III. THE CONSTITUTIONAL FRAMEWORK FOR INTELLIGENCE ACTIVITIES

A. The Joint Responsibilities of the Legislative and Executive Branches—Separation of Powers and Checks and Balances

While the Constitution contains no provisions expressly allocating authority for intelligence activity, the Constitution's provisions regarding foreign affairs and national defense are directly relevant. From the beginning, U.S. foreign intelligence activity [1] has been conducted in connection with our foreign relations and national defense.

In these areas, as in all aspects of our Government, the Constitution provides for a system of checks and balances under the separation of powers doctrine. In foreign affairs and national defense, Congress and the President were both given important powers. The Constitution, as Madison explained in *The Federalist*, established "a partial mixture of powers." [2] Unless the branches of government, Madison said, "be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be maintained." [3] The framers' underlying purpose, as Justice Brandeis pointed out, was "to preclude the exercise of arbitrary power." [4]

This pattern of checks and balances is reflected in the constitutional provisions with respect to foreign affairs and national defense. In foreign affairs, the President has the power to make treaties and to appoint Ambassadors and envoys, but this power is subject to the "advice and consent" of the Senate.[5] While the President has the exclusive power to receive ambassadors from foreign states,[6] the Congress has important powers of its own in foreign affairs, most notably the power to regulate foreign commerce and to lay duties.[7]

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[1] A definition of the term "foreign intelligence activity" is necessary in order to properly assess the constitutional aspects of foreign intelligence activity. Foreign intelligence activity is now understood to include secret information gathering and covert action. Covert action is defined by the CIA as secret action designed to influence events abroad, including the use of political means or varying degrees of force. The political means can range from the employment of propaganda to large-scale efforts to finance foreign political parties or groups so as to influence elections or overthrow governments; covert action involving the use of force may include U.S. paramilitary operations or the support of military operations by foreign conventional or unconventional military organizations. (Memorandum from Mitchell Rogovin, Special Counsel to the Director of Central Intelligence, House Select Committee on Intelligence, Hearings, 12/9/75, p. 1730.)

[2] *The Federalist*, No. 47 (J. Madison).

[3] *The Federalist*, No. 48 (J. Madison).

[4] *Meyers* v. *United States*, 272 U.S. 52, 292 (1926).

[5] United States Constitution, Article II, Section 2.

[6] *Ibid.*, Sec. 3.

[7] *Ibid.*, Art. I, Sec. 8.

In national defense, the President is made Commander-in-Chief, thereby having the power to command the armed forces, to direct military operations once Congress has declared war, and to repel sudden attacks.[8] Congress, however, has the exclusive power to declare war, to raise and support the armed forces, to make rules for their government and regulation, to call forth the militia, to provide for the common defense, and to make appropriations for all national defense activities.[9]

Moreover, under the Necessary and Proper clause, the Constitution specifies that Congress shall have the power "to make all laws necessary and proper for carrying into execution" not only its own powers but also "all other powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof." [10]

This constitutional framework—animated by the checks and balances concept—makes clear that the Constitution contemplates that the judgment of both the Congress and the President will be applied to major decisions in foreign affairs and national defense. The President, the holder of "the executive power," conducts daily relations with other nations through the State Department and other agencies. The Senate, through its "advice and consent" power and through the work of its appropriate committees participates in foreign affairs. As Hamilton observed in *The Federalist*, foreign affairs should not be left to the "sole disposal" of the President:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.[11]

Similarly, in national defense, the constitutional framework is a "partial mixture of powers," calling for collaboration between the executive and the legislative branches. The Congress, through its exclusive power to declare war, alone decides whether the nation shall move from a state of peace to a state of war. While as Commander-in-Chief the President commands the armed forces, Congress is empowered "to make rules" for their "government and regulation." [12]

Moreover, in both the foreign affairs and defense fields, while the President makes executive decisions, the Congress with its exclusive power over the purse is charged with authority to determine whether, or to what extent, government activities in these areas shall be funded. [13]

The Constitution, while containing no express authority for the conduct of foreign intelligence activity, clearly endowed the Federal Government (i.e., Congress and the President jointly) with all the power necessary to conduct the nation's foreign affairs and national

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[8] *Ibid.*, Art. II, Sect. 2.
[9] *Ibid.*, Sect. 8.
[10] *Ibid.*
[11] *The Federalist*, No. 75 (A. Hamilton).
[12] United States Constitution, Article I, Section 8.
[13] *Ibid.*, Art. II, Sect. 8.

defense and to stand on an equal basis with other sovereign states. [14] Inasmuch as foreign intelligence activity is a part of the conduct of the United States' foreign affairs and national defense, as well as part of the practice of sovereign states, the Federal Government has the constitutional authority to undertake such activity in accordance with applicable norms of international law.[14a]

We discuss below the manner in which Congress and the Executive branch have undertaken to exercise this federal power, and the consistency of their action with the Constitution's framework and system of checks and balances.

B. The Historical Practice

The National Security Act of 1947 [14b] was a landmark in the evolution of United States foreign intelligence. In the 1947 Act, Congress created the National Security Council and the CIA, giving both of these entities a statutory charter.

Prior to 1947, Congress, despite its substantial authority in foreign affairs and national defense, did not legislate directly with respect to foreign intelligence activity. Under the Necessary and Proper Clause, and its power to make rules and regulations for the Armed Forces, Congress might have elaborated specific statutes authorizing and regulating the conduct of foreign intelligence. In the absence of such statutes, Presidents conducted foreign intelligence activity prior to the 1947 National Security Act on their own authority.

In wartime, the President's power as Commander-in-Chief provided ample authority for both the secret gathering of information and covert action.[15] The authority to collect foreign intelligence information before 1947 in peacetime can be viewed as implied from the Presi-

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[14] As the Supreme Court has declared, "the United States, in their relation to foreign countries . . . are invested with the powers which belong to independent nations. . . ." [*Chinese Exclusion Case*, 130 U.S. 581, 604 (1889).]

[14a] There are a number of international agreements which the United States has entered into which prohibit certain forms of intervention in the domestic affairs of foreign states. The Nations Charter in Article 2(4) obligates all U.N. members to 'refrain in their international relations from the threat or use of force against the territorial integrity of any state." The Charter of the Organization of American States (OAS) in Article 18 provides:

"No State or group of States has the right to intervene, directly or indirectly for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements."

Under the Supremacy Clause of the Constitution (Art. VI, Sec. 2), treaty obligations of the United States are part of the law of the land. While the general principles of such treaties have not been spelled out in specific rules of application, and much depends on the facts of particular cases as well as other principles of international law (including the right of self-preservation, and the right to assist states against prior foreign intervention) it is clear that the norms of international law are relevant in assessing the legal and constitutional aspects of covert action.

[14b] 50 U.S.C. 430.

[15] In *Totten* v. *United States*, 92 U.S. 105 (1875), the Supreme Court upheld the authority of the President to hire, without statutory authority, a secret agent for intelligence purposes during the Civil War. Authority for wartime covert action can be implied from the President's powers as Commander-in-Chief to conduct military operations in a war declared by Congress. Compare, *Totten* v. *United States*.

dent's power to conduct foreign affairs.[16] In addition to the more or less discreet gathering of information by the regular diplomatic service, the President sometimes used specially-appointed "executive agents" to secretly gather information abroad.[17] In addition, executive agents were on occasion given secret political missions that were similar to modern day political covert action.[18] These, however, tended to be in the form of relatively small-scale responses to particular concerns, rather than the continuous, institutionalized activity that marked the character of covert action in the period after the passage of the 1947 National Security Act. There were no precedents for the peacetime use of covert action involving the use of armed force of the type conducted after 1947.

1. Foreign Intelligence and the President's Foreign Affairs Power

Although the Constitution provides that the President "shall appoint ambassadors, other public ministers and consuls" only "by and with the advice and consent of the Senate," beginning with Washington Presidents have appointed special envoys to carry out both overt diplomatic functions and foreign intelligence missions.[19] The great majority of these envoys were sent on overt missions, such as to negotiate treaties or to represent the United States at international conferences. Some, however, were sent in secrecy to carry out the near equivalent of modern-day intelligence collection and covert political action. For example, in connection with U.S. territorial designs on central and western Canada in 1869, President Grant's Secretary of State sent a private citizen to that area to investigate and promote the possibility of annexation to the United States.[20]

Presidential discretion as to the appointment of such executive agents derived from the President's assumption of the conduct of foreign relations. From the beginning, the President represented the United States to the world and had exclusive charge of the channels and processes of communication. The President's role as "sole organ" of the nation in dealing with foreign states was recognized by John Marhall in 1816 [21] and reflected the views expressed in *The Federalist*

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[16] Compare, *United States* v. *Butenko*, 494 F.2d 593 (3d Cir. 1974): "Decisions affecting the United States' relationship with other sovereign states are more likely to advance our national interests if the President is apprised of the intentions, capabilities and possible responses of other countries."

[17] Henry Wriston, *Executive Agents in American Foreign Relations*, (1929, 1967).

[18] *Ibid.*, pp. 693, *et. seq.*

[19] The first such specially-appointed individual was Governeur Morris, sent by President Washington in 1789 as a "private agent" to Britain to explore the possibilities for opening normal diplomatic relations. Morris was appointed in October 1789 because Washington's Secretary of State, Jefferson, was not yet functioning. The mission was not reported to the Congress until February 1791. Henry Wriston, "The Special Envoy," *Foreign Affairs*, 38 (1960), pp. 219, 220)

[20] Wriston, *Executive Agents in American Foreign Relations*, p. 739.

[21] Marshall spoke, not as Chief Justice in an opinion of the Supreme Court, but rather in a statement to the House of Representatives. The House of Representatives was engaged in a debate as to whether a demand by the British Government for the extradition of one Robbins was a matter for the courts or for the President, acting upon an extradition treaty. Marshall argued that the case involved "a national demand made upon the nation." Since the President is the "sole organ of the nation in its external relations" Marshall said, "of consequence, the demand can only be made upon him." [10 Annals of Congress 613 (1800), reprinted in 5 Wheat, Appendix, Note 1, at 26 (U.S. 1820).]

that the characteristics of the Presidency—unity, secrecy, decision, dispatch—were especially suited to the conduct of diplomacy.[22] As a consequence, historical development saw the President take charge of the daily conduct of foreign affairs, including the formulation of much of the nation's foreign policy. But "sole organ" as to communications with foreign governments and historical practice did not amount to "sole disposal" in a constitutional sense over foreign affairs; as Hamilton declared, the Constitution did not grant that degree of power to the President in foreign affairs.[23] Moreover, Marshall's reference to the President as "sole organ" did not purport to mean that the President was not subject to congressional regulation, should Congress wish to act. For Marshall, in addition to speaking of the President as "sole organ," went on to point out that "Congress, unquestionably, may prescribe the mode" by which such power to act was to be exercised.[24] Congress, with its own constitutional powers in foreign affairs, its power over the purse, and under the authority contained in the Necessary and Proper Clause, had the option of regulating the practice of using executive agents on foreign intelligence missions, as well as the conduct of foreign intelligence activity by other means.[25]

2. The Use of Force in Covert Action

Covert action may include the use of armed force. In modern times, the President's authorization of the CIA–financed and directed invasion of Cuba at the Bay of Pigs and paramilitary operations in Laos are examples of this type of covert action.

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[22] Nor did Marshall intend to say that "sole organ" meant the power of "sole disposal." As the eminent constitutional expert Edward S. Corwin wrote, "Clearly, what Marshall had foremost in mind was simply the President's role as instrument of communication with other governments." (Edward S. Corwin, *The President's Control of Foreign Relations*, p. 216.)

[23] *The Federalist*, No. 75 (A. Hamilton).

[24] Citing Marshall's expression, the Supreme Court has recognized the President as "sole organ" of communication and negotiation in foreign affairs. [*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1952).] Although dicta of Justice Sutherland in the *Curtiss-Wright* opinion put forward a broad view of "inherent" Presidential power in foreign affairs, the case and the holding of the court involved, as Justice Jackson stated in his opinion in the *Steel Seizure* case, "not the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress." [*Youngstown Steel & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635–636 (1952) (consurring opinion).]

In *Curtiss-Wright* a joint resolution of Congress had authorized the President to embargo weapons to countries at war in the Chaco, and imposed criminal sanctions for any violation. After President Franklin D. Roosevelt proclaimed an embargo, the Curtiss-Wright Corporation, indicted for violating the embargo, challenged the congressional resolution and the President's proclamation, claiming Congress had made an improper delegation of legislative power to the President. Speaking for six justices, Justice Sutherland sustained the indictment, holding only, as Justice Jackson later noted, "that the strict limitation upon Congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in external affairs." (343 U.S. at 636.)

[25] In 1793, for example, Congress established a procedure for the financing of secret foreign affairs operations. It enacted a statute providing for expenses of "intercourse or treaty" with foreign nations. The Act required the President to report all such expenditures, but granted him the power to give a certificate in lieu of a report for those payments the President deemed should be kept secret. (Act of February 9, 1973, 1 Stat. 300.

The executive branch relies in large part on the President's own constitutional powers for authority to conduct such covert action.[26] After the failure of the Bay of Pigs operation in 1961, the CIA asked the Justice Department for an analysis of the legal authority for covert actions. In its response, the Justice Department's Office of Legislative Council stated:

> It would appear that the executive branch, under the direction of the President, has been exercising without express statutory authorization a function which is within the constitutional powers of the President, and that the CIA was the agent selected by the President to carry out these functions.[27]

The Justice Department memorandum pointed to the President's foreign relations power and his responsibility for national security.[28] Arguing by analogy from the President's power as Commander-in-Chief to conduct a declared war, the memorandum contended that the President could conduct peacetime covert actions involving armed force without authority from Congress. The memorandum argued that there was no limit to the means the President might employ in exercising his foreign affairs power:

> Just as "the power to wage war is the power to wage war successfully," so the power of the President to conduct foreign relations should be deemed to be the power to conduct foreign relations successfully, *by any means necessary* to combat the measures taken by the Communist bloc, including both open and covert measures.[29] [Emphasis added.]

In view of the Constitution's grant of concurrent jurisdiction to the Congress in foreign affairs and Congress' exclusive constitutional authority to declare war, there is little to support such an extravagant claim of Presidential power in peacetime. The case which prompted the Justice Department's argument—the invasion of Cuba at the Bay

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[26] In September 1947, the CIA General Counsel expressed the opinion that activity such as "black propaganda, ranger and commando raids, behind-the-lines sabotage, and support of guerrilla warfare" would constitute "an unwarranted extension of the functions authorized" by the 1947 Act. (Memorandum from the CIA General Counsel to Director, 9/25/47.) And, in 1969, the CIA General Counsel wrote that the 1947 Act provided "rather doubtful statutory authority" for at least those covert actions—such as paramilitary operations—which were not related to intelligence gathering. (Memorandum from CIA General Counsel to Director, 10/30/69.) The Agency's General Counsel took the position that the authority for covert action rested on the President's delegation of his own constitutional authority to CIA through various National Security Council Directives. (Ibid.)

[27] Memorandum, Office of Legislative Counsel, Department of Justice, 1/17/62, p. 11.

[28] *Ibid.*, p. 7. The memorandum stated:

"Under modern conditions of 'cold war,' the President can properly regard the conduct of covert activities . . . as necessary to the effective and successful conduct of foreign relations and the protection of the national security. When the United States is attacked from without or within, the President may 'meet force with force' . . . In wagering a worldwide contest to strengthen the free nations and contain the Communist nations, and thereby to preserve the existence of the United States, the President should be deemed to have comparable authority to meet covert activities with covert activities if he deems such action necessary and consistent with our national objectives."

[29] *Ibid.*

of Pigs—illustrates the serious constitutional questions which arise. In that operation, the President in effect authorized the CIA to secretly direct and finance the military invasion of a foreign country. This action approached, and may have constituted, an act of war. At the least, it seriously risked placing the United States in a state of war *vis-á-vis* Cuba on the sole authority of the President. Absent the threat of sudden attack or a grave and immediate threat to the security of the country, only Congress, under the Constitution, has such authority. As James Madison declared, Congress' power to declare war includes the "power of judging the causes of war." [30] Madison wrote:

> Every just view that can be taken of the subject admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging the causes of war, is fully and exclusively vested in the legislature. . . ." [31]

This view was also affirmed by Hamilton who, although a principal exponent of expansive Presidential power, wrote that it is the

> exclusive province of Congress, when the nation is at peace, to change that state into a state of war . . . it belongs to Congress only, to go to war.[32]

Nor is there much support in historical practice prior to 1950 for the use of armed force to achieve foreign policy objectives on the sole authority of the President. The 1962 Justice Department memorandum argued that the practice of Presidents in using force to protect American citizens and property abroad was authority for covert action involving armed force.[33] Before the post-World War II era, Presidents on occasion asserted their own authority to use armed force short of war, but as the Senate Committee on Foreign Relations noted in 1973, these operations were for "limited, minor, or essentially non-political purposes." As the Foreign Relations Committee stated:

> During the course of the nineteenth century it became accepted practice, if not strict constitutional doctrine, for Presidents acting on their own authority to use the armed forces for such limited purposes as the suppression of piracy and the slave trade, for "hot pursuit" of criminals across borders, and for the protection of American lives and property in places abroad where local government was not functioning effectively. An informal, operative distinction came to be accepted between the use of the armed forces for limited, minor or essentially nonpolitical purposes and the use of the armed forces for "acts of war" in the sense of large-scale military operations against sovereign states.[34]

That these operations were, as the Committee on Foreign Relations noted, for "limited, minor, or essentially non-political purposes" is also

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[30] *Letters of Helvidius* (1793). Madison, *Writings*, Vol. 6, p. 174 (Hunt ed.).
[31] *Ibid.*
[32] Hamilton, *Works*, Vol. 8, pp. 249–250 (Lodge ed.)
[33] Justice Department Memorandum, 1/17/62, p. 2.
[34] Senate Report No. 220, 93d Cong., 1st Sess. (1973).

affirmed by the eminent authority on constitutional law, Edward Corwin. Prior to the Korean War, the "vast majority" of such cases, Corwin wrote, "involved fights with pirates, landings of small naval contingents on barbarous coasts [to protect American citizens], the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border." [35]

To stretch the President's foreign relations power so far as to authorize the secret use of armed force against foreign states without congressional authorization or at least "advice and consent," appears to go well beyond the proper scope of the Executive's power in foreign affairs under the Constitution. Moreover, where Congress is not informed prior to the initiation of such armed covert action—as it was not, for example, in the Bay of Pigs operation—the constitutional system of checks and balances can be frustrated. Without prior notice, there can be no effective check on the action of the executive branch. Once covert actions involving armed force, such as the invasion of Cuba at the Bay of Pigs or paramilitary operations, are begun, it may be difficult if not impossible for practical reasons to stop them. In such circumstances, covert action involving armed intervention in the affairs of foreign states may be inconsistent with our constitutional system and its principle of checks and balances.

C. The Constitutional Power of Congress To Regulate the Conduct of Foreign Intelligence Activity

Prior to the 1947 National Security Act, Congress did not seek to expressly authorize or regulate foreign intelligence activity by statute. Congress' decision not to act, however, did not reduce or eliminate its constitutional power to do so in the future. The Necessary and Proper Clause and its power to "make rules for the government and regulation" of the armed forces, along with Congress' general powers in the fields of foreign affairs and national defense, were always available.

In this light, the question of the legal authority for the conduct of foreign intelligence activity in the absence of express statutory authorization can be viewed in the manner set forth by Justice Jackson in the *Steel Seizure* case. He wrote:

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility.[36]

Foreign intelligence activity, particularly political covert action not involving the use of force, can be seen as lying in such a "zone of twilight" in which both the President and the Congress have concurrent authority and responsibilities. (As discussed above, the use of covert

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[35] Edward S. Corwin, "The President's Power," in Haight and Johnson, eds. *The President's Role and Powers*, (1965), p. 361.

[36] *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (concurring opinion).

action involving armed force raises serious constitutional problems where it is not authorized by statute, particularly if Congress is not informed.) When Congress does not act, the President may in certain circumstances exercise authority on the basis of his own constitutional powers.

Congress can, however, choose to exercise its legislative authority to regulate the exercise of that authority. In view of the President's own constitutional powers, Congress may not deprive the President of the function of foreign intelligence. But, as Chief Justice Marshall stated, Congress can "prescribe the mode" by which the President carries out that function. And the Congress may apply certain limits or controls upon the President's discretion.

The Supreme Court has affirmed this constitutional power of Congress. In *Little* v. *Barreme*,[37] Chief Justice Marshall, speaking for the Court, found the seizure by the U.S. Navy of a ship departing a French port to be unlawful, even though the Navy acted pursuant to Presidential order. By prior statute, Congress had authorized the seizure of ships by the Navy, but limited the types of seizures that could be made. The President's orders to the Navy disregarded the limits set out in the law. If Congress had been silent, Chief Justice Marshall stated, the President's authority as Commander-in-Chief might have been sufficient to permit the seizure. But, Marshall declared, once Congress had "prescribed . . . the manner in which this law shall be carried into execution," the President was bound to respect the limitations imposed by Congress.[38]

There have been at least as many conceptions of the range of the President's own power as there have been holders of the office of the President. In the case of foreign intelligence activity, Justice Jackson's statement that "comprehensive and undefined Presidential powers hold both practical advantages and grave dangers for the country" [39] is particularly relevant, especially in view of the tension between the need for secrecy and the constitutional principle of checks and balances. Yet, as Justice Brandeis declared, "checks and balances were established in order that this should be a government of laws and not of men." [40]

The 1947 National Security Act represented the exercise of Congress' constitutional power to order the conduct of foreign intelligence activity under law. By placing the authority for foreign intelligence activity on a statutory base, Congress sought to reduce the reliance on "comprehensive and undefined" Presidential power that had previously been the principal source of authority. However, the language of the 1947 Act did not expressly authorize the conduct of covert action and, as discussed earlier, Congress apparently did not intend to grant such authority. As a result, inherent Presidential power has continued to serve as the principal source of authority for covert action.

Congress continued to exercise this constitutional power in subsequent legislation. In the Central Intelligence Act of 1949,[41] Congress

[37] 2 Cranch 170 (1805).
[38] 2 Cranch 170, 178 (1805).
[39] *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 634 (1952) (concurring opinion).
[40] *Myers* v. *United States*, 272 U.S. 52, 292 (1926) (dissenting opinion).
[41] 50 U.S.C. 403a–403j.

set out the administrative procedures governing CIA activities. The 1949 Act regulated the CIA's acquisition of material, the hiring of personnel and its accounting for funds expended.

In 1974, Congress imposed a reporting requirement for the conduct of certain foreign intelligence activities. In an amendment to the Foreign Assistance Act,[42] Congress provided that no funds may be expended by or on behalf of the CIA for operations abroad "other than activities intended solely for obtaining necessary intelligence" unless two conditions were met: a) the President must make a finding that "each such operation is important to the national security of the United States", and b) the President must report "in a timely fashion" a description of such operation and its scope to congressional committees.[43]

In short, the Constitution provides for a system of checks and balances and interdependent power as between the Congress and the executive branch with respect to foreign intelligence activity. Congress, with its responsibility for the purse and as the holder of the legislative power, has the constitutional authority to regulate the conduct of foreign intelligence activity.

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[42] 22 U.S.C. 2422.
[43] *Ibid.*