

# Congressional Access to Classified Information

By  
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## I. INTRODUCTION

In September 1996, Director of Central Intelligence John M. Deutch revoked the security clearance of an executive branch employee for revealing classified information to a member of Congress. This action sparked the first national security dispute between President Clinton and Congress to generate the threat of a presidential veto, and helped demonstrate the ability of the executive and legislative branches to deadlock over institutional prerogative when a workable, practical solution is plainly available.

The controversy began when State Department official Richard Nuccio revealed to then-Congressman Robert Torricelli that the Central Intelligence Agency may have known about, or even been involved in, the death of a Guatemalan guerrilla commander who was the husband of American lawyer Jennifer Harbury.<sup>1</sup> When Torricelli publicly revealed the information, the CIA and members of the intelligence community branded Nuccio a renegade. In a letter to Nuccio in December 1996, Deutch wrote that his actions "jeopardized . . . the security and integrity of US intelligence sources, methods and activities."<sup>2</sup> CIA officials were angered that Nuccio violated a cardinal rule, revealing the name of a CIA asset.<sup>3</sup>

Nuccio counterattacked.<sup>4</sup> He defended his actions during an appearance on CBS's *60 Minutes*, claiming that he contacted Torricelli only after colleagues at the State Department and the National Security Council had rejected his entreaties to act on the information.<sup>5</sup> He added that without his security clearance, he

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1. Thomas W. Lippman, *Under Fire by CIA, State Department Official Takes Case to Public; Nuccio Dispute Follows Guatemala Controversy*, WASH. POST, Nov. 25, 1996, at A4.

2. Peter Kornbluh, *The CIA's Whipping Boy; How a Whistleblower Got What He Didn't Deserve*, WASH. POST, Dec. 22, 1996, at C1.

3. See *id.*

4. *Whistle-Blowing State Department Official Says CIA Is After his Job*, CHICAGO TRIB., Nov. 17, 1996, at 23 [hereinafter *Whistle-Blowing State Department Official*].

5. See *id.* See also Lippman, *supra* note 1, at A4.

could not do his job. "I will never work in the executive branch or in Congress again," said Nuccio.<sup>6</sup>

Members of Congress came to Nuccio's side with two initiatives. First, sixteen members of the House of Representatives asked President Clinton to reverse Deutch's decision and reinstate Nuccio's security clearance.<sup>7</sup> Second, in a move that sparked the confrontation with President Clinton, the Senate Intelligence Committee proposed an amendment to the Senate version of the Intelligence Authorization Act for Fiscal Year 1998 directing President Clinton to inform executive branch employees that existing law does not prohibit them from disclosing classified evidence of law violations to appropriate members of Congress.<sup>8</sup>

The President threatened to veto the provision, claiming that it would encroach on the executive branch's constitutional responsibility for national security.<sup>9</sup> Ultimately, Congress did not include the proposal in the final Intelligence Authorization Act,<sup>10</sup> concluding that the matter needed further study in the face of the threatened veto.<sup>11</sup> This article explores the constitutionality of the provision and suggests modifications that should represent a compromise acceptable to Congress and the President. First it reviews the facts that led up to the dispute.

## II.

### BACKGROUND TO THE DISPUTE

Jennifer Harbury, a Harvard-educated American lawyer, began representing Guatemalan refugees seeking political asylum in the United States in the late 1980s, and eventually traveled to Guatemala to write a book about the Guatemalan revolutionary movement.<sup>12</sup> During her stay, she met and fell in love with Efrain Bamaca, a leader of the Guatemalan rebel movement.<sup>13</sup> The two married in 1991 in a common law ceremony in Texas.<sup>14</sup> Bamaca returned to Guatemala

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6. See *Whistle-Blowing State Department Official*, *supra* note 4, at 23. Nuccio later went to work for Torricelli after Torricelli became a senator. See Alexander Marks, *Do Whistleblowers Threaten Security When Telling Congress of Spies' Lies? Showdown Comes This Week on a Senate Proposal to Shield Whistleblowers*, CHRISTIAN SCIENCE MONITOR, July 15, 1997, at 1.

7. See *Lawmakers: Restore Clearance for Aide who Informed on CIA*, CHICAGO TRIB., Nov. 30, 1996, at 3.

8. See S. REP. NO. 105-24, at 27 (1997).

9. Marks, *supra* note 6, at 1.

10. See 142 Cong. Rec. S11,321-02, S11,324 (statement of Sen. Specter).

11. Marks, *supra* note 6, at 1.

12. James Risen, *Mission Impossible? Jennifer Harbury Had Hoped Media and Congressional Attention Would Persuade Guatemala to Release Her Husband's Body. But Her Wait Continues*. L.A. TIMES, June 7, 1995, at E1.

13. *Id.*

14. *Id.*

and disappeared in March 1992 after a firefight with the Guatemalan military.<sup>15</sup> The military claimed Bamaca had been killed and buried.<sup>16</sup>

In January 1993, another Guatemalan guerrilla who had been captured by the Guatemalan army informed Harbury that he had seen her husband alive in captivity.<sup>17</sup> Harbury staged a hunger strike in Guatemala City in an attempt to press the Guatemalan government for information about her husband.<sup>18</sup> Although this fast only lasted six days, she staged two more, a lengthier one in front of the National Palace in Guatemala and the last in Washington, D.C., a block from the White House.<sup>19</sup>

She persistently asked State Department and national security officials for information to support her demands for information from the Guatemalan government, to no avail.<sup>20</sup> In January 1996, a car bomb exploded outside of the house of her lawyer, Jose Pertierra. Pertierra immediately accused the Guatemalan government of attempting to intimidate his client.<sup>21</sup> But the United States Government seemed reluctant to help.<sup>22</sup> Bamaca was not an American citizen, and was not legally married to Harbury.<sup>23</sup> Furthermore, he was a participant in a civil war that the United States wanted to end.<sup>24</sup> A memo from the State Department, to then National Security Adviser Anthony Lake, stated, "Harbury's determination to resolve this case is having perhaps unintended negative consequences on the peace process."<sup>25</sup> Concerned about its need to appear as an impartial participant in the peace negotiations, the State Department was reluctant to highlight its efforts to find information on Harbury's husband.<sup>26</sup>

For three years Harbury protested, seeking information about her husband. Meredith Larson, co-chair of Coalition Missing, stated that Harbury "encountered doors blocked over and over . . . people tried to portray her as crazy, as not credible . . ." <sup>27</sup> However, she returned to Guatemala in June 1995, pursuing information provided by Amnesty International and other human rights organizations regarding the whereabouts of her husband's grave.<sup>28</sup> The trip was also prompted by a State Department briefing of Harbury and her lawyers about where its officials believed Bamaca to be buried.<sup>29</sup>

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15. *See id.*

16. Edward Orlebar, *Wife's Search Embarrassing for Guatemala; American Digs for Truth About Disappearance of her Rebel-Commander Husband, Shining Spotlight on Country's Human Rights Record*, L.A. TIMES, Sept. 18, 1993, at A3.

17. *Id.*

18. *Id.*

19. Risen, *supra* note 12, at E1.

20. *See id.*

21. Pamela Constable, *Car Bomb Explodes Outside Lawyer's Home in District; Blast is Linked to Guatemalan Case*, WASH. POST, Jan. 6, 1996, at B1. One FBI investigator noted that the bomb was not planted by an amateur, but by "adults with experience." *See id.*

22. Risen, *supra* note 12, at E1.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

The new information followed Nuccio's revelations to Representative Torricelli in March 1995 of possible CIA knowledge of Guatemalan military involvement in Bamaca's death. Acting on the information provided by Nuccio, Torricelli wrote a letter to President Clinton, forwarding a copy to the *New York Times*, alleging that the CIA had information concerning Bamaca's death.<sup>30</sup> He demanded that any official who withheld information about Bamaca's death be dismissed.<sup>31</sup> Torricelli said that Guatemalan Colonel Julio Roberto Alpirez ordered the death of Bamaca and, in a separate incident, that of an American hotel operator in Guatemala.<sup>32</sup> Torricelli further alleged that Alpirez was on the CIA payroll when he ordered the deaths. The CIA later acknowledged that it had failed to inform members of Congress of information concerning Alpirez's involvement in the two murders.<sup>33</sup> CIA Director James Woolsey, however, declined to impose any penalties on those involved, which led, in part, to his departure.

In May 1995, John Deutch assumed control of the CIA and demanded that CIA officials in Guatemala show why he should not close their offices.<sup>34</sup> Although he did not take that drastic step, Deutch fired two CIA officials and disciplined eight others for their involvement in the Alpirez controversy.<sup>35</sup> Meanwhile, Harbury filed suit against current and former CIA, State Department, and national security officials, seeking damages of \$25 million.<sup>36</sup> Deutch's next administrative action, revoking Nuccio's security clearance, prompted congressional response.

Calls for such congressional action began in 1995 when Sen. Patrick Leahy expressed outrage at the CIA's cover-up.<sup>37</sup> Congressman Torricelli called this "the single worst example of the intelligence community being beyond civilian control and operating against our national interest."<sup>38</sup>

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30. See Doyle McManus, *CIA Linked to Guatemala Killings, Lawmaker Alleges Intelligence: New Jersey Congressman Says White House Covered Up Details in Deaths of Leftist Leader, American Hotel Operator*, L.A. TIMES, Mar. 23, 1995, at A7.

31. See *id.*

32. Richard A. Serrano, *CIA, Lawmaker Trade Charges over Covert Operation Intelligence: Agency's Acting Director Denies Any Cover-up Surrounding Guatemala Murders*, L.A. TIMES, Mar. 24, 1995, at A4.

33. James Risen, *CIA Admits Slip in Guatemalan Murder Cases*, L.A. TIMES, Apr. 6, 1995, at A1.

34. James Risen, *CIA Staff Told to Justify Missions in Latin America*, L.A. TIMES, June 24, 1995, at A1.

35. James Risen, *2 CIA Officers Ousted over Guatemala Scandal*, L.A. TIMES, Sept. 30, 1995, at A1.

36. Toni Locy, *Harbury Sues U.S. Officials*, WASH. POST, Mar. 8, 1996, at A28. A report by a presidential advisory panel in 1996 concluded that CIA officers were not involved in the murders of Devine or Bamaca. See Art Pine, *Report Clears CIA of Abuses in Guatemala Inquiry: Presidential Panel Says It Found No Credible Evidence for Charges that Agents Participated in Torture and Killings of Americans*, L.A. TIMES, June 29, 1996, at A19. The panel did criticize the CIA for recruiting informants of questionable character, many of whom had "reprehensible" records of human rights. See *id.*

37. See 141 CONG. REC. S4842-01, S4842 (1995) (statement of Sen. Leahy).

38. See 141 CONG. REC. S4755-02, S4755 (1995) (statement of Sen. Murray) (quoting Rep. Torricelli).

The Senate Select Committee on Intelligence addressed the issue in its report on the Intelligence Authorization Act of 1998.<sup>39</sup> The report stated that, in addition to the CIA and the President, Congress and the American public are consumers of intelligence.<sup>40</sup> Further, the report argued that United States national security interests include divulging information about the kidnapping or murder of Americans abroad to the victims' families. It noted concern that executive branch policies on intelligence could prevent Congress from learning of wrongdoing in areas over which it has oversight responsibility.<sup>41</sup> The result was section 306 of the Senate version of the Intelligence Authorization Act for Fiscal Year 1998.<sup>42</sup> The current version of the provision reads:<sup>43</sup>

Section 1. Encouragement of Disclosure of Certain Information to Congress.

(a) Encouragement –

- (1) In General – Not later than 30 days after the date of enactment of this Act, the President shall take appropriate actions to inform the employees of the covered agencies, and employees of contractors carrying out activities under classified contracts with covered agencies, that –
  - (A) except as provided in paragraph (4), the disclosure of information described in paragraph (2) to the individuals referred to in paragraph (3) is not prohibited by law, executive order, or regulation or otherwise contrary to public policy;
  - (B) the individuals referred to in paragraph (3) are presumed to have a need to know and to be authorized to receive such information; and
  - (C) the individuals referred to in paragraph (3) may receive information so disclosed only in their capacity as members of the committees concerned.
- (1) Covered Information – Paragraph (1) applies to information, including classified information, that an employee reasonably believes to provide direct and specific evidence of –
  - (A) a violation of any law, rule, or regulation;
  - (B) a false statement to Congress on an issue of material fact; or
  - (C) gross mismanagement, a gross waste of funds, a flagrant abuse of authority, or a substantial and specific danger to public health or safety.

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39. S. REP. NO. 105-24 (1997) (Authorizing Appropriations for Fiscal Year 1998 for the Intelligence Activities of the United States Government and the Central Intelligence Agency Retirement and Disability System and for Other Purposes).

40. *See id.*

41. *See id.*

42. S. 858, 105<sup>th</sup> Cong. § 306 (1997).

43. S. 1668, 105<sup>th</sup> Cong. § 1 (1998). This article focuses on the current version of what began as section 306 of Senate Bill 858. The Senate passed the current version on March 9, 1998. For ease of reference, "Section 306" will be used in this article to refer to the current version of the provision.

- (3) Covered Individuals – The individuals to whom information described in paragraph (2) may be disclosed are the members of a committee of Congress having as its primary responsibility the oversight of a department, agency, or element of the Federal Government to which such information relates.
- (4) Scope – Paragraph (1)(A) does not apply to information otherwise described in paragraph (2) if the disclosure of the information is prohibited by Rule 6(e) of the Federal Rules of Criminal Procedure.
  - (a) Report – Not later than 60 days after the date of enactment of this Act, the President shall submit to Congress a report on the actions taken under subsection (a).
  - (b) Construction With Other Reporting Requirements – Nothing in this section may be construed to modify, alter, or otherwise affect any reporting requirement relating to intelligence activities that arises under the National Security Act of 1947 (50 U.S.C. 401 et seq.) or any other provision of law.
  - (c) Covered Agencies Defined – In this section, the term ‘covered agencies’ means the following:
    - (1) The Central Intelligence Agency.
    - (2) The Defense Intelligence Agency.
    - (3) The National Imagery and Mapping Agency.
    - (4) The National Security Agency.
    - (5) The Federal Bureau of Investigation.
    - (6) Any other Executive agency, or element or unit thereof, determined by the President under section 2302(a)(2)(C)(ii) of title 5, United States Code, to have as its principal function the conduct of foreign intelligence or counterintelligence activities.

Entitled “Encouragement of Disclosure of Certain Information to Congress,” section 306 directs the President to inform employees of certain agencies that disclosing confidential information to members of congress is not illegal. Information covered by this provision includes that classified information that would provide evidence of a violation of a law, rule, or regulation; a false statement to Congress; or the gross mismanagement, waste of funds, or abuse of authority; or otherwise a danger to public health or safety.

### III.

#### THE CONSTITUTIONAL DISPUTE

Viewed from afar, the dispute over section 306 seems one in which Congress and the President have taken unyielding, absolutist positions that are constitutionally unsustainable. From the standpoint of the executive branch, the Senate may appear to claim that Congress can constitutionally enact a statute that permits any federal employee to make any information available to any

member of Congress at any time. That is the conclusion that could seem to flow from at least two prior statutes, read in light of the structure of section 306.

The first statute is the "Lloyd La Follette Act."<sup>44</sup> Enacted in 1912, the Act "was intended 'to protect employees against oppression and in the right of free speech and the right to consult their representatives.'"<sup>45</sup> The Act provides as follows:

The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied.<sup>46</sup>

It is easy to see why this language, applied in a contemporary context, could cause concern in the executive branch. Read literally, it admits of no qualification on the right of *any* federal employee to furnish *any* member of Congress with *any* information, however highly classified. As of 1995, the latest year in which the data were compiled, over 3.2 million government employees and contractors held security clearances.<sup>47</sup> (Of those, some 768,000 held top secret clearances.) The possibility exists that one of those 3.2 million persons could prove irresponsible, that one of 535 members of Congress could also prove irresponsible, that highly sensitive information could be transmitted from the one to the other, and that grave harm could thereby be done to the national security interests of the United States. Clearly the Lloyd La Follette Act—enacted before World War I, before the enactment of the Espionage Act, before the establishment of any U.S. intelligence service or even any classification system—was not drafted with the problem of classified information security in mind.

The second statute is an appropriations rider enacted in 1987 and re-enacted in subsequent appropriations acts. The rider prohibits the use of appropriated funds for the enforcement of a non-disclosure agreement that fails to provide explicitly that the agreement "do[es] not supersede, conflict with, or otherwise alter" the Lloyd La Follette Act.<sup>48</sup> Obviously, no agreement between a federal agency and an employee can lawfully modify or supersede the rights and responsibilities conferred upon that employee by a statute; only another law can "supersede, conflict with, or otherwise alter" a prior statute. Thus, the rider is effectively meaningless, conferring no rights or responsibilities that did not already exist under the Act. In this iteration, however, the rider seems to presuppose that the Lloyd La Follette Act does in fact govern the disclosure of classified information to Congress.

The structure of section 306 implies that the Lloyd La Follette Act and the appropriations rider already permit the disclosure of certain information by an executive branch employee to a member or committee of Congress. Were prior

44. 5 U.S.C. § 7211.

45. *Bush v. Lucas*, 462 U.S. 367, 384 (1983) (quoting H.R. REP. NO. 62-388, at 7 (1912)).

46. 5 U.S.C. § 7211.

47. GENERAL ACCOUNTING OFFICE, GAO/NSIAD-95-101, BACKGROUND INVESTIGATIONS: IMPEDIMENTS TO CONSOLIDATING INVESTIGATIONS AND ADJUDICATIVE FUNCTIONS 12 (1995).

48. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 625, 110 Stat. 3009 (1996).

authority to disclose not presupposed, arguably section 306 would itself contain a substantive provision permitting such disclosure. Yet it contains none; the provision merely sets forth a communication requirement, obliging the President to transmit certain information about the law to certain employees. While one can understand why Congress might wish to avoid addressing the issue whether substantive disclosure authority already exists (in the Lloyd La Follette Act and the appropriations rider), the manner in which section 306 “fudges” the issue is inartful, suggesting as it does that the joint import of the Lloyd La Follette Act and the appropriations rider is identical to the provisions of section 306(a) with respect to covered information, covered individuals, and covered agencies—which it manifestly is not. If the sponsors of section 306 do not believe that the Lloyd La Follette Act and the appropriations rider should be read to permit the broad, unqualified disclosure that a literal construction of the two would require, clarity would be served by setting forth at the outset of section 306 a substantive provision permitting disclosure of the sort described in the communication requirement.

The Administration’s claim seems to be the mirror image of a literal construction of the Lloyd La Follette Act: however narrowly tailored the statutory entitlement to disclose information to Congress, the Administration seems to argue, the President still has constitutional power to prohibit *any* federal employee from disclosing to *any* member or committee of Congress *any* information about *any* activity, however unlawful, dishonest, wasteful, or dangerous.<sup>49</sup> All the President need do, according to the Justice Department, is to classify the information in question. The President’s “constitutional authority to protect national security and other privileged information” empowers the Chief Executive to decline to comply with any statute that impinges upon that power.

Moreover, an ambiguous statute will be construed narrowly, in a manner consistent with these constitutional principles; the Lloyd La Follette Act and the appropriations riders have therefore been construed by the Justice Department as having no application to classified information. As the Department puts it, the rider “does not authorize any disclosure to a Member of Congress that is not permitted under” the applicable executive order.<sup>50</sup> Under this broad claim, Congress is thus denied any role, however minimal, in determining the extent to which information that putatively relates to the national security should be protected. No need to know, however compelling, can permit Congress to authorize executive employees to disclose information demonstrably necessary to meet its legislative needs.

If the issue were framed as a choice between the two extreme positions outlined above, it would be impossible to say that the Constitution takes either

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49. See “Statement of Administration Policy: S. 858—Intelligence Authorization Act for Fiscal Year 1998,” Executive Office of the President, Office of Management & Budget, June 18, 1997; memorandum from Christopher H. Schroeder, Acting Assistant Attorney General, Department of Justice, for Michael J. O’Neill, General Counsel, Central Intelligence Agency, Nov. 26, 1996 (access to classified information).

50. Schroeder, *supra* note 49, at 4.

view. Clearly the President has the power to "promulgat[e] and enforc[e] . . . executive regulations[ ] to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense."<sup>51</sup> Nevertheless, nothing in the Constitution compels the conclusion that Congress lacks power simply to require the President to inform specified federal employees with respect to rights and responsibilities established by law.

To the contrary, Article II, Section 3 requires that the President "take care that the laws be faithfully executed," a provision that may fairly be read to oblige the President to ensure that statutory rights and responsibilities bearing upon the conduct of executive branch employees' duties be brought to their attention. Moreover, Congress is given the power to "make all laws necessary and proper for carrying into execution the foregoing powers,"<sup>52</sup> which might reasonably be read to subsume the power to require the communication of the content of particularly relevant laws to specified federal employees, or at least as not disabling Congress from requiring that communication. A requirement to that effect that proved extraordinarily burdensome to administer (such as, say, a requirement that the entire U.S. Code must be made available to every federal employee) would raise the question whether Congress was interfering with the President's responsibility to administer the law. However, section 306 is narrowly tailored to achieve a valid objective, thus escaping any challenge that it interferes with the President's administrative responsibilities.

#### IV. RESOLVING THE DISPUTE

Contrary to the insistence of the Justice Department, the issue is *not* "whether under the existing executive branch rules and practices employees are free to make a disclosure to Members of Congress based on their own determination on the need-to-know question."<sup>53</sup> Congress, if section 306 were enacted, would not have given executive branch employees unfettered discretion to make need-to-know decisions. Rather, in section 306(a)(1)(B), Congress *itself* would have determined that covered individuals are "presumed to have a need to know . . ." The issue is not the scope of presidential authority in the face of congressional silence, but the scope of presidential authority in light of rules that Congress would prescribe.

The larger question, therefore, is whether the President has plenary power to act in a manner inconsistent with subsection (a) of section 306, *viz.*, by indicating that the disclosure of covered information to Congress is not permitted, or by penalizing an employee who discloses covered information to Congress. If such power does indeed reside solely in the Chief Executive, the enactment of section 306 would be unconstitutional.

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51. *New York Times Co. v. United States*, 403 U.S. 713, 729-30 (1971) (Stewart, J., joined by White, J., concurring).

52. U.S. CONST. art. I, § 8, cl. 18.

53. Schroeder, *supra* note 49, at 5.

On this issue, as with all issues concerning plenary presidential power in national security and foreign affairs, the analytic framework is provided in Justice Jackson's concurring opinion in the *Steel Seizure Case*,<sup>54</sup> adopted by the full Court in upholding the validity of the Iran hostage settlement agreement in *Dames & Moore v. Regan*.<sup>55</sup> He said:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Perhaps for this reason, in no case touching on foreign relations or national security has the Supreme Court invalidated an act of Congress for the reason that it impinged upon the President's sole power under the Constitution. In two hundred years of dispute between the President and Congress over war and peace, commitment and neutrality, trade embargoes and arms sales, Congress has never lost before the High Court. Indeed, in only one case, *National Federation of Federal Employees v. United States*,<sup>56</sup> has any court invalidated an act of Congress on the ground of its violating general presidential foreign affairs powers—and that decision was vacated and remanded by the Supreme Court.<sup>57</sup> This may not be saying much; the Supreme Court has not decided many cases dealing with these momentous issues, and efforts to get the courts to resolve such disputes frequently are dismissed as “non-justiciable”—as political questions not admitting of the possibility of judicial review.

Nonetheless, the record is a sobering one for anyone arguing, as does the Justice Department on this issue, that a given subject falls within the President's exclusive constitutional domain. The only foreign affairs/national security cases in which plenary presidential power controlled the outcome pertained to policies promulgated by states. And these cases are only two, both dealing with the same transaction. President Franklin Roosevelt recognized the Soviet Union in 1933 and, as part of the package, entered into an executive agreement with the Soviets in which the two nations settled outstanding claims against each other. The courts of the state of New York refused to enforce the agreement, which effectively required them to enforce the confiscation orders of the Soviet government. In *United States v. Pink*<sup>58</sup> and *United States v. Belmont*,<sup>59</sup> the Supreme Court affirmed that New York's refusal interfered with the President's recognition power. Because states have little claim to power in the international realm, and because the foreign affairs powers of Congress are substantial, *Pink* and *Belmont* cannot readily be applied to interpolate limits on congressional

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54. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

55. 453 U.S. 654 (1981).

56. 695 F. Supp. 1196 (D.D.C. 1988).

57. 490 U.S. 153, 161 (1989).

58. 315 U.S. 203 (1942).

59. 301 U.S. 324 (1937).

power. The dispute in these cases was between the President and a state—indeed, between the President and merely the *courts* of a state—and not between the President and Congress. The limitation of federal supremacy thus further reinforced the President's claim to power, an arrow absent from the executive quiver in disputes with Congress.

The most reasonable conclusion, therefore, is that the Constitution authorizes Congress to permit *some* federal employees to disclose *some* information to *some* committees or members of Congress under *some* circumstances. Where the Constitution draws the line in each category is impossible to say. From the beginning, the separation of powers doctrine has proven difficult to apply. Even James Madison, for example, had little hope that the notion of separated powers would provide much practical guidance. “[N]o skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive, and Judiciary. . . . [O]bscurity reigns in these subjects, and [they] puzzle the greatest adepts in political science.”<sup>60</sup>

Still, it is safe to conclude that an absolutist view on either side cannot command constitutional support. Rather than permitting either the executive branch or the legislative branch to disregard altogether the interests of the other, the Constitution mandates that both sets of interests be accorded sufficient weight to ensure that each branch remains able to carry out its institutional responsibilities. In *Nixon v. Administrator of General Services*, upholding legislation that controlled presidential papers after resignation, the Court focused on “the extent to which [a provision of law] prevents the Executive branch from accomplishing its constitutionally assigned functions.”<sup>61</sup> The same standard was applied in *Morrison v. Olson*,<sup>62</sup> where the Court upheld the validity of the independent counsel statute, and in *Mistretta v. United States*,<sup>63</sup> where the Court upheld the validity of the Sentencing Reform Act.

In light of these constitutional principles, it would seem advisable, in forging a compromise on the issues raised by section 306, that Congress not insist upon the absolutist view embodied in a literal construction of the Lloyd La Follette Act, and that the President not insist upon the absolutist view embodied in the Justice Department's position. Rather, as the approach of section 306 implies, the task ought to be seen as determining what class of information should be covered, what class of individuals in Congress should be covered, and which agencies should be covered for the purpose of determining when disclosure is permissible. Contrary to the implication of section 306, however, the presumption should not be that existing statutes already permit the disclosure of classified information to Congress. Rather, the starting premise ought to be that, *whatever* the import of existing law, the conditions set forth in section 306 will hereafter govern such disclosures.

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60. The Federalist No. 37 (J. Madison).

61. 433 U.S. 425, 443 (1977).

62. 487 U.S. 654 (1988).

63. 488 U.S. 361 (1989).

That objective can be readily accomplished. Subsection (a) should be redrafted to make subparagraphs (A), (B), and (C) independent, freestanding, substantive provisions. To do so, simply strike out paragraph (1) of subsection (a) and make subparagraphs (A), (B), and (C) under paragraph (1) complete sentences. It is probably unnecessary to retain the communication requirement of section (1); covered persons likely will be aware of this new statute in any event, and a communication requirement, while not constitutionally invalid, does interject Congress in an administrative activity normally within the President's discretion and thus raises the likelihood of executive branch objection. If the requirement is retained, it probably should be moved back to the end of the section and made a new subsection (e).

One further modification is appropriate. The Lloyd La Follette Act will, of course, remain in effect, and the question arises: how should it and section 306 be read as consistent with one another? On its face, the Lloyd La Follette Act applies to a larger category of information that includes the category covered by section 306. It is therefore necessary to make clear that, where both statutes apply, section 306 controls. In other words, section 306 carves out from the coverage of the Lloyd La Follette Act that subset of information described in paragraph (2). A cleaner way to meet this issue would be to draft section 306 so as to render it applicable *only* to classified information. This could be done by striking out "including classified information" in paragraph (2) of subsection (a) and inserting "classified" before "information" in that same paragraph. To make the intent wholly unambiguous, it would still be appropriate to insert a provision indicating that, in the event of conflict, section 306 controls. Inasmuch as the President's objections appear to be related only to the disclosure of classified information to Congress, there should be no quarrel with narrowing the scope of section 306 to cover only classified information. The disclosure of unclassified information would thus continue to be governed by the Lloyd La Follette Act.

A statute drafted along these lines would clearly pass constitutional muster. Such an approach would effectively eschew reliance upon abstract constitutional theory and would represent instead an effort by both branches to reach a practical accommodation of opposing interests. The task is to reconcile those interests in a manner that weighs one set of risks against another, without viewing either set outside of a comparative context.<sup>64</sup> If Congress and the President do so, the result will meet the requirements of the Constitution as well as the imperatives of sound policy-making.

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64. See *United States v. American Telephone & Telegraph*, 551 F.2d 384 (D.C. Cir. 1976).