/crs/intel/R40136.pdf>.

40. “Congress shall have power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.” U.S. CONST. art. I, § 8.

it appropriated and authorized for those very purposes—cannot be seriously defended. For example, if the President has entered into a treaty governing nonproliferation, and the treaty is before the Senate for ratification, the members cannot make an informed judgment about the wisdom of the treaty obligations imposed on the United States without full access to the relevant analyses of the professional intelligence experts of the executive branch.

These products are classified, however, and the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI),⁴¹ as a practical matter, are the gatekeepers for the rest of the members on their acquisition and storage.⁴² These committees have the sole responsibility for drafting the laws of access, and these laws must include provisions ensuring that other members of Congress, as appropriate, may review the materials. Acting under its Article I authority to set its own rules of procedure, Congress established a system for the safe handling of classified information that, if used properly, will maximize the ability of all legislators to acquire the information they need to perform their constitutional duties, without risk to our national security.⁴³

*B. Intelligence Committees: Broad Access
to "Operational Information"*

All members of Congress need access to the intelligence agencies' analytic products, each to the extent determined by his committee assignments, the interests of his constituents, and his responsibility to vote on bills brought to the floor. The SSCI and the HPSCI, however, in order to pursue their special oversight mission, also need access to intelligence "operational information." The job of these committees, as charged by their respective bodies, is primarily to oversee how the agencies of the intelligence community conduct operations overseas, or

41. The SSCI and the HPSCI are the legislative committees responsible for overseeing federal intelligence activities.

42. The SSCI and the HPSCI conduct all of their business in a "Secure Compartmented Information Facility" (SCIF). The classified materials the executive entrusts to Congress are kept in vaults within the SCIF, and a professional security staff monitors them. Any member of Congress who wishes to read classified material must do so in a committee SCIF, under the supervision of security personnel.

43. Article I of the Constitution gives each house the power to make its own rules of procedure. U.S. CONST. art. I, § 5, cl. 2.

domestically, to collect foreign intelligence. Their goal is to scrutinize the policies and activities the executive uses to clandestinely steal secrets (foreign intelligence or FI) and to conduct covert activities to change the situation on the ground abroad (covert action or CA).⁴⁴ It is this type of highly sensitive “sources and methods” information that often forms the basis of disputes between the branches over access.

As with most things, operational information falls along a continuum. At one end of the spectrum, there is information about which Congress cannot perform its core functions. For example, Congress must have detailed budget numbers each year in order to approve or disapprove funding for ongoing or proposed intelligence operations—a duty expressly imposed upon Congress in Article I, Section 9. Although these budget numbers are highly classified, only the most secretive executive would expect Congress to approve funding without acknowledging that legislators need access to a high level of detail about the various programs’ financial needs. Congress simply would be unable to perform its appropriation and authorization duties without detailed information about the nature of the programs and their estimated cost.⁴⁵

Moving along the spectrum of operational information in the possession of the executive, the congressional oversight committees also need access to any and all—both FI and CA—information that they, not the executive, determine will inform their proper oversight functions. The courts have never articulated a category of information that is beyond Congress’s reach. After all, the committees are keeping an eye on the process of acquisition of FI and the use of our intelligence assets to conduct CA operations on the ground. There is nothing that is

44. See, e.g., *supra* note 21.

45. The intelligence appropriations and authorizations, except for the overall number, are classified. The top line was first made available in 2007. Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 601, 121 Stat. 266, 335, amended by Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, § 364, 124 Stat. 2654, 2702. Attached to each bill is a “classified annex.” The classified annex explanation is boilerplate in every intelligence authorization bill. See, for example, the House bill for 2010, which includes in the classified annex all the detailed numbers for the hundreds of individual programs in the sixteen intelligence agencies for the coming fiscal year. See H.R. REP. NO. 111-186, at 3–4 (2009). Any member of the House and Senate may come to the secure committee spaces and review the classified annexes before voting on the bills. See S. REP. NO. 111-223, at 1 (2010); S. Res. 400, 94th Cong. (1976) (enacted).

constitutionally beyond their legitimate grasp, and the Framers did not give the President any authority to resist.

On the farthest end of the spectrum, however, there are some categories of operational information that Congress, under most circumstances, does not need to do its job and would be unwise to seek.⁴⁶ Although the Full Access Doctrine provides that Congress is entitled to it, only very rarely would Congress need to know, for example, the operational details of a Central Intelligence Agency (CIA) plan to capture a named al Qaeda leader next Tuesday at 1300 on a particular street corner in Khost, Afghanistan. Such information would not enhance the ability of Congress to perform its constitutional role, and it would be of legitimate concern to the intelligence agencies that short-term operational planning of such a high-risk nature be held as closely as possible, at least until the operation has been executed.⁴⁷ In fact, senior White House officials, in most cases, also have no need for the specifics of an imminent operation.

Similarly, it would be highly unusual for Congress to need the true names of foreign human assets recruited to collect information about the plans and intentions of nations and terrorist groups who may wish to do us harm. Rarely, if ever, would the names of these assets provide information important to any proper legislative function.⁴⁸ Again, distribution of such information to anyone outside the CIA—including to senior executive branch officials—could pose serious risk, without affording benefit, to the lives of the assets, the lives or careers of the intelligence officers who run those assets, and to the ability of the United States to continue to get critical information from

46. I do not concede that Congress is not entitled, as a constitutional matter, to this information. As discussed in Part VI, Congress should, however, for practical reasons, in exercising its exclusive right to set its own rules of access, balance need against possible damage. If the information adds little or nothing to its lawmaking or appropriating responsibilities, Congress should not request it, for any risk of disclosure is not warranted.

47. There is a critical distinction between Congress's need to have detailed knowledge about the policy decision to launch a program of this type, and the need to know the details of a specific operational plan. Of course, the President's intention to conduct operations of this general nature must be provided to Congress in advance. Also, the success or failure of an operation, after its completion, is of critical interest to Congress in its oversight capacity.

48. Congress does have an interest in examining the costs and benefits of utilizing particularly unsavory persons to act on behalf of the United States. It is not necessary for the legislators to know their names, however, in order to make judgments about their suitability to act on behalf of the U.S.

them. Finally, the highly technical details of signals intelligence collection platforms used, for example, by the National Security Agency (NSA), are of little use to Congress, and are of such great importance to our national security efforts that their compromise could have devastating consequences.⁴⁹

Accordingly, although Congress has the constitutional power to seek and receive all such information, the risk of exposure of some types of operational information, however small, usually far outweighs the benefit, if any, to the performance of its legislative and appropriation responsibilities. But acquiring access to these narrow categories of information is rarely the subject of notable conflict between the branches, and is not of concern here. Rather, the focus here is on the statutes, internal rules within each branch, and comity between members of Congress and presidents that are used to justify denying or limiting access to intelligence information that is essential to Congress's legislative responsibilities, and to democratic control of executive conduct.

C. *Operational Information Constituting Core Intelligence Matters to which Congress Must Have Full Access*

"Covert action" (CA) programs are a prime example of information that Congress must have to do the job the Framers envisioned, and any limitations placed on access to CA programs should be imposed with the utmost caution. A CA program is defined in law as "an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly."⁵⁰ CA programs are often the boldest, riskiest, and most controversial activities in which intelligence agencies, and, indeed, the entire executive branch, take part. On our continuum, one would be hard pressed to come up with a description of any governmental activity that is in need of closer con-

49. See ALFRED CUMMING, CONG. RESEARCH SERV., R 40698, "GANG OF FOUR" CONGRESSIONAL INTELLIGENCE NOTIFICATIONS 4-5 (2009), available at <http://www.fas.org/sgp/crs/intel/R40698.pdf>. See generally ERICH ROSENBACH & AKI J. PERITZ, CONFRONTATION OR COLLABORATION?: CONGRESS AND THE INTELLIGENCE COMMUNITY (2009).

50. National Security Act of 1947 § 503(e), 50 U.S.C § 413b(e) (2006).

gressional scrutiny than CA programs.⁵¹ Examples of such programs could include, hypothetically, supporting financially a group plotting to overthrow the leadership of a foreign country, transporting suspected terrorists from one country to the custody of another, spreading propaganda about a local chieftain in his village to undermine his influence, or planning clandestinely to capture or kill terrorist leaders around the world. As this Article will discuss, Congress has unwisely imposed by law strict limitations on its own access to this kind of information.

When they come to the attention of the public, covert action operations often attract the most controversy.⁵² But the daily "bread and butter" operational work of our intelligence officers is the collection of "foreign intelligence" (FI) on the plans, intentions, and capabilities of foreign nations, groups, and persons. Congress must be told about the existence of all of these collection programs, their purposes and goals, the detailed parameters of their implementation, and the benefits and risks they present. Under the current statutory scheme, Congress placed tight limitations on its own access to this kind of information, and placed too much discretion in the hands of the executive—discretion to which the President has no right, and that the Framers rightly feared he might abuse.⁵³

In sum, in the hushed corridors of the CIA, the discussion of everything operational that its officers do, or want to do, around the world will fall into one of these two categories: foreign intelligence collection or covert action. The Agency's lawyers must make judgments frequently on whether operations fall into one or the other category, and there are a number of critical legal and policy consequences that hinge on the answer: Do we have approval that covers this activity? Do we have approval from the right official? Does it violate any existing U.S. law, presidential executive order, or internal agency rule? Do we have congressional authorization to expend funds on this activity? Do we use money to fund the activity from Congress's "FI pot" or "CA pot"? And, most significant for our purposes

51. Of course, other governmental programs—for instance, economic programs—are of great importance to the welfare of the American people. But Congress is not denied access to the details of these programs.

52. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1.

53. See generally THE FEDERALIST NO. 51 (James Madison).

here, *do we have to tell Congress about it and, if so, when, how, what, and whom must we tell?*⁵⁴

III. PRESIDENTIAL DENIALS OF INTELLIGENCE INFORMATION: WITHOUT CONSTITUTIONAL BASIS

Despite the tireless efforts of defenders of unlimited executive power, no one to date has successfully identified an expressed or implied power in the Constitution to justify keeping Congress in the dark on any executive branch policies or activities, let alone on those involving intelligence matters. There is no constitutional language that suggests that Congress cannot have access to all aspects of the activities of the United States performed on behalf of the American people. Further, the courts have never identified a substantive area that is beyond the scope of Congress's inquisitorial powers. To the contrary, the courts have expressly stated that the substance of the information alone can never form the basis upon which the President can withhold information from Congress—including national security information.⁵⁵

A. *Executive Privilege*

The Supreme Court has enunciated one—and only one—doctrine supporting the power of the President to deny information, of any kind, requested by Congress: executive privilege.⁵⁶ The privilege is grounded in principles of separation of powers and provides a basis for the President to protect a specific and small category of information the courts have identified as critical to the President's ability to function as the chief executive.

In light of the frequent assertions by the Supreme Court that Congress cannot perform its core Article I powers unless it has broad access to information from the executive, discussed

54. The executive branch has too much discretion over "whether" to provide information and, perhaps unlawfully, has withheld it altogether in some cases. In a November 2010, classified report of the House Permanent Select Committee on Intelligence, the committee concluded that on at least sixteen occasions during the administrations of Presidents Clinton, Bush, and Obama, the executive branch had failed to provide information about high stakes intelligence programs to the committees. See Scott Shane, *Intelligence Bodies Faulted on Disclosure*, N.Y. TIMES, Nov. 19, 2010, at A19.

55. See *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 128 (D.C. Cir. 1977).

56. See ROSENBERG, *supra* note 19, at 9–10.

above, it is no surprise that the Court typically is reticent about shielding the President's activities from Congress's eyes, entering the fray only when it has no choice.⁵⁷ In a high stakes battle of the branches in 1974, the Supreme Court in *United States v. Nixon*⁵⁸ acknowledged for the first time that there might be times when the executive may assert a privilege to deny information to Congress or the courts. The Court found that the facts before it did not present such a situation, and ordered President Nixon to turn over audiotapes of his conversations in the Oval Office because they could shed light on criminal conduct relevant to federal court proceedings.⁵⁹

In the forty years since the *Nixon* decision, Congress and presidents have repeatedly battled over the scope of executive privilege, and lower courts have tried to set forth its parameters.⁶⁰ Of particular interest here is the 1977 decision by the D.C. Circuit in *United States v. AT&T*.⁶¹ In *AT&T*, a House of Representatives subcommittee had demanded documents from the Federal Bureau of Investigation relating to the bureau's request to AT&T for assistance with warrantless wiretaps on U.S. citizens, ostensibly made for national security purposes. Responding to an argument made by the Department of Justice that this highly sensitive information should be shielded from Congress, the D.C. Circuit rejected the notion that national security information is, without more, covered by executive privilege, stating:

The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up. While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of ambassadors.⁶²

57. *Id.* at 8–10.

58. 418 U.S. 683 (1974).

59. *See id.*

60. *See* ROSENBERG, *supra* note 19, at 7–10.

61. 567 F.2d 121 (D.C. Cir. 1977).

62. *Id.* at 128. In the end, the court refused to settle the dispute, instead demanding that the two branches first try to work it out, which they did.

The D.C. Circuit recognized what the Supreme Court had been telling us for decades: the President and Congress share the responsibility for protecting our national security. Both branches have their duties, and for Congress to perform its constitutional responsibilities, it must know what the executive branch is doing to protect national security. Congress cannot legislate or make appropriations for secret programs to which it does not have meaningful access.

For our purposes, there is no need to explore deeply the debate over what information falls within the scope of executive privilege. It is sufficient to summarize what the courts have determined is *not* covered:

First, the privilege does not apply to anything except the deliberative processes of the President, or his communications with his close advisors in their roles supporting presidential decision-making.⁶³

Second, the privilege does not apply *per se* to national security information, except to the extent that the requested information also falls within the deliberative processes of the chief executive. Neither the Supreme Court nor any lower court has recognized a presidential “national security privilege” supported by the Constitution. In fact, the D.C. Circuit expressly rejected it.⁶⁴

Third, Congress does not need to prove its specific entitlement to information. Once information has been requested by another branch, the presumption is that the executive must provide it. The burden is on the executive to support the applicability of the privilege if it desires to withhold the information,⁶⁵ though a good faith effort to reach an accommodation is usually required before a court will enter the fray.⁶⁶

63. *In re Sealed Case* (Espy), 121 F.3d 729, 745–46, 751–52 (D.C. Cir. 1997) (recognizing the “deliberative process” privilege as a common law privilege that applies to the pre-decisional materials of executive officials, and the “presidential communications” privilege, which protects both pre- and post-decisional materials made by advisers preparing advice for the President, and is more difficult to overcome because it is rooted in the constitutional separation of powers and the executive’s role therein).

64. *See Am. Tel. & Tel. Co.*, 567 F.2d at 128.

65. *See Comm. on Judiciary v. Myers*, 558 F. Supp. 2d 53, 99 (D.D.C. 2008) (subpoenaed presidential advisor obligated to testify before House committee).

66. *See id.*; *United States v. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C. 1983); ROSENBERG, *supra* note 19, at 7–10.

Fourth, the privilege does not shield final executive policy decisions from discovery. Except perhaps to the extent that the Congress seeks deliberations by the President and his advisors in forming his policies, the Congress is entitled to know—in a manner meaningful to its constitutional duties—the existence and parameters of all policies pursued by the executive branch, especially for intelligence purposes.⁶⁷ To hold otherwise would obliterate Congress's oversight role established in Article I. The privilege belongs to the President's deliberations, and sometimes to those of his closest advisors, but courts have not extended the privilege to decisions, policies, or activities of agencies of the executive branch or agency officials.⁶⁸ The courts have never endorsed the use of the President's limited privilege to deny to Congress information in the hands of the agencies of the intelligence community.

These four principles are sufficient to demonstrate that the doctrine of executive privilege does not apply to finished intelligence products prepared by the analysts of the intelligence agencies. Similarly, no articulation of executive privilege could shield from Congress operational information in the hands of the executive about, first, the sources and methods by which it collects foreign intelligence throughout the world, and, second, the policy decisions about, and outcomes of, covert action operations the executive is determined to conduct on the ground. Other than his personal deliberations in forming the policies, the President cannot rely on the privilege to keep any FI or CA information from the intelligence committees, unless Congress acquiesces.

B. *"Unitary Executive" Theory: An Independent Constitutional Basis to Withhold?*

As discussed above, the question of whether there is a separation of powers basis for the President to withhold documents or witnesses from Congress has been asked and answered by the courts: If the doctrine of executive privilege applies to the

67. See *supra* Part I.

68. See *In re Sealed Case (Espy)*, 121 F.3d at 752 (presidential communications privilege extends only to "communications made by presidential advisers in the course of preparing advice for the President"). See also MARK J. ROZELLE, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY* 65–66 (2d ed. 2002).

requested information, the President may withhold it; if executive privilege does not apply, he may not.

Directly relevant for our purposes, in 2002 President Bush signed the Intelligence Authorization Act for Fiscal Year 2003, which required, among other things, that the congressional intelligence committees receive regular reports from executive agencies on specific matters within their oversight jurisdiction.⁶⁹ The President signed the bill into law, but stated:

Many provisions of the Act . . . establish new requirements for the executive branch to disclose sensitive information. As I have noted in signing last year's Intelligence Authorization Act and other similar legislation, the executive branch shall construe such provisions in a manner consistent with *the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.*⁷⁰

As many commentators have noted,⁷¹ President Bush provided neither case law nor scholarly works to support this broad view of the nature of his constitutional authority. With the exception of his privilege to protect "the deliberative processes of the Executive," which was not in any way implicated by the information requested in the intelligence authorization bill, there is no such legal support available.⁷²

1. *The "Removal Power" Theory*

There is a growing body of scholarship both supporting and rejecting the unitary executive theory.⁷³ And the views of those

69. The statute required executive agencies to submit to Congress a number of annual and semiannual classified reports including, for example, a report on intelligence provided to the United Nations, a report on the protection of the identities of covert agents, and a report on the acquisition of technology relating to weapons of mass destruction and advanced conventional munitions. Pub. L. No. 107-306, § 811, 116 Stat. 2383, 2418 (2002) (codified as amended at 50 U.S.C. § 415b(a)(1) (2006)).

70. Presidential Statement on Signing the Intelligence Authorization Act for Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 2102-03 (Nov. 27, 2002) (emphasis added).

71. See, e.g., T.J. HALSTEAD, CONG. RESEARCH SERV., RL 33667, PRESIDENTIAL SIGNING STATEMENTS, CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 17-19 (2007); Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 521 (2005).

72. See ROSENBERG, *supra* note 19, at 13.

73. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 20 (2008) (supporting the

who advocate the theory are far from monolithic. Steven Calabresi, Christopher Yoo, and others dating back to the Reagan Administration, have written extensively on the topic. Their careful articulation of the theory focuses on the process of presidential control over the executive branch, and "holds that the Constitution creates a unitary executive branch under the plenary control of the President, who may direct his subordinates' performance of their statutory duties within the limits of whatever discretion is conferred by statute."⁷⁴ Specifically, Professors Calabresi and Yoo argue that the Constitution gives the power to remove and control all subordinate officials in the executive branch and, accordingly, "[t]he president is . . . not only the commander in chief of the military, but also the law enforcement officer in chief of the federal government,"⁷⁵ with the exclusive power to exercise whatever authority has been provided in law.

In a significant setback to these "removal power" theorists, the Supreme Court considered and rejected the argument that the President can remove any subordinate without cause as applied to the facts before it in *Morrison v. Olson*.⁷⁶ The Court upheld the constitutionality of provisions in the Ethics in Government Act that denied the President the power to remove an independent counsel.⁷⁷ In a seven-to-one decision, the Court concluded that "even officers performing such core executive functions as prosecution could be insulated from presidential removal."⁷⁸

Relevant to the issues at stake here, in *Morrison* the Court reaffirmed the line of cases establishing the power of Congress to require reports from the executive branch. Citing *McGrain v. Daugherty*,⁷⁹ the Court stated, "Congress' role under the Act is limited to receiving reports or other information and oversight of the independent counsel's activities, functions that we have

"classic theory" of the unitary executive whereby whatever power is wielded in the executive branch is at the authority of the president); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62 (1990).

74. HAROLD H. BRUFF, *BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR* 99-101 (2009).

75. CALABRESI & YOO, *supra* note 73, at 4.

76. 487 U.S. 654 (1988).

77. *Id.* at 685-93.

78. CALABRESI & YOO, *supra* note 73, at 378.

79. 273 U.S. 135 (1927).

recognized generally as being incidental to the legislative function of Congress.”⁸⁰ According to the Court, unitary executive principles did not provide for the denial of information to Congress in the performance of its legislative duties.⁸¹

2. *An Even More Expansive Theory*

Undaunted by the Supreme Court’s rejection of “removal power” unitary executive principles in *Morrison*, some lawyers in the Justice Department and the White House advised President George W. Bush to exercise significantly broader power than those principles would support. John Yoo, a lawyer in the Office of Legal Counsel at the Department of Justice from 2001 to 2003, was the primary figure responsible for providing the legal analysis to support many of the aggressive intelligence programs President Bush implemented in the aftermath of the 9/11 attacks.⁸² John Yoo argued that, in times of national crisis, the Constitution permits executive power to expand considerably, and, even if Congress expressly prohibits the President from taking specific actions, he, as the unitary executive, may do so anyway.⁸³ President Bush adopted John Yoo’s view that the Vesting and Commander in Chief Clauses of Article II give the President virtually unfettered substantive power to take actions that, under his sole discretion, he believes are necessary to protect the nation.

Exposing the process versus substance rift among unitary executive scholars, Mr. Yoo, now a law professor at the University of California at Berkeley, recently criticized as too limited Steven Calabresi and Christopher Yoo’s version of the doctrine. In a review of their 2008 book, *The Unitary Executive*,⁸⁴ John Yoo argued:

If we follow the same methodology as Calabresi and [Christopher] Yoo, it becomes apparent that the executive power encompasses much more than managing those who enforce

80. *Morrison*, 487 U.S. at 694 (internal citation omitted).

81. See *Morrison*, 487 U.S. at 686 (distinguishing *Myers v. United States*, 272 U.S. 52 (1926), and *Bowsher v. Synar*, 478 U.S. 714 (1986), which addressed instances where Congress sought to overstep the legislative function).

82. See Robert Barnes, *Sentence in Memo Discounted FISA*, WASH. POST, May 23, 2008, at A15.

83. John Yoo, *Unitary, Executive, or Both?*, 76 U. CHI. L. REV. 1935, 2018 (2009) (reviewing CALABRESI & YOO, *supra* note 73).

84. CALABRESI & YOO, *supra* note 73.

the law. Article II vests powers of substance that come to the fore during crises.⁸⁵

John Yoo argued that Steven Calabresi and Christopher Yoo advocate a far too narrow application of their own theories, and that executive power encompasses much more than personnel management, the same interpretation he espoused during his time in the Bush Administration.

In anticipation of this criticism, Steven Calabresi and Christopher Yoo spent one page of their 544-page treatise addressing the approach of President Bush and John Yoo:

George W. Bush's reliance on the advice of Berkeley law professor John Yoo to make sweeping claims of implied, inherent presidential power in the War on Terror . . . push[ed] the envelope of presidential power to its outer limits. Although Bush deserves a lot of credit for his steps to safeguard the country, *the cost of the bad legal advice that he received is that Bush has discredited the theory of the unitary executive by associating it not with presidential authority to remove and direct subordinate executive officials but with implied, inherent foreign policy powers, some of which, at least, the president simply does not possess.*⁸⁶

Accordingly, Reagan- and Bush-era unitary executive theorists are presently in fundamental disagreement. The two camps disagree over the scope of a doctrine, the validity of which the Supreme Court denied over twenty years ago.

3. *The Bush White House Goes Even Further*

Both the procedural and substantive unitary executive theorists might have cringed at the ham-handed use of their beloved principles in some of the signing statements of President Bush. Vice President Cheney's counsel, David Addington, has been credited with scouring every bill signed into law by President Bush and adding boilerplate language to the signing statements asserting that unitary executive principles govern the extent to which the President has to comply with the law, including requests for reports by Congress.⁸⁷ Neither John Yoo nor Steven Calabresi suggest that the unitary executive theory

85. Yoo, *supra* note 83, at 2018.

86. CALABRESI & YOO, *supra* note 73, at 429 (emphasis added).

87. CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACIES 236–37 (2007).

may be used to keep intelligence information, or any information, from Congress.

With nearly forty years of jurisprudence governing when and if the President may keep information from Congress, the law in this area is settled and does not need novel theories to fill a vexing void. President Nixon already asserted that the President could shield information from Congress or the courts if it relates to the exercise of his core powers—they cannot do anything to stop him, he argued, so why would they need any information? The Supreme Court rejected an absolute, unqualified presidential privilege, despite vigorous assertions by President Nixon that national security required such a privilege.⁸⁸

In 2008, the nonpartisan Congressional Research Service, in an exhaustive report on executive privilege, reviewed the variety of assertions made during the Bush Administration on congressional access to information, and concluded:

The George W. Bush Administration . . . articulated a legal view of the breadth and reach of presidential constitutional prerogatives that if applied to information and documents often sought by congressional committees, would stymie such inquiries. . . . [These] assertions of . . . presidential prerogatives [were] unaccompanied by any authoritative judicial citations.⁸⁹

Whatever the validity or scope of the unitary executive theory, it cannot operate to shield a President from his duty to give information to Congress to enable it to perform its constitutionally mandated obligations.

88. *United States v. Nixon*, 418 U.S. 683, 705–06 (1974).

89. ROSENBERG, *supra* note 19, at 12–13. In fairness to President Bush, he was under no obligation in a signing statement to provide detailed legal analysis and citation. On the other hand, if the executive announces to the public that he is signing a bill into law that he does not consider binding upon him, some support would be helpful.

IV. THE INADEQUACY OF ASSERTIONS OF
COMITY AND SECRECYA. *The Failure of President Obama's Assertion
of a History of Comity*

The existing statutes governing access by Congress to information about the intelligence policies and activities of the U.S. government are discussed below.⁹⁰ But first, having demonstrated the unwillingness of President Bush to share secrets with Congress, it is useful to explore how President Obama has, at times, been similarly unwilling to disclose information, employing rationales with no better grounding in the Constitution.

After six years of failing to enact an intelligence authorization bill, and thereby having little, if any, meaningful oversight of the agencies of the intelligence community for the bulk of the Bush presidency, the Senate and House intelligence committees managed to get their authorization bills for Fiscal Year 2010 passed by both houses and headed to conference.⁹¹

Both bills included language directed at remedying a problem identified by Congress in the statutory provisions governing notification of covert action programs to the committees.⁹² Existing law gave the President the authority to limit his notifications to only eight members of Congress⁹³—the “Gang of Eight”—about a new CA program, or modification of an ongoing program, rather than to all the members of the two committees. Whenever the President determined that, in his judgment, “extraordinary circumstances affecting vital interests of the United States” were at stake, he could choose to keep all but the Gang of Eight out of the loop.⁹⁴ The 2010 bills proposed to change that provision to require all members of the committees to receive a “general description” of the CA activities.⁹⁵ In other words, with the amendments, at least the non-gang committee

90. See *infra* Part V.

91. See S. 1494, 111th Cong. (2009); H.R. 2701, 111th Cong. (2009).

92. S. 1494, 111th Cong. §§ 331-334 (as passed by the Senate, Sept. 16, 2009); H.R. 2701, 111th Cong. § 321 (as passed by the House, Feb. 26, 2010).

93. 50 U.S.C. § 413b(c)-(d) (2006), amended by Pub. L. No. 111-259, 124 Stat. 2654 (2010).

94. These provisions are discussed in detail in *infra* Part V.

95. H.R. 2701, 111th Cong. § 331 (as amended by the Senate, Sept. 27, 2010).

members would know about the existence of a program, even if they could not know its details.⁹⁶

On March 15, 2010, President Obama's director of the Office of Management and Budget sent the chairpersons of the committees a letter suggesting that the President would veto a bill that included some of the provisions in the House or Senate bills, including the covert action notification provisions.⁹⁷ The "veto threat" letter included the following explanation:

There is a long tradition of comity between the branches regarding intelligence matters, and the Administration has emphasized the importance of providing timely and complete congressional notification, and of using "Gang of 8" limitations only to meet extraordinary circumstances affecting the vital interests of the United States. The provisions in the Intelligence Authorization Acts undermine this fundamental compact between the Congress and the President regarding the reporting of sensitive intelligence matters . . . an arrangement that for decades has balanced congressional oversight responsibilities with the President's responsibility to protect sensitive national security information.⁹⁸

Unlike President Bush's signing statements, President Obama's veto threat did not claim that there is an inherent constitutional power possessed by the executive that these amendments would undermine. Nor did the threat suggest that President Obama has the authority to sign the bill, and then not follow its provisions. Rather, President Obama relied on the "fundamental compact between the Congress and the President," and upon the "long tradition of comity between the branches," as a rationale for his disagreement with the changes in the covert action notification provisions in the bills.⁹⁹

This is certainly a kinder, gentler approach to keeping information from Congress than the dismissive attitude of President

96. David Pozen distinguishes between shallow secrets, where the existence but not content of a secret is known, and deep secrets, where the very existence of a secret is itself secret. See Pozen, *supra* note 17, at 260.

97. Marc Ambinder, *Clash with Congress: Obama Threatens Veto of Intelligence Funding Bill*, THE ATLANTIC (July 8, 2009), <http://www.theatlantic.com/politics/archive/2009/07/clash-with-congress-obama-threatens-veto-of-intelligence-funding-bill/20921/>; letter from U.S. Dep't of Justice to Sen. Feinstein (Mar. 15, 2010), <http://www.justice.gov/ola/views-letters/111-2/031510-ltr-feinstein-bond-re-hr2701-s1494-intel-auth-bills.pdf>.

98. Letter from Peter Orszag, Dir., Office of Mgmt. & Budget, to Sen. Feinstein (Mar. 15, 2010), <http://www.fas.org/irp/news/2010/03/omb031610.pdf>.

99. *Id.*

Bush. But the result is exactly the same: The President successfully bullied Congress to avoid fulfilling the constitutional mandate, long recognized by the Supreme Court, to give to Congress all nonprivileged information Congress seeks to perform its Article I responsibilities, particularly in the area of national security.

Cooperation is, of course, a good thing. It is true that the Supreme Court and lower courts are happy when the bickering branches try to work things out. There are ample references in the executive privilege cases that the courts prefer not to resolve a dispute when there is no evidence that Congress and the President have tried to reach an accommodation about the witnesses or documents sought by a committee.¹⁰⁰ And often they do reach a compromise.

But they are not obligated to agree, and sometimes they cannot. Moreover, these agreements favored by the courts were reached on a case-by-case basis, during fights over requests by a specific congressional committee for specific information from the executive. Here we have something different. Congress, having been burned badly in situations in which the Gang of Eight notification has backfired,¹⁰¹ wanted to change the rules of the game—and Congress did so in legislation. By passing the bills in the House and the Senate, no small feat, the Congress said to the President: Comity is not working for us anymore. We need to change the rules, because they favor you.

President Obama has the authority under Article I, Section 7, to use his veto pen, and Congress has the authority to override the veto with a two-thirds vote of both houses. Neither of those events occurred, as the committees rewrote and passed the bills to satisfy the President. In doing so, Congress avoided a fight but, once again, gave the President power he is not due under the Constitution, thereby ceding some of its own. Congress gave up too quickly a chance to assert its constitutional entitlement to require information from the President in the manner determined by Congress to serve its Article I responsibilities.

100. Because the courts are willing to resolve the dispute, after reasonable informal efforts to agree have been made, this duty is more in the nature of a "ripeness" requirement than a mandate to cooperate. *See, e.g.,* *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977); *see also* ROSENBERG, *supra* note 19, at 8–10.

101. *See* Massimo Calabresi, *Pelosi Faces Off with Obama on CIA Oversight*, TIME (June 25, 2010), <http://www.time.com/time/nation/article/0,8599,1999599,00.html>.

B. *Current Rules Protecting Secrecy are Adequate*

Secrecy is critical to the safety of our nation. Since the nation's inception, our national leaders have relied not only on the information acquired through diplomatic channels—what other nations want us to know—but also on knowledge gained clandestinely—what they want to keep secret. Of course, many of our adversaries overseas are not nations, but groups with whom we do not have diplomatic relations, such as arms dealers, drug traffickers, pirates, or terrorists. The significance of our ability to collect and keep secrets critical to the safety and well-being of our citizens cannot be overstated. Many of those who complain about too much secrecy¹⁰² often do not have even a basic understanding of the needs of our nation in the conduct of foreign affairs and national defense. Even the most open democracy in the world must keep secrets.

The United States spends billions of dollars annually¹⁰³ to collect intelligence around the world, both through the recruitment of human sources and the implementation of technical methods—known collectively as “sources and methods.”¹⁰⁴ If they are exposed, as a result of either espionage or authorized and unauthorized leaks, the efforts and expenditures by our intelligence agencies are rendered worthless, and our tax dollars have been wasted. First, we do not want a nation or terrorist group to learn that we know about their plans, intentions and capabilities, or we will lose the advantage of that knowledge. Second, should our adversaries realize that we have the

102. See, e.g., Julian Assange, *Conspiracy as Governance*, IQ.ORG (Dec. 3, 2006), <http://web.archive.org/web/20070829163014/iq.org/conspiracies.pdf>.

103. Historically, the annual budget of the intelligence agencies was classified. See, e.g., STEPHEN DAGGETT, CONG. RESEARCH SERV., RS 21945, THE U.S. INTELLIGENCE BUDGET: A BASIC OVERVIEW 2–3 (2004), available at <http://www.fas.org/irp/crs/RS21945.pdf>. The top line number has since been made public, although the details are still classified. See Press Release, Office of the Dir. of Nat. Intelligence, DNI Releases Budget Figure for 2010 National Intelligence Program (Oct. 28, 2010), <http://www.fas.org/irp/news/2010/10/dni102810.pdf>.

104. The National Security Act gives the Dir. of Nat. Intelligence the responsibility of protecting “sources and methods,” but does not define the term. 50 U.S.C. § 403-1(i)(1)(D) (2006). Other executive orders and statutes use the term, also without definition. See, e.g., Exec. Order No. 13,470, 3 C.F.R. 218 (2009). The term has become somewhat of a talisman in intelligence circles, and is often used in a generic manner to waive off further inquiry on a subject. For example, the notification provision requiring Congress to be kept “fully and currently informed” has a “sources and methods” exception that leaves great discretion with the executive branch. 50 U.S.C. § 413a(a)(1) (2006).

ability to acquire their secrets, they will cut off access by eliminating as many possible human sources as they determine necessary, or by taking measures to protect against a particular technical collection. Third, and perhaps most important in the overall scheme, every time a human source has been compromised, the ability of our intelligence officers to retain current agents, recruit agents in the future, and continue to work successfully with foreign liaison intelligence services is damaged significantly. Why would a person agree to put his life and his family at risk to spy for the United States if the CIA case officer cannot guarantee that his identity will be protected?¹⁰⁵ Why would a foreign intelligence service work closely with the United States on operations, risking internal political blowback or compromise of its own sources, if it sees that senior policymakers in the U.S. government leak information for political advantage?

Leaks, both authorized and unauthorized, often do not involve the actual identification of a specific source or method, but rather the exposure of an analytic product derived from them. Whenever a piece of intelligence information is revealed, for example by the publication of information contained in an analytic product, the targets overseas will try to discern how the information was acquired and then take remedial action, such as killing the likely source or suspected sources, or changing the practice that made them vulnerable to the collection platform.¹⁰⁶ Putting aside the horror of lost human life and the cost of lost technology, the damage to our national security caused by leaks of sensitive information can be, and has been, far broader than it may appear to the public eye.¹⁰⁷

105. Intelligence officers are often frustrated when journalists who have printed information that reveals our nation's human sources subsequently refuse to cooperate in a leaks investigation, in order to protect their own sources. See, e.g., Adam Liptak, *Reporter Jailed After Refusing To Name Source*, N.Y. TIMES, July 7, 2005, at A1.

106. Osama bin Laden famously ceased communicating on satellite phones in the 1990s after a report was leaked that could only have been derived from his conversations. Rowan Scarborough, *Times Faulted by 9/11 Panel: But 'Revelation' of bin Laden's Phone Was Known*, WASH. TIMES, Dec. 21, 2005, at A1.

107. Whenever there has been a breach, the intelligence agency whose sources or methods have been exposed conducts a damage assessment. The immediate goal is to determine if there is an imminent risk to human assets or to ongoing operations, and if so, to take protective action. For example, the leak of the name of a long-serving CIA clandestine service officer would require the assembling of a team of officers inside the agency to examine the details of her career: every cover she has used, every person or company related to those covers, every other officer who has used those covers, every place she has served, every CIA officer with whom she has

Critically, the executive branch has a classification system in place to enforce secrecy and to minimize the risk of exposure of sensitive intelligence information. Federal law, executive orders, and internal agency rules govern the handling of sensitive sources and methods information. Congress has defined “classified information”¹⁰⁸ and has passed criminal laws to punish those who reveal certain types of sensitive information.¹⁰⁹ Executive Order 12,958, most recently amended in 2003 by Executive Order 13,292, defines the classification structure, based on the level of danger that is anticipated by its disclosure, as follows:

(1) “Top Secret” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

(2) “Secret” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

(3) “Confidential” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.¹¹⁰

worked overseas, every foreign intelligence service with whom she has worked, every foreign asset she has recruited, handled, or contacted, every operation with which she has been involved, and so on. When the assessment is complete, actions must be taken throughout the world to seek to minimize the damage.

108. National Security Act of 1947 § 606, 50 U.S.C. § 426(1) (2006) (“The term ‘classified information’ means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.”).

109. The criminal laws reach only certain types of classified information. In 2000, concerned about leaks, the House and Senate passed a bill that would have criminalized a broader category of secrets, but President Clinton vetoed the bill. *See* Intelligence Authorization Act for Fiscal Year 2001, H.R. 4392, 106th Cong. § 303 (2000); Jack Nelson, *U.S. Government Secrecy and the Current Crackdown on Leaks* 17–18 (Joan Shorenstein Ctr. on the Press, Politics, & Pub. Policy, Working Paper Series No. 2003-1, 2002), available at http://www.hks.harvard.edu/presspol/publications/papers/working_papers/2003_01_nelson.pdf.

110. Exec. Order No. 13,292, 3 C.F.R. 196 (2004).

Issues involving classification or the fear of unauthorized disclosure have no proper place in a discussion of Congress's entitlement to information from the President, though it may often inappropriately add to executive officials' recalcitrance to provide it. In our republic, the American people give top level clearances for access to classified information to each member of the House and Senate when they vote for them to serve as their representatives in Washington. All members of Congress may, at least in theory, read any classified document and access all classified information. Sensitive intelligence information provided to Congress remains in classified channels, and is handled by members and their cleared staff only in secure facilities monitored by professional security personnel.¹¹¹

Beyond the classification system itself, there are other mechanisms that serve to limit access to sensitive intelligence information. Cleared officials in the executive branch and congressional staff do not have proper access to particular categories of classified information unless they also have a "need to know."¹¹² This means, for example, that a person who works on counter-proliferation matters may not have a "need to know" about sensitive programs involving other subjects, such as counter-narcotics.

Limiting access on a need to know basis occurs through both formal and informal means. The formal mechanism is the designation of compartments. A special compartment will be created to protect a program, and an executive branch official or congressional staff member will be "read into" a compartment if, and only if, his duties require him to have access to that program. The intelligence agencies keep careful record of those persons with access to a particular "sensitive compartmented information"¹¹³ (SCI) program so that, if a breach occurs, investigators will know where to begin.¹¹⁴ Informal need to know is practiced every day, in a common sense manner, by government officials who do not communicate about their work with colleagues who work on other matters.

111. Congressional staff members who handle classified information in the performance of their duties receive the same background investigation and are subjected to the same clearance process as officials of the executive branch.

112. Exec. Order No. 12,968, 3 C.F.R. 391 (1995).

113. 32 C.F.R. § 159.12(y) (1980).

114. *See, e.g.*, 32 C.F.R. § 154.77 (2010).

The members of the House and Senate intelligence committees, by virtue of their mission to conduct oversight of our intelligence agencies,¹¹⁵ have a need to know the details of all intelligence programs conducted by the U.S. government. Some staff may work on certain issues and not others, and access is limited accordingly. But the need to know concept has no place in the overall scheme of intelligence oversight by Congress, except to the extent that it has been incorporated into the statutes governing notification, as discussed below.

The classification and need to know rules rarely provide a legitimate basis upon which to deny intelligence information to Congress. Nevertheless, the White House has been bullying Congress on this point for decades, claiming that information should be limited to prevent its disclosure.¹¹⁶ It is time for members of Congress to fight back against the notion that they are somehow less trustworthy than executive branch officials. Congress could perhaps conduct an investigation into programs about which information has been withheld, and could certainly change the statutes governing the flow of information.

It is, of course, safer for fewer persons to know a secret than more. But a congressional investigation likely would reveal that even the most tightly held programs have quite a large number of executive branch officials in the compartment. Rarely, if ever, is there a program that does not have at least a hundred officials involved, and the total is usually many more. Even so, whenever the intelligence committees are notified of these programs, the White House, at its discretion, has at times chosen to limit access to just four or eight members of Congress.¹¹⁷ A highly compartmented program such as that which authorized waterboarding¹¹⁸ of suspected terrorists, for exam-

115. H. Res. 658, 95th Cong. (1977) (enacted) (resolution creating House Intelligence Committee); S. Res. 400, 94th Cong. (1976) (enacted) (resolution creating Senate Intelligence Committee).

116. Senator Birch Bayh, Chairman of the Senate Intelligence Committee in 1980, was upset when he learned that President Carter had not informed him about U.S. plans to rescue the hostages from Iran. Senator Bayh stated, "It would have been so easy to tell us" but "[a]ny leaker of that information would be hung up by his thumbs. I expressed my anger to [President] Carter about not informing us. Carter had a thing about not being able to trust the committee." CUMMING, *supra* note 49, at 4–5.

117. Existing law and practices are discussed in more detail *infra* Part V.

118. The Office of Legal Counsel of the Department of Justice explained that when an individual undergoes waterboarding, he is "bound securely to an inclined bench . . . [and a] cloth is placed over the forehead and eyes. Water is then applied

ple, was briefed to just four members of Congress and a couple of staff members.¹¹⁹ And with respect to the need for legal advice, it is common for the most controversial and risky programs to have ten or more executive branch lawyers reviewing them, while the intelligence committees are often allowed none.¹²⁰

Finally, there is another reason, far more nefarious, motivating the White House to deny or limit congressional access to information: a desire to limit political pushback. This motive is unacceptable, and accordingly is never acknowledged. The constitutional theory supporting Congress's entitlement to full access to the activities of the executive is that Congress may not like what is going on and will take measures to stop it. The laws and rules currently in place enable the executive to keep Congress in the dark with respect to our nation's most risky and controversial intelligence programs. Accordingly, the activities that need the most oversight by the legislature in fact get the least.¹²¹

V. THE WEAKNESS OF EXISTING STATUTES GOVERNING CONGRESSIONAL ACCESS TO INTELLIGENCE

The history of congressional oversight of the intelligence policies and activities of the U.S. government is recent and short. It began in the mid-1970s with the investigations of the

to the cloth in a controlled manner. As this is done, the cloth is lowered until it covers both the nose and mouth. Once the cloth is saturated and completely covers the mouth and nose, air flow is slightly restricted . . . due to the presence of the cloth. This causes an increase in carbon dioxide level in the individual's blood. This increase in the carbon dioxide level stimulates increased effort to breathe. This effort plus the cloth produces the perception of 'suffocation and incipient panic,' i.e. the perception of drowning. The individual does not breathe any water into his lungs." Memorandum from Jay S. Bybee, Asst. Att'y Gen., U.S. Dep't. of Justice, to John Rizzo, Acting Gen. Counsel of the Cent. Intelligence Agency 3-4 (Aug. 1, 2002), available at <http://www.fas.org/irp/agency/doj/olc/zubaydah.pdf>.

119. See Scott Shane & Mark Mazzetti, *In Adopting Harsh Tactics, No Inquiry into Past Use*, N.Y. TIMES, Apr. 22, 2009, at A1.

120. For example, the NSA's electronic communications surveillance program (Terrorist Surveillance Program, or TSP) was briefed to the Gang of Eight, which includes leadership of the intelligence committees, the Speaker and minority leader of the House, and the Senate majority and minority leaders. These members of Congress were not allowed to seek advice from counsel, even though the program was contrary to statutes governing electronic surveillance inside the United States. See CUMMING, *supra* note 49, at 5, 8.

121. See Shane & Mazzetti, *supra* note 119.

Church and Pike committees of the Senate and House.¹²² These investigations revealed a variety of covert government activities, including the wiretapping of Americans for political purposes and the attempted assassination of foreign leaders.¹²³ During that period, the SSCI and the HPSCI were created, and they remain today as the committees of jurisdiction on all matters related to intelligence.¹²⁴

In response to the Church and Pike committee revelations, Congress and the President acted to implement new and rigorous controls over the conduct of our intelligence agencies. President Ford issued Executive Order 11,905,¹²⁵ superseded by Executive Order 12,333,¹²⁶ and Congress passed the Foreign Intelligence Surveillance Act of 1978 (FISA),¹²⁷ as well as amendments to the National Security Act of 1947.¹²⁸ Congress also began the process of enacting provisions to ensure that it would never again be uninformed about the government's clandestine activities. The new intelligence committees were put in charge of receiving and storing sensitive intelligence information and for using it to conduct appropriate oversight, lawmaking, and budget authorizing.¹²⁹ In this critical area of executive branch conduct, Congress was in a position for the first time to be an effective check on the executive, as envisioned by the Framers.¹³⁰

122. In a recent series of reports, the Congressional Research Service traced in detail the history of the statutes and practices governing the executive branch's provision of intelligence information to Congress. See ALFRED CUMMING, CONG. RESEARCH SERV., R 40691, SENSITIVE COVERT ACTION NOTIFICATIONS: OVERSIGHT OPTIONS FOR CONGRESS (2010), available at <http://www.fas.org/sgp/crs/intel/R40691.pdf>; ALFRED CUMMING, CONG. RESEARCH SERV., RL 33715, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS (2009), available at <http://www.fas.org/sgp/crs/intel/RL33715.pdf>; CUMMING, *supra* note 49.

123. L. BRITT SNIDER, THE AGENCY AND THE HILL: CIA'S RELATIONSHIP WITH CONGRESS, 1946–2004, at 34–38 (2008).

124. *Id.* at 51–54.

125. Exec. Order No. 11,905, 3 C.F.R. 90 (1976).

126. Exec. Order No. 12,333, 3 C.F.R. 200 (1982).

127. Pub. L. No. 95-511, 92 Stat. 1783.

128. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, 94 Stat. 1975 (1980). See RICHARD A. BEST, JR., CONG. RESEARCH SERV., RL 32500, PROPOSALS FOR INTELLIGENCE REORGANIZATION, 1949–2004, at 21, 26–27 (2004), available at <http://www.fas.org/irp/crs/RL32500.pdf>. Both the executive order and FISA remain in place, with amendments.

129. SNIDER, *supra* note 123, at 51, 54.

130. Before these changes, notifications to Congress regarding intelligence matters, if they occurred at all, were “oral and often cursory . . . limited to committee

On several occasions since the 1970s, Congress has amended the statutes governing its access to intelligence information.¹³¹ These changes have always been motivated by: (1) Congress's frustration with the failure of the White House and the intelligence agencies to keep it properly informed; or (2) Congress's embarrassment over the latest public scandal caused by the weakness of its oversight.¹³² But these piecemeal changes have not worked. As discussed in Part II above, the flow of information from the executive branch to the intelligence committees can be divided into three types: analytic products, foreign intelligence collection (FI) activities, and covert action (CA) operations. The laws and practices in all of these areas are seriously deficient, and the intelligence committees have been lax and careless in enforcing those rules that are in place.

A. *Full Access Critical for the Exercise
of Constitutional Duties*

Congress is entitled to any information it needs from the executive, including the fruits of its intelligence collection and expert analysis of that information.¹³³ Both the collection and analysis are performed at taxpayer expense, with funds appropriated and authorized by Congress. The legislative and executive branches both have the constitutional responsibility to govern. Articles I and II of the Constitution give considerable power over our national security policies to Congress and the President; keeping our nation safe is a shared responsibility. Accordingly, the information at the disposal of the President and senior executive branch officials must also be provided readily and routinely to the intelligence committees, and available to all members of Congress in secure facilities, as necessary. Effective fulfillment of Congress's express powers, such as the ratification of treaties, the appropriation of funds for for-

chairmen and ranking members and one or two staff members." CUMMING, *supra* note 49, at 1.

131. See, e.g., CUMMING, *supra* note 39, at 2-4; CUMMING, *supra* note 49, at 1-5; ROSENBERG, *supra* note 19.

132. See generally CUMMING, *supra* note 49.

133. See *supra* Part I. Analytic products produced on the initiative of the executive branch are usually available to the intelligence committees, and to other members who request access. The focus here is on statutory requirements, or congressional requests, for analysts to prepare and submit reports to the committees, in order for them to conduct effective oversight.

eign policy and intelligence programs, and war authorizations, depends upon its members having access to the best information available.

Nevertheless, under current law and practices, Congress does not have full and ready access to analytic products. The National Security Act requires intelligence agencies to “furnish the congressional intelligence committees any information or material concerning intelligence activities, other than covert actions, which is within their custody or control, and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.”¹³⁴ In practice, however, this does not happen in a reliable manner.

In 2002, the SSCI conducted a survey described in the report accompanying the Intelligence Authorization Bill for Fiscal Year 2003, and observed:

One important mechanism for oversight by the Committee is to require annual and one-time reports by the Director of Central Intelligence to the intelligence committees of the Congress. As the Committee conducts its oversight responsibilities each year, it identifies problems, issues and subject areas about which it needs additional information from the Community. In most cases, the Committee needs the information sought in the reports in order to inform the drafting of legislation or the budget authorization decisions for the following year. Accordingly, it is important that such reports be accurate and thorough. It is equally important that they be submitted on or before their due dates.

The Committee has taken a close look at the performance of the Director of Central Intelligence in providing these important reports in a timely manner. The results of this review are dismal. Between December 1, 2001, and May 1, 2002, the Intelligence Community was required to submit a total of 84 annual and one-time reports to the congressional intelligence committees. Of this number, 18 were submitted after their due date; eight were incomplete, interim reports; and 51 were not submitted at all. Perhaps most disturbing, 10 of the reporting requirements not met were contained in statute [as opposed to report language]. In sum, of the 84 re-

134. 50 U.S.C. § 413a(a)(2) (2006).

ports required, seven were submitted by the deadline, for an overall record of eight percent compliance.¹³⁵

Based on this study, Congress amended existing law to eliminate some outdated reporting requirements and to simplify the due dates in the Intelligence Authorization Act for Fiscal Year 2003.¹³⁶ In addition, the statute gave an automatic thirty-day extension on all reports,¹³⁷ and a further extension if the "preparation and submittal of such report at such time . . . will be detrimental to the national security of the United States."¹³⁸ Accordingly, Congress made reasonable efforts to streamline the reporting requirements and to recognize that, in some instances, the immediate needs of our national security might necessitate patience in the receipt of the information it has specified by law that it needs.

The statutory requirements enacted in the FY 2003 law remain in place,¹³⁹ though there is no public record of whether they have made any difference to the eight-percent compliance rate revealed by the committee study. The intelligence committees need to conduct a new review on the status of compliance with congressional requests for reports from the intelligence agencies. The American people deserve to know whether the Director of National Intelligence¹⁴⁰ is providing Congress with the reports required by law, and the committees need to determine whether they should tighten the enforcement and perhaps pass new, tougher legislation.

The record does show, however, that President George W. Bush suggested dozens of times in signing statements that his interpretation of the unitary executive theory gave him the constitutional authority to decline to provide reports required

135. S. REP. No. 107-149, at 6-7 (2002).

136. Pub. L. No. 107-306, § 811, 116 Stat. 2383, 2418 (2002).

137. *Id.*

138. 50 U.S.C. § 415b(d) (2006).

139. Intelligence Authorization Act for Fiscal Year 2004, Pub. L. No. 108-177, 117 Stat. 2599 (2003), and Intelligence Authorization Act for Fiscal Year 2005, Pub. L. No. 108-487, 118 Stat. 3939 (2004), made no changes to the law on reports. There has been no Intelligence Authorization Act from then until Fiscal Year 2010.

140. In 2004, the position of Director of National Intelligence was created. The holder of that position is responsible for all community-wide matters, including the provision of information to Congress. *See* Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified at 50 U.S.C. §§ 403, 403-1 (2006)).

by law, as discussed in Part III, above. One must divine his rationale, as he gave none.

Such a notion flies in the face of black letter law on congressional access to information.¹⁴¹ For example, in the run-up to the Iraq War, the SSCI asked the intelligence community to prepare a “National Intelligence Estimate” (NIE)—a consensus report by the analysts of all the intelligence agencies—on the justification for invading a sovereign nation.¹⁴² Quickly, in the space of a month, the report was provided. The consensus of the intelligence experts was that Iraq was developing a program of weapons of mass destruction—biological, chemical, and nuclear. Based in part on that report, Congress passed an authorization for the President to attack Iraq,¹⁴³ which he did in early 2003.

Setting aside the fact that the President had not ordered an NIE on this subject to inform his own decision to go to war, could President Bush have told his intelligence officials to decline to compile the NIE and provide it to Congress? Such a reaction would have been politically disastrous, but it would also have been constitutionally impermissible. Congress may have whatever it decides it needs from the executive to perform its constitutional responsibilities, and the President has neither the power nor the discretion to refuse. To the extent the current statutory structure confuses the executive branch into believing that providing reports to the intelligence committees is optional, the laws need to be clarified and strengthened to reflect the constitutional principles of full access.

*B. Greater Access for the Intelligence Committees
and Less Discretion for the President*

Section 413a(a)(1) of Title 50 requires the intelligence agencies to “keep the congressional intelligence committees fully and currently informed of all intelligence activities . . . carried out for or on behalf of, any department, agency, or entity of the

141. *See supra* Part III.

142. 1 LOCH K. JOHNSON, STRATEGIC INTELLIGENCE 320–21 (2007); DIR. OF NAT’L INTELLIGENCE, NATIONAL INTELLIGENCE ESTIMATE: IRAQ’S CONTINUING PROGRAMS FOR WEAPONS OF MASS DESTRUCTION (2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB129/nie.pdf>.

143. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (codified at 50 U.S.C. § 1541 (2006)).

United States Government, including any significant anticipated intelligence activity and any significant intelligence failure."¹⁴⁴ Despite the breadth of this language, the practices of notification developed over the past few decades have resulted in so much executive discretion that the statutory standard no longer serves the needs of the Congress, if it ever did.

The activities covered by this reporting requirement are all non-covert-action foreign intelligence activities—primarily foreign intelligence collection operations (FI). The preamble to Section 413a(a) implicitly gives the executive branch agencies the power to withhold reports otherwise required by that section "[to] the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters."¹⁴⁵

This caveat is so lacking in any objective standard that it gives virtually unfettered power to the executive to withhold anything it wants, for any reason. All of the FI activities are important and cannot be disclosed without harm to our nation, and have therefore been classified according to the level of harm that would result. But Congress and its staff have all the necessary clearances and need to know as any officials of the executive branch with access to any particular FI program. Moreover, with only very narrow exceptions,¹⁴⁶ it is the most significant, risky, and controversial activities that are likely to be—and have been— withheld under this caveat, and those are the very activities in need of congressional scrutiny. If interpreted broadly, the caveat swallows up the very information that is most necessary for Congress to perform its constitutional responsibilities.

The situation is even more unworkable in practice. The statutory language provides for notification of FI programs to the intelligence committees. There is no legal basis for allowing fewer than all members of the two committees to receive every notification required by the statute. Nevertheless, the caveat quoted above allowing the agencies to use "due regard" for the protection against unauthorized disclosures provided a hook

144. 50 U.S.C. § 413a(a)(1) (2006).

145. *Id.* § 413a(a).

146. See the discussion, *supra* Part II.

that led to the creation of the infamous Gang of Four.¹⁴⁷ Under longstanding informal practices still in use today, intelligence agencies sometimes notify—usually in an informal oral briefing—just the chairmen and ranking members of the two intelligence committees of FI matters the executive branch determines are particularly sensitive. There is no written standard as to how the agencies make the determination that something is “extra secret,” and the discretion lies with the President.¹⁴⁸ Thus, Congress has: (1) delegated to the full committees the mission of conducting oversight of the activities of the intelligence agencies; (2) enacted statutes that require all members of the committees to be kept “fully and currently informed” of the government’s activities; but (3) with no statutory basis, tolerated an informal practice for decades that FI programs, determined by the executive to be extra sensitive, may be briefed to only four members.

There is no public disclosure mechanism for this loophole’s use, and its documentation is sketchy, at best.¹⁴⁹ This kind of comity between the branches, endorsed by President Obama in 2010,¹⁵⁰ is unhealthy in our democracy. It was brokered originally by members no longer in Congress,¹⁵¹ and it is hidden from the American people, the full membership of Congress, and even the rest of the members of the intelligence committees.¹⁵² Congress’s full access to information envisioned in the Supreme Court cases—total access unless the information falls within the limited doctrine of executive privilege—requires the access to be meaningful. An informal, oral briefing, contrary to

147. See CUMMING, *supra* note 49, at 9–10.

148. The statute provides that the “President and the congressional intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of this subchapter.” 50 U.S.C. § 413(c) (2006). There is no public record that any such written procedures have been put in place.

149. Agency briefers tell the four members not to take notes and not to share the information with other members of the committees or staff. Any classified records that may exist about these briefings over the years are the notes or memoranda of the intelligence officials.

150. See *supra* Part IV.

151. CUMMING, *supra* note 49, at 4–5 (discussing the Senator Bayh deal).

152. The Fiscal Year 2010 amendments to these provisions provide for the rest of the committee to be told that there has been a notification about which they cannot know, the general description of the notification, and the reason they cannot know it. Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, § 331(c)(4), 124 Stat. 2654, 2686 (2010).

the express provisions of law, to just four members of Congress—the fact of which is known only to those four—does not put the legislative branch in a position to exercise any of its Article I responsibilities to legislate, appropriate, or investigate.¹⁵³ Meaningless access is no access at all.

This problem played out in the spring of 2009, when it became known that Speaker Nancy Pelosi, while ranking member of the House intelligence committee, and thus a member of the Gang of Four, had received briefings on enhanced interrogation techniques of terrorism suspects used by the Bush Administration, including waterboarding.¹⁵⁴ The Speaker was embarrassed by reports that she had implicitly sanctioned the practice when she was first informed of it in 2002. There may have been steps she could have taken, but as a practical matter, Gang of Four members are asked under this practice to receive information about critical national security matters without any formal ability to do anything about it, except complain privately to the President.¹⁵⁵ Reports indicate that they receive nothing in writing, are told not to take notes, often have no staff assistance, and cannot discuss the material with anyone but the other three Gang of Four members.¹⁵⁶ The practice serves to give the executive branch a scapegoat if a controversial program becomes public, but it provides absolutely nothing to assist Congress in the performance of its lawmaking, appropriations, and oversight duties. It therefore fails the constitutional standard for congressional full access.

Finally, there is also new evidence that past and present presidents have kept FI intelligence activities from the committees, including the chairmen and ranking members. On No-

153. Cf. Scott Shane, *Intelligence Bodies Faulted on Disclosure*, N.Y. TIMES, Nov. 19, 2010, at A19 (reporting that the House Intelligence Committee found sixteen cases of intelligence agency failure to inform Congress of activities as required by law).

154. Vicki Divoll, Op-Ed., *Congress's Torture Bubble*, N.Y. TIMES, May 13, 2009, at A31.

155. See Paul Kane, *Top Pelosi Aide Learned of Waterboarding in 2003*, WASH. POST, May 9, 2009, at A1 (discussing Rep. Jane Harman's letter to the Bush-era CIA expressing concern about waterboarding); Letter from Sen. John D. Rockefeller, Vice-Chairman, U.S. Sen. Select Comm. on Intelligence, to V.P. Richard Cheney (July 17, 2003), <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/surv27.pdf> (expressing, in a handwritten letter, which no staff could type without breaking confidentiality, his concerns about the warrantless wiretapping program).

156. CUMMING, *supra* note 39, at 1–2; CUMMING, *supra* note 49, at 1; Divoll, *supra* note 154.

vember 18, 2010, Chairman Reyes of the House Permanent Select Committee on Intelligence issued a press release describing an investigation that the committee had concluded on the notification practices of the last three presidents, including President Obama.¹⁵⁷ Although the report itself is classified, Chairman Reyes described the investigation and its conclusions: “In its investigation, the Committee examined sixteen specific instances, spanning three Administrations, in which the Community did not provide Congress with complete, timely, and accurate information about intelligence activities. . . . The [classified] findings . . . are impressive and eye-opening.”¹⁵⁸

C. *The Weakness of the Current Regime Governing Notification of Covert Action Programs*

As discussed in Part II above, Section 413b of Title 50 defines CA programs as those “activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”¹⁵⁹ Current law requires that the President approve such an activity in a written “finding” and that the congressional intelligence committees receive notification of the program.¹⁶⁰ As with FI programs, however, CA notifications are sometimes provided to fewer than all members of the committees, in this case, the Gang of Eight, which consists of the chairmen and ranking members of the committees, and the majority and minority leaders of the House and Senate. But with CA notifications, the statute actually provides for this limited briefing, as opposed to the private agreement among a few members and White House officials concerning FI programs, discussed above.¹⁶¹ The statutory standard permitting limitation of the

157. Press Release, House Permanent Select Comm. on Intelligence, Chairman Reyes Statement on Completion of Committee Investigation (Nov. 18, 2010), <http://intelligence.house.gov/Media/PDFS/ReyesRelease11182010.pdf>.

158. *Id.*

159. 50 U.S.C. § 413b(e) (2006).

160. 50 U.S.C. § 413b(a)–(b) (2006).

161. 50 U.S.C. § 413b (2006) (as amended by Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, §§ 331(c)(2)(C)(ii), (c)(4), 124 Stat. 2654, 2685–86, (2010)) (establishing that the intelligence committees must be notified that a “Gang of Eight” briefing has occurred and the “general description” of the notification, and providing that after 180 days all members are to receive the full notification, except

notification to the Gang of Eight is that the President has determined that it is "essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States."¹⁶² Again, Congress has unwisely limited its own access to information to which it is constitutionally entitled by enacting a statute with a vague, undefined standard, within the sole discretion of the President to interpret and apply.

In 2010, Congress showed its unhappiness with this notification standard. Perhaps aware that the statute and practices fall short of the constitutional allowance for access to information, the House and Senate passed amendments to the covert action notification provisions.¹⁶³ But as discussed above, President Obama was displeased with the new notification procedures in the bills and indicated his plans to veto a final version if it contained them.¹⁶⁴

The committees rushed to water down the changes, perhaps understandably as they were on the cusp of getting an authorization bill passed and signed for the first time in six years. But the bill the President signed does very little to improve the notification to the full committees of CA findings. First, the standard for limiting the notifications to just eight members is the same as it has been and is still within the discretion of the President. Second, although the rest of the members of the committees will now receive a "general description" of the notification at the time it is given, that term is undefined and within the discretion of the President to apply.¹⁶⁵ Third, after 180 days all members will receive the full notification unless the President determines that it is still "essential to continue to limit access . . . to meet extraordinary circumstances affecting

that when there are "extraordinary circumstances affecting vital interests of the United States" that would be at risk if the intelligence committees are told, in which case the intelligence committee must be given the reasons why they still cannot have access).

162. 50 U.S.C. § 413b(c)(2) (2006).

163. H.R. 2701, 111th Cong. (2010); S. 1494, 111th Cong. (2010).

164. See Letter from Peter R. Orszag, Dir., Exec. Office of the President, Office of Mgmt. & Budget, to Sen. Dianne Feinstein, Chairwoman, U.S. Sen. Select Comm. on Intelligence (Mar. 15, 2010), <http://www.fas.org/irp/news/2010/03/omb031610.pdf>.

165. As compared to previous law, it is progress that the full committee will at least know that there is a secret program about which they cannot know. See Pozen, *supra* note 17, at 330–31.

the vital interests of the United States.”¹⁶⁶ That is exactly the same standard that is used to justify a Gang of Eight limited notification in the first place. Thus, in effect, the new CA laws merely require a renewal of the “vital interests” justification every six months.

It is unlikely that the 2010 amendments will do much, if anything, to increase meaningful access by Congress to these important CA programs. And the laws, rules, and informal practices governing notification of all other types of intelligence information—analytic products and foreign intelligence collection programs—have not been changed by the amendments. We do not know whether there have been secret changes, under principles of comity, that are unavailable to the rest of Congress, and the American people.

VI. GUIDING PRINCIPLES FOR REFORM: THE CONSTITUTIONAL PRINCIPLE OF “FULL ACCESS”

The past several years have been a trying time for Congress in its quest to learn what it needs to know about the intelligence activities of the U.S. government. The extreme secrecy of the George W. Bush Administration, and the aggressive nature of his and President Obama’s intelligence programs in the post-9/11 era, combined to give Congress a long overdue and painful wake-up call. After a number of these programs were leaked to the public—warrantless electronic surveillance inside the United States,¹⁶⁷ CIA “black site” detention centers,¹⁶⁸ and “enhanced interrogation” of suspected terrorists¹⁶⁹—Congress struggled to react, realizing that the weaknesses in its oversight of the President’s excesses had been revealed to the American people on the front pages of every newspaper in the country. Pleading ignorance was not a politically viable approach, because a handful of members had, in fact, received briefings on some aspects of these programs.

166. Pub. L. No. 111-259, § 331(c)(2)(C)(ii), 124 Stat. 2654, 2685 (2010) (to be codified at 50 U.S.C. § 413b).

167. James Risen & Eric Lichtblau, *Spying Program Snared U.S. Calls*, N.Y. TIMES, Dec. 21, 2005, at A1.

168. See Priest, *supra* note 52.

169. See Shane & Mazzetti, *supra* note 119.

The problem was two-fold. First, the executive had interpreted the notification statutes, adding its view of the comity between the branches, to permit it to provide the basic parameters of the programs to gangs of four or eight members. Second, because neither the intelligence committees, nor Congress as a whole, knew about the programs, Congress was unable to react by exercising its powers to make laws, appropriate funds, or conduct investigations. Congress, in effect, knew about the programs, but not in a way in which it could do anything about them.

The intelligence committees were thus motivated to try to fix some of the most glaring deficiencies in the statutes and informal practices that had governed their access to the intelligence activities of the executive branch for decades. Congress should be commended for enacting an intelligence authorization bill for the first time in six years,¹⁷⁰ though the new law does nothing to improve FI notifications. It does, however, make some changes in the CA notification requirements that may occasionally prove to be useful, if, of course, the executive branch follows them.¹⁷¹ But the laws still favor the President by giving him broad discretion to withhold information if he believes that the vital interests of the United States are somehow affected. These standards have no concrete meaning, and the wrong branch has the power to apply them. This approach has not worked in the past, is not likely to work in the future, and undermines the constitutional principles embodied in the Full Access Doctrine.

It would be wise for Congress to start over. Forty years of tweaking the statutes has not worked. Congress should start with a blank page, and follow several basic principles to guide its drafting of the "Full Access to Intelligence Act of 2011."

PRINCIPLE ONE: Congress is constitutionally entitled to all information in the possession of the executive that it needs to perform its Article I duties to legislate, appropriate, and conduct oversight.

PRINCIPLE TWO: It is neither necessary, practical, nor in the interests of national security for Congress to receive all

170. See Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, 124 Stat. 2654 (2010).

171. See House Permanent Select Comm. on Intelligence, *supra* note 157 (reporting three presidents' failure to comply with notification laws).

intelligence information. The drafting challenge is to articulate laws that give the access necessary for Congress to fulfill its constitutional role, without creating an unwieldy, redundant, or inappropriate structure.

PRINCIPLE THREE: To the fullest extent practicable, the new laws, rules, and practices governing access should be written and available to the American people so that they can have confidence that their representatives are keeping close tabs on the intelligence activities of the United States government. Because these activities are secret, it is particularly important that the rules of congressional access are open and that comity between the branches does not govern any important aspect of the process.

PRINCIPLE FOUR: The content and implementation of the laws, rules, and practices governing access should be based on the following goals:

A. Avoid broad and vague discretion afforded to the President and executive branch officials to determine that information otherwise covered by the reporting and notification statutes may nevertheless be withheld, or limited, if the information is deemed by them to be particularly “sensitive” or “vital” to national security. It is these very programs that often need the most effective congressional oversight, not the least.

B. Abandon the notion that the President may cull small numbers of legislators from the herd and satisfy his reporting and notification obligations by telling only them about an intelligence policy or activity. Under Article I, Congress is a branch that is vested with the legislative power to act in the aggregate. New access rules should never give the President the ability to provide notification in a manner that essentially precludes legislative action.

C. Ensure that the rules of the House of Representatives and the Senate are adequate and appropriate to govern the access and handling of sensitive national security information in a manner that serves properly the legislative responsibilities of Congress. Under Article I, Section 5, Clause 2, each house of Congress sets its own rules of procedure, and each house, not the President, should fashion those rules to balance properly their legislative needs against the demands of the national security of the United States. There is no basis to fear that

Congress, a full partner with the President in the protection of our nation's secrets, will establish procedures that put those secrets at risk.

D. Eliminate the notion reflected in the current laws, rules and practices of access that members of Congress and their staff are less trustworthy than executive branch officials. Although it is a counterintelligence truism that fewer people knowing a secret is safer than more people knowing it, the current balance is skewed dramatically in favor of the executive. Hundreds of executive officials have access to programs that only a handful of members of Congress are told about. Further, there is absolutely no empirical evidence that leaks of classified information are more likely to come from Congress than from the White House, or agencies of the executive branch.

E. Pierce the facade perpetrated by executive branch officials that concerns about unauthorized disclosure are motivating their notification decisions. The limited notifications of controversial and risky programs, or past intelligence fiascos, are often driven by the desire to avoid pushback by Congress—lawmaking or funding actions that will change or stop the programs, or investigations that will hold intelligence officers accountable. It is precisely this pushback that the Framers wanted when they established our system of checks and balances. The constitutional entitlement to full access makes these checks possible.

CONCLUSION

The Full Access Doctrine provides that Congress is entitled to any and all nonprivileged information from the executive—and Congress sets the rules of access, not the President. But in the area of national security, Congress has tied its own hands by enacting laws that give the President too much control. And worse, outside the bounds of these laws, backroom deals between the President and a handful of legislators, many of them long since gone from Congress, live on as comity between the branches. Because such agreements are off the books, the rest of the members of Congress have no say in arrangements that operate to keep them in the dark about what our intelligence agencies are doing. And, of course, the terms of these deals are

kept from the American people. In the existing framework, Congress is not fulfilling its constitutional responsibilities to make laws, appropriate funds, and oversee the conduct of the executive branch.

New legislation should be enacted based on the constitutional principles that Congress is entitled to demand anything it wants to serve its proper duties, and the President is required to provide it. All the new rules must be publicly available, and secret arrangements must not creep back into the process. Any limitations on access will be of Congress's choosing, reflecting both the needs of our national security and the practical considerations of Congress's own institutional structures. For this, we do not need lawyers, because the legal solution is simple: Except for the President's private deliberations, Congress can have it all. Instead, we need experienced policy advisors and seasoned intelligence officers who have a deep understanding of the realities of intelligence operations around the world. With their help, legislators can draft new laws of access based on valid counterintelligence considerations, and on informed assessments of what they need to know to do a good job of oversight, as the Framers expected.