CONGRESSIONAL REPORTING REQUIREMENTS: TESTING THE LIMITS OF THE OVERSIGHT POWER

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INTRODUCTION

During the spring and summer of 2004, the civil war and devastating humanitarian crisis in Sudan garnered international attention. The United States and the international community debated how best to address the needs of millions of starving refugees as well as how to deal with mounting evidence that the Government of Sudan was perpetrating genocide. This was not the first time in recent history that the United States had encountered this issue. In October 2002 Congress passed the Sudan Peace Act, aimed at facilitating an end to the war. Included among the bill's provisions were several requirements directing the Executive Branch to provide Congress with information on its actions with regard to Sudan.

These requirements are extremely common—and often unnoticed—elements of modern federal legislation. Having created a complex network of federal executive agencies, Congress has struggled with how best to gather information about the activities of the sprawling federal bureaucracy. To carry out this daunting task, Congress has increasingly relied on reporting requirements as its favored monitoring device.

This comment addresses the phenomenon of congressional reporting requirements and examines their constitutional implications. Simply put, reporting requirements are nothing more than statutory demands that the Executive Branch inform Congress of actions it has taken or provide it with factual information on a specified subject. This comment first examines the history and frequency of reporting requirements. It then turns to the question of whether refusal by the Executive Branch to comply with a reporting requirement could give rise to litigation, and it proposes a framework for analysis of that question. Finally, this comment examines Congress's recent use of reporting requirements in the Sudan Peace Act to address the devastating civil war in southern Sudan, and then it applies the proposed analytic framework to those requirements.

I. THE HISTORY AND BACKGROUND OF REPORTING REQUIREMENTS

In the broadest sense, a reporting requirement is any provision enacted by Congress that requires a member of the Executive Branch to supply Congress, or one of its committees, with specific information in the form of a report. This practice has a long history, and today many thousands of reporting requirements are in force. Congress itself has periodically recognized that the utility of many of the reports has diminished with time. In response, it has repeatedly attempted, with only modest success, to eliminate useless or redundant reports.

The first congressional reporting requirements date back to the early days of the Republic.[1] Perhaps the most notorious requirement, however, and the one that arguably led to the current popularity of reporting requirements in general, is contained in the War Powers Resolution.[2] This requirement allows the President, as Commander-in-Chief, to take certain military actions, including the deployment of troops, without congressional approval, so long as he promptly reports his actions to Congress.[3] The constitutionality of this statute has been debated extensively in the literature,[4] but not in the context of the constitutionality of reporting requirements in general. Instead, the literature generally focuses on the line between Congress's power to declare war and the President's power to act as Commander-in-Chief.[5]

The War Powers Resolution is an important link in the history of the congressional reporting requirement, because the decades following the Resolution saw an explosion of reporting requirements. One source estimates that 200 new reports were enacted during the 1960s and nearly 800 were added in the 1970s.[6] In the late 1970s and early 1980s, the General Accounting Office ("GAO") attempted to study the total number of reporting requirements in place at the time. It was unable to do so effectively, given that there is no system for tracking the reporting requirements or for determining whether reports were actually submitted in accordance with the statutes.[7] In 1989, the Wall Street Journal reported that while the Clerk of the House, the Library of Congress, and the GAO each maintained rudimentary lists of the reports required, the GAO had concluded that "the lack of adequate records makes exact counting virtu-

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1. *See* The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 214 (1996) (memorandum from Assistant Attorney General Walter Dellinger) *in* 63 LAW & CONTEMP. PROBS. 514, 565 (2000) [hereinafter Dellinger].

2. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §1541 (2000)).

3. 50 U.S.C. §1543 (2000).

4. *See, e.g.*, JOHN F. LEHMAN, MAKING WAR: THE 200-YEAR-OLD BATTLE BETWEEN THE PRESIDENT AND CONGRESS OVER HOW AMERICA GOES TO WAR (1992); Patrick D. Robbins, Comment, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. REV. 141 (1988); Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984).

5. *See, e.g.*, Edwin B. Firmage, *The War Power of Congress and Revision of the War Powers Resolution*, 17 J. CONTEMP. L. 237 (1991); Allan Ides, *Congress, Constitutional Responsibility and the War Power*, 17 LOY. L.A. L. REV. 599 (1984). An in-depth discussion of the War Powers Resolution is outside the scope of this paper.

6. H.R. REP. NO. 96-1268, at 1 (1980).

7. Walter J. Olson, *How Congress Erodes the Power of the Presidency: The Reporting Burden*, WALL ST. J., Feb. 6, 1989, at A8.

ally impossible."[8] The GAO reached the same conclusion again in 1992.[9]

One commentator describes this phenomenon as "Congress's [u]ncontrollable 'In' basket," noting that by 1990 Congress was requiring about 3,000 reports a year at an estimated cost of $350 million.[10] Many of the required reports must be submitted more than once a year—sometimes even quarterly—to the relevant congressional committees.[11]

Beyond the mere number and frequency of the required reports, the financial and personnel burdens placed on agencies compiling individual reports are often extremely high. In testimony before the House Committee on Government Reform in 2001, Office of Management and Budget ("OMB") Director Sean O'Keefe estimated that one report required by the Gramm-Leach-Bliley Act[12] consumes 12.1 million hours of work annually by the federal agency responsible for it.[13] In addition, once a report is compiled, it must often go through an involved bureaucratic approval process.[14] Before a report is submitted, it must be approved at each step in the executive chain of command before ultimately receiving final approval from the President or a cabinet secretary.[15] As such, reporting requirements are not always the inexpensive mechanisms for gathering information that their proponents hold them out to be. As the case study in Part V, *infra*, demonstrates in further detail, not all reporting requirements are created equal. In addition to substantial variations in the amount of information they require, the type of information required also varies widely.[16]

In general, the reports fall into two broad categories: testimonial and factual. The testimonial category is filled with reports that are descriptive or analytical in nature, frequently explaining to Congress the way in

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8. *Id.* (quoting the 1981 GAO study).

9. *See* GEN. ACCT. OFF., REP. NO. GAO/GGD-92-90FS, CONGRESSIONAL REPORTS: OMB AND OTHER AGENCY REPORTING REQUIREMENTS (Aug. 31, 1992).

10. Jim Payne, *Congress's Uncontrollable 'In' Basket*, WALL ST. J., May 15, 1991, at A14.

11. *Id.*

12. Financial Services Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (involving major reforms to the banking industry).

13. *Paperwork Reduction: Hearing Before the House Subcomm. on Energy Policy, Natural Res. and Reg. Aff.*, 107th Cong. (Apr. 24, 2001) [hereinafter *Paperwork Reduction*] (statement of Sean O'Keefe, Deputy Director, Office of Management and Budget).

14. Olson, *supra* note 7.

15. *Id.*

16. *See id.*; *see also* Pamela Fessler, *Complaints Are Stacking Up As Hill Piles on Reports*, 49 CONG. Q. WKLY. REP. 2562 (Sept. 7, 1991) (describing reports varying in subjects from "the possibility that U.S. aid might inadvertently have helped the Khmer Rouge" to "a report on using existing Air Force bases . . . for the B-2 bomber"), *available at* 1991 WL 5332412.

which a statute is being implemented or a federal program is being administered.[17] Often, they are the result of specific concerns raised by one or more members of the committees of reference.[18] In some cases, these reports are the equivalent of hearing testimony in miniature on a specific issue—statements of the type that would be read into the record by an executive official at an oversight hearing.[19] In other cases, the reports are themselves the subject of hearings held by a committee to further analyze the content of the report.[20]

The second type of report—the factual report—merely presents the compilation and recitation of specific facts and data without analysis.[21] These reports are, almost by definition, most useful in cases where raw data alone indicates whether legislation has been effective or needs modification. The factual report can also be used for political purposes by a committee or a member seeking to make a partisan point about the effectiveness of an agency or a piece of legislation.[22]

Neither type of report consistently demonstrates that the benefits to Congress bear at least a rough proportionality to the administrative costs. While some reports no doubt do, many others have become mostly worthless with the passage of time.[23] A 1988 Congressional Research Service study found that, in a sample of several hundred reports, one-third were "no longer serving a useful purpose."[24] Even Congress has periodically agreed with this finding and recognized that many of the re-

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17. *E.g.*, BUREAU OF AFRICAN AFFAIRS, U.S. STATE DEP'T, 2002 COMPREHENSIVE REPORT ON U.S. TRADE AND INVESTMENT POLICY TOWARD SUB-SAHARAN AFRICA AND IMPLEMENTATION OF THE AFRICAN GROWTH AND OPPORTUNITY ACT, THE SECOND OF EIGHT ANNUAL REPORTS (May 2002), *available at* http://www.state.gov/documents/ organzation/11518.pdf (detailing at length the State Department's implementation of Pub. L. No. 106-200, 114 Stat. 251 (2000), The African Growth and Opportunity Act).

18. The committee of reference is the congressional committee with subject matter jurisdiction over the content of the legislation.

19. *E.g.*, U.S. DEP'T OF JUSTICE, ASSESSMENT OF U.S. ACTIVITIES TO COMBAT TRAFFICKING IN PERSONS (Aug. 2003), *available at* http://www.state.gov/g/tip/rls/rpt/ 23495.htm.

20. *E.g.*, *Reviewing the Sudan Peace Act Report: Hearing Before the Subcomm. on Africa of the House Comm. on Int'l Relations*, 108th Cong. (May 13, 2003), *available at* http://wwwc.house.gov/international_relations/108/87089.pdf (House International Relations Subcommittee on Africa hearing that was convened after the State Department transmitted a report required by the Sudan Peace Act, Pub. L. No. 107-245, 116 Stat. 1504 (2002)).

21. *See, e.g.*, Fessler, *supra* note 16 (describing a report that required the Pentagon to describe its aid to civilians who became unemployed as a result of military base closing and a report that calls for a factual study into the effects of burning oil on troops in the Persian Gulf War).

22. *See id.* (describing reporting requirements as "'an easy out or a face-saving measure' for a member who does not have the votes for a legislative proposal")(quoting former Rep. Lee Hamilton).

23. Olson, *supra* note 7.

24. *Id.*

ports it required of the Executive Branch were duplicative, unnecessary, or simply wasteful.[25] Representative Lee Hamilton, who chaired a 1988 House commission that was charged with identifying unnecessary foreign aid reports, concluded after his study that "[s]ome are valuable, but most of them could be dispensed with."[26] When the task force issued its findings, it noted that many of the reports were not useful because they were simply "too voluminous to be read."[27]

Over the last two decades, Congress has engaged in a cycle of eliminating reporting requirements *en masse* in reform-oriented legislation, then gradually restoring many of the eliminated reports. In addition, scores of new reporting requirements are included in legislation every year. The result is an ongoing increase in the number of reporting requirements on the books, despite Congress's cyclical efforts to the contrary.

Prior to 1980, Congress had passed legislation modifying or eliminating small numbers of reports,[28] but in the 1980s, it began enacting legislation designed to address the issue more comprehensively. The first of five acts, the Congressional Reports Elimination Act of 1980,[29] eliminated or consolidated 131 reports.[30] The bill was the result of recommendations made by the GAO and the OMB.[31] Those agencies compiled a list of reports, which was distributed to congressional committees.[32] Each committee had the opportunity to strike from the list any of the reports within their jurisdiction.[33] The committees initially removed

25. *See* Fessler, *supra* note 16. It is also interesting to note that there has apparently been no suggestion, in the academic literature or otherwise, that the reports might confer a collateral benefit on the public by providing them with information about the operations of the government or the individual policies it is pursuing. This somewhat conspicuous absence may be due in part to the reports' esoteric subjects. Nevertheless, it is not inconceivable that some of the reports could in some instances be a source of information for either the public or the news media. See *infra* Part IV.B.1 for an example of a reporting requirement that might actually provide the public with useful information on a topic that has recently garnered mainstream interest.

26. *Id.*

27. *Id.*

28. *See* Pub. L. No. 83-706, 68 Stat. 966 (1954); Pub. L. No. 86-533, 74 Stat. 245 (1960); Pub. L. No. 89-348, 79 Stat. 1310 (1965); Pub. L. No. 93-608, 88 Stat. 1969 (1967).

29. Pub. L. No. 96-470, 94 Stat. 2237 (1980).

30. H.R. REP. NO. 96-1268, at 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4675.

31. These recommendations had been required by the Legislative Reorganization Act of 1974, in order to "enhance [the reports'] usefulness to the congressional users and to eliminate duplicative or unneeded reporting." Legislative Reorganization Act of 1974, Pub. L. No. 93-344, 88 Stat. 327, § 801, 31 U.S.C. 1152(d) (1974).

32. H.R. REP. NO. 96-1268, *supra* note 30, at 2.

33. *Id.*

104 reports from the list, and the Government Operations Committee then removed another twenty-five from the bill during markup.[34]

In 1982, the same process took place.[35] The OMB requested that Congress eliminate approximately 200 more reports,[36] and the relevant congressional committees whittled the figure down to seventy-seven reports.[37] The result was the Congressional Reports Elimination Act of 1982.[38] Four years later, the same cycle led to the passage of the Congressional Reports Elimination Act of 1986.[39] Testifying for the GAO, Charles Bowsher estimated that there were approximately 3,000 reporting requirements in place at the time and that, in 1986 alone, Congress created 575 new reporting requirements.[40] Nevertheless, the OMB was only able to identify 240 unnecessary or overly burdensome reports.[41] Members of Congress were generally dissatisfied with the recommendations, and the final legislation affected only twenty-five reports.[42]

In 1995, Congress tried to address the issue again with the Federal Reports Elimination and Sunset Act of 1995,[43] with somewhat more success. In addition to eliminating nearly 200 reports, the Act automatically eliminated reports containing "regular periodic reporting requirements" four years after the Act was signed into law.[44] Finally, the Act required the President to identify additional reports he believed should be eliminated during the next budget cycle.[45] Acting in accordance with the 1995 Act, President Clinton identified a list of 400 unnecessary or wasteful reports.[46] That list became the basis of the Federal Reports Elimina-

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34. *Id.*

35. H.R. REP. NO. 97-804, at 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3435.

36. *Id.* The OMB indicated that it was acting pursuant to a provision in the Paperwork Reduction Act of 1980.

37. *Id.* at 55.

38. Congressional Reports Elimination Act of 1982, Pub. L. No. 97-375, 96 Stat. 1819 (1982).

39. Congressional Reports Elimination Act of 1986, Pub. L. No. 99-386, 100 Stat. 821 (1986).

40. H.R. Rep. No. 99-698, at 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1833.

41. GEN. ACCT. OFF., REP. NO. GAO/AFMD-88-4, EFFORTS TO ELIMINATE OR MODIFY REPORTING REQUIREMENTS NEED TO BE IMPROVED, at 4-5 (Apr. 1988).

42. A GAO study issued in 1988 was sharply critical of the process that led to the enactment of the 1986 Act. It opined that the agencies had not adequately consulted with Congress during the process of recommending reports for elimination and that they did not adequately justify their ultimate proposals to Congress. As a result, members were not convinced that eliminating many of the reports proposed by agencies would allow them to perform their oversight functions effectively. *See* GEN. ACCT. OFF., *supra* note 41.

43. Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, 109 Stat. 707 (1995).

44. H.R. REP. NO. 104-327, at 25 (1995), *reprinted in* 1995 U.S.C.C.A.N. 674.

45. S. REP. NO. 105-187, at 1 (1998), *available at* 1998 WL 236792.

46. *Id.* at 1-2.

tion Act of 1998.[47] Again, committee chairmen and ranking members of the committees of reference reviewed the list and indicated their objections to eliminating specific reports.[48] As a result, the list of 400 reports dwindled to the 187 that were ultimately included in the 1998 Act.[49]

Congress has not taken comprehensive action in this area since 1998, but many of the reports affected by the various Reports Eliminations Acts have since been reinstated in some form. In 2001 OMB Director Sean O'Keefe noted that, although the two most recent Acts had together eliminated hundreds of reports, during the next two years alone, Congress imposed over 250 additional reporting requirements, many of which merely reimposed requirements that had just been eliminated several months earlier.[50]

Reporting requirements have a history nearly as long as that of Congress itself. While rarely publicized, the requirements are imposed with astounding frequency. Though Congress and its committees have periodically acknowledged that scores of the requirements should be eliminated, they have proven easier to implement than to repeal. Accordingly, the number of reporting requirements in place continues to grow, and the goal of the Reports Elimination Acts seems not to have been reached in the end. Taken as a whole, this history makes it clear that once enacted, a reporting requirement is likely to remain in place virtually indefinitely, regardless of its burden on the Executive Branch or its ultimate worth to Congress.

II. REPORTING REQUIREMENTS AS A FUNCTION OF CONGRESS'S OVERSIGHT POWER

The power to create executive agencies is vested in Congress, not the President.[51] Implicit in this power to create is the authority to monitor and investigate.[52] This authority, which has come to be known as the

47. Federal Reports Elimination Act of 1998, Pub. L. No. 105-362, 112 Stat. 3280 (1998).

48. S. REP. NO. 105-187, *supra* note 45, at 2.

49. *Id.*

50. *See, e.g.*, Pub. L. No. 107-74, An Act to Prevent the Elimination of Certain Reports, Pub. L. No. 107-74, 115 Stat. 701 (2001) (restoring reports that had previously been required of the National Aeronautics and Space Administration (NASA), the National Science Foundation (NSF) and the National Oceanographic and Atmospheric Administration (NOAA)); H.R. 3111, 96th Cong. (1980); H.R. 3234, 96th Cong. (1980); H.R. 3046, 96th Cong. (1980); H.R. 3002, 96th Cong. (1980) (each proposing to restore a previously eliminated reporting requirement).

51. Wiener v. United States, 357 U.S. 349, 356 (1958).

52. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1975); Barenblatt v. United States, 360 U.S. 109, 111 (1959).

oversight power, and its limits are important to understanding the constitutionality of reporting requirements. The modern oversight power is understood to be very broad but not unlimited.[53] Specifically, congressional oversight cannot be exercised in a way that encroaches on the responsibilities of the Executive Branch and thus violates the constitutional principle of separation of powers.[54] At the very least, exercise of oversight power must be undertaken with some legislative purpose in mind.[55] Reporting requirements can be a valid expression of the oversight power, but they must fit within constitutional limits.

A. The Development of the Modern Oversight Power

Congress created dozens of new federal agencies during the twentieth century and delegated a significant amount of quasi-legislative authority to those agencies.[56] Simply put, significant portions of the modern Executive Branch would not exist but for the New Deal, the Great Society, and their more recent progeny.[57] One of the results of the continued creation of new administrative agencies was a significant shift in the balance of power between the Legislative and Executive Branches. In an effort to check the shift that resulted from the New Deal, Congress passed the Legislative Reorganization Act of 1946.[58] The act vigorously reasserted congressional oversight power over the Executive Branch, and it remains the statutory basis for a great deal of contemporary oversight activity.

In the 1946 Act, Congress defined oversight as the power of a congressional house or committee to "exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee."[59] Thus, oversight of an individual agency can be conducted by any committee holding jurisdiction over the subject matter of the agency's responsibilities. In this way, the oversight authority is a check held by the Legislative Branch on the Executive Branch's implementation of statutes. The powers of oversight and investigation have been held to be

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53. *Eastland*, 421 U.S. at 504; *Barenblatt*, 360 U.S. at 111-112.

54. *See Barenblatt*, 360 U.S. at 112.

55. *Id.* at 111-112.

56. *See* ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL (1959); WILLIAM EDWARD LEUCHTENBURG, THE NEW DEAL: A DOCUMENTARY HISTORY (1968).

57. *See* SCHLESINGER, *supra* note 56; LEUCHTENBURG, *supra* note 56.

58. Legislative Reorganization Act of 1946, 2 U.S.C. §31 (1946). *See* Karla W. Simon, *Congress and Taxes: A Separation of Powers Analysis*, 45 U. MIAMI L. REV. 1005, 1027 n.81 (1991) (indicating that the Act was intended to renew oversight of the Executive Branch).

59. Legislative Reorganization Act of 1946, ch. 753, § 136, 60 Stat. 832 (1946).

both broad and authorized by the Constitution.[60] The Supreme Court has indicated that the oversight power is contained within the Constitution's grant of "legislative power" to Congress[61] and is consistent with the necessary and proper clause.[62]

B. Types of Oversight

Oversight actions fall into two informal and overlapping categories: legislative and investigative.[63] In practice, legislative oversight is most frequently undertaken in the form of committee and subcommittee hearings.[64] Legislative oversight can involve studying whether acts passed by Congress have been implemented effectively[65] or whether new legislative action should be taken in an area where Congress has previously acted.[66] The committee usually invites at least one representative from the appropriate federal agency to oversight hearings, along with several experts from the field.[67] Although legislative oversight usually has at least some investigative aspects, its ultimate goal is not to expose wrong-

60. Barenblatt v. United States, 360 U.S. 109, 111 (1959).

61. U.S. CONST. art. I, § 8, cl. 18.

62. *See* McGrain v. Daugherty, 273 U.S. 135 (1927); Watkins v. United States, 354 U.S. 178, 187 (1957).

63. Though the semantic distinction is mine, it is based mostly on the fact that Congress typically treats them as two different functions. Indeed, modern congressional committees also tend to separate their work, even at the staff level, along the lines that I have drawn. While writers have spoken of "the power of oversight" and "the investigative power" as two distinct concepts, I view both as arising out of the same broad and inherent power of inquest, which I refer to merely as oversight. *See generally* MORTON ROSENBERG, INVESTIGATIVE OVERSIGHT; AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY 1 (2003).

64. See the examples of the hearings cited *infra* notes 65-66.

65. Rule X(2)(b)(1)(A), Rules of the House of Representatives, 108th Cong. 9 (Jan. 7, 2003), *available at* http://www.house.gov/rules/108rules.pdf; Rule XXVI(8)(a)(1), Standing Rules of the Senate, Revised to April 27, 2000, *available at* http://rules.senate.gov/senaterules/rule26.htm. For an example of this principle in practice, see *Visa Overstays: A Growing Problem for Law Enforcement: Hearing Before the Subcomm. on Immigration, Border Sec., and Claims of the House Comm. on the Judiciary*, 108th Cong. (October 16, 2003), *available at* http://www.house.gov/judiciary/89878.PDF [hereinafter *Visa Hearings*] (examining whether the federal agencies were failing to enforce laws against overstaying non-immigrant visas).

66. Rule X(3), Rules of the House of Representatives, *supra* note 65, at 9; Rule XXVI(8)(a)(2), Standing Rules of the Senate, *supra* note 65. For an example of this principal in practice, see *Should There Be A Social Security Totalization Agreement With Mexico?: Hearings Before the Subcomm. on Immigration, Border Sec., and Claims of the House Comm. on the Judiciary*, 108th Cong. (Sept. 11, 2003), *available at* http://www.house.gov/judicary/89298.PDF.

67. For a representative example of witness lists at oversight hearings, see *Visa Hearings*, *supra* note 65, at III.

doing.[68] Instead, committees use legislative oversight to examine policy questions, which frequently involve whether an agency's authority or discretion in an area should be expanded, modified, or even contracted.[69]

Legislative oversight of an administrative agency can be undertaken in any form by any committee or subcommittee with subject matter jurisdiction. The respective rules of the House and Senate set out the agencies over which individual committees can exercise oversight.[70] Rule X(1)(f)(10) of the Rules of the House, for example, gives the House Committee on Energy and Commerce jurisdiction over the Department of Energy and the Federal Energy Regulatory Commission.[71] The chair of the Committee on Energy and Commerce is thus free to conduct as much or as little oversight of those agencies as he or she sees fit. The Committee can agree to rules delegating all or some of the Committee's oversight responsibilities to a subcommittee.[72]

Investigative oversight, unlike legislative oversight, typically involves examining allegations of corruption or malfeasance within an individual department or by a specific official.[73] Though the investigation may ultimately foster a legislative response, its primary purpose is simply to bring the relevant facts to light.[74] The determination of whether and how best to legislatively remedy the situation is likely to take place later, after the investigation is completed. Investigative hearings are frequently high-profile affairs and often are initiated in response to widely reported scandals.[75] The investigative oversight power has been used to shed light on scandals from Teapot Dome to the Iran Contra affair to Enron.[76] Today, a significant portion of investigative oversight is undertaken by the House Government Reform and the Senate Governmental

68. *See* Rule X, Rules of the House of Representatives, *supra* note 65, at 9.

69. *Id.* (explaining this principle of oversight in detail).

70. *See id.* at Rule X(1) (defining the jurisdiction of the standing committees of the House).

71. *Id.* at Rule X(1)(f)(10).

72. *See* The Subcommittee on Oversight and Investigations of The House Committee on Energy and Commerce, *at* http://energycommerce.house.gov/108/subcommittees/Oversight_and_Investigations.htm (stating that the subcommittee has "[r]esponsibility for oversight of agencies, departments, and programs within the jurisdiction of the full committee, and for conducting investigations within such jurisdiction") (last visited Oct. 10, 2004).

73. McGrain v. Daugherty, 273 U.S. 135, 161 (1927).

74. One commentator has argued that in addition investigative oversight "sustains and vindicates [Congress's] role in our constitutional scheme of separated powers and checks and balances." ROSENBERG, *supra* note 63, at 1.

75. For a more extensive account of congressional investigations throughout history, see JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE, § 2 (1988); CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1974 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975).

76. *See* ROSENBERG, *supra* note 63, at 1.

Affairs Committees. In fact, the House Government Reform Committee was primarily responsible for Congress's investigations into allegations of wrongdoing by the Clinton administration, including Whitewater and Travelgate.[77]

C. The Limits of the Oversight Power

Investigative oversight includes a broad power to subpoena documents and to compel individuals to appear before Congress or one of its committees. This subpoena power has been amply litigated,[78] and private individuals who defy congressional subpoenas risk charges of contempt of Congress.[79]

The oversight power as a whole, however, is subject to both the inherent limits of the legislative power and the external limits of the Bill of Rights. Litigation arising out of the House Committee on Un-American Activities during the 1950s helped to clarify the limits of the power. In *Barenblatt v. United States*, the defendant refused to answer five questions asked of him at a hearing of the Committee.[80] Specifically, the Committee asked whether he was a member of the Communist Party, and whether he was associated with various other communist organizations.[81] The defendant asserted the privilege against self-incrimination at the hearing. For his refusal to answer, he was convicted of five counts of contempt of Congress under 2 U.S.C. §192.[82]

The Court held that the defendant's right of free association under the First Amendment must be balanced against the interest of Congress in compelling the answers.[83] The existence of such an interest, according to the Court, is to be determined based on whether the oversight investigation is related to a valid legislative purpose.[84] Applying the facts of the case, the Court explained that Congress has "wide" power to regulate communist activity with legislation, given the Communist Party's perceived threat to national security at the time.[85] This power suffi-

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77. *See* David Wagner, *Congressional Investigations*, INSIGHT MAGAZINE, Dec. 16, 1996, at 8.

78. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); The 1992-93 Staff of the Legislative Research Bureau, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 SYRACUSE J. OF LEGIS. & POL'Y 1, 7 (1995).

79. *See* Barenblatt v. United States, 360 U.S. 109, 113 n.1, 115 (1959).

80. *Id.* at 113.

81. *Id.* at 114.

82. *Id.* at 113.

83. *Id.* at 126-27.

84. *Id.* at 127.

85. *Id.* at 127-28.

ciently establishes a valid legislative purpose. Indeed, because the Communist Party advocated the violent overthrow of the U.S. government, according to the Court, the individual's free association interest was comparatively small.[86] In the end, the Court ruled that it lacked authority to stop the investigative activities of the House Committee on Un-American Activities or to permit the defendant to refuse to answer its questions.[87]

The oversight power is also subject to self-imposed limits created by Congress. In *Watkins v. United States*,[88] decided two years before *Barenblatt*, the Court explained that the power of individual committees to conduct investigations is limited to the subject matter over which the committee has legislative jurisdiction.[89] In *Watkins*, the defendant had also appeared before the Committee on Un-American Activities. Watkins answered most of the questions asked of him by the Committee, but refused to answer questions that he believed fell outside of the scope of the Committee's authority.[90] Specifically, he openly discussed his own association with the Communist Party, but refused to indicate whether other individuals named by the Committee were Communists.[91] The Court began its analysis with a lengthy history of the British Parliament's power to investigate and issue contempt citations.[92] Among other things, the opinion describes how the power to hold individuals and officials in contempt, which was absolute and not checked by any other governmental body, was abused by the Parliament and used for political purposes.[93]

The *Watkins* court further explained that the authority of individual committees is limited by the authorizing resolution that either the House or Senate adopts in order to create the committee in the first instance.[94] This authorizing language provides individuals responding to questions put by a committee with a benchmark for determining whether the "question under inquiry" is appropriate.[95] The Court held that committees must make the question under inquiry clear at the outset.[96] This ensures that subpoenaed individuals will have enough information to decide

86. *Id.* at 128-29.
87. *Id.* at 134.
88. 354 U.S. 178 (1957).
89. *Id.* at 187.
90. *Id.* at 185.
91. *Id.* at 183-85.
92. *Id.* at 188.
93. *Id.* at 188-93.
94. *Id.* at 201. *See also* discussion *infra* Part II.A-B.
95. *Watkins*, 354 U.S. at 208-09.
96. *Id.* at 214-15.

whether specific questions are so far removed from the subject of the inquiry that they violate the Due Process Clause of the Fifth Amendment.[97]

The oversight power similarly does not extend into matters that are within the province of another branch of government.[98] Put differently, the subject of oversight activity must be one on which the Congress could legislate or make appropriations.[99] In *Eastland v. United States Servicemen's Fund*,[100] the Court considered whether specific investigative oversight activity was within the Constitution's grant of legislative power, and thus whether the speech and debate clause provided immunity for the members of Congress conducting the investigation. A Senate subcommittee initiated an investigation of the United States Servicemen's Fund ("USSF"), a corporate entity that had established coffeehouses on U.S. military bases around the world. The USSF distributed literature opposing U.S. military involvement in southeast Asia and encouraged servicemen to express their anti-war opinions at the coffeehouses.[101] The subcommittee subpoenaed the bank records of the USSF to determine the sources of its funding, and the USSF challenged the legitimacy of the investigation.[102] The Court stated that in order to be legitimate, "[t]he subject of any inquiry always must be one 'on which legislation could be had.'"[103] Applying this rule to the facts of the case, the justices concluded that the investigation was legitimate because it involved gathering facts on a subject—namely the activity of corporations on military bases—on which Congress could legislate.[104]

Despite the existence of the case law described above, the Court has not been forced to specify more precisely the extent to which individual oversight inquiries must be related to potential legislation. Similarly, while reporting requirements in general are thought to be a legitimate function of the oversight power and thus constitutional,[105] the constitutionality of an individual reporting requirement has never been formally challenged in the courts. Because a court has never confronted the question directly, it remains unclear when a reporting requirement reaches beyond legitimacy as a function of the oversight power, and becomes

97. *Id.* at 215.

98. Barenblatt v. United States, 360 U.S. 109, 112 (1959) (explaining Congress "cannot inquire into matters that are exclusively the concern" of a coordinate branch).

99. *See id.* at 111 (explaining "[t]he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution").

100. 421 U.S. 491 (1975).

101. *Id.* at 494.

102. *Id.* at 494.

103. *Id.* at 504 n.15 (quoting McGrain v. Daugherty, 273 U.S. 135, 177 (1927)).

104. *Eastland*, 421 U.S. at 506.

105. Dellinger, *supra* note 1; 1 Op. Att'y Gen. 335, 336 (1820).

subject to an external constitutional check such as the principle of separation of powers. Part III, *infra*, addresses the contours of this question.

III. REPORTING REQUIREMENTS AND THE PRINCIPLE OF SEPARATION OF POWERS

While individuals have occasionally resisted testifying before congressional committees on the grounds that the committee was acting outside the scope of its oversight powers,[106] an executive agency has yet to refuse to comply with a reporting requirement. It is not inconceivable, however, that an overburdened agency faced with an arduous reporting requirement imposed by a hostile Congress might someday assert constitutional grounds for refusing to comply with a requirement.[107] Similarly, the agency might comply only partially, claiming that full compliance is not required by the Constitution. If the issue were of sufficient importance to both parties, attempts at negotiation[108] could fail, leading a group of irritated members of Congress to take the issue to the courts. Given the lack of previous litigation on this issue, it is unclear what the outcome would be if the President or an executive agency were to refuse to comply, or to comply only partially, with a reporting requirement imposed by a statute.

Although the practice of imposing reporting requirements is generally believed to be constitutional,[109] the substance of individual reports could still raise questions about constitutionality. Were a reporting requirement to be challenged in the courts, it might be analyzed under both the political question doctrine and the separation of powers principle. Applied in light of existing precedent, the political question doctrine probably does not bar the challenge from proceeding, while the existing separation of powers jurisprudence suggests at least one framework for the analysis of individual reporting requirements.

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106. *See, e.g.*, *McGrain*, 273 U.S. 135; Barenblatt v. United States, 360 U.S. 109 (1959).

107. As *infra* Part IV illustrates, such a scenario could arise relatively easily out of a dispute over whether Congress has the power to implement the reporting requirement in question. Similar disputes have arisen when Congress has subpoenaed the Executive Branch for specific information as part of an investigation. *See, e.g.*, United States v. Nixon, 418 U.S. 683 (1974). The issue here, however, involves the case where Congress demands information in a statute rather than a subpoena. Congress need only make the type of information likely to be withheld during an investigation the subject of a reporting requirement in order to trigger the scenario contemplated here.

108. It is worth pointing out that both sides do have considerable negotiating leverage. While an agency can urge the President to veto legislation enacted over its protestations, Congress ultimately holds the power of the purse, and can credibly threaten the funding of the agency causing it problems.

109. Dellinger, *supra* note 1; 1 Op. Att'y Gen. 335, 336 (1820).

A. Reporting Requirements are Likely Not Political Questions

A threshold question in analyzing the constitutionality of a reporting requirement is whether the political question doctrine would bar a court's involvement in the issue in the first place. *Baker v. Carr*,[110] the leading political question case, involved a reapportionment dispute that gave rise to an equal protection challenge. The plaintiffs complained that legislative districts in the state had been drawn "arbitrarily and capriciously."[111] The Court held that a political question exists when resolution of the issue turns on "standards that defy judicial application," leaving the Court unable to effectively determine the constitutionality of the action in question.[112] The most basic issue that the Court was asked to decide was "the consistency of state action with the [Fourteenth Amendment]," an area where judicial standards "are well developed and familiar."[113] As such, there were adequate standards available on which the Court could base an opinion, and the issue was thus justiciable.

The Court's holding in *Baker* relied in part on an earlier political question case, *Luther v. Borden*.[114] In *Luther*, two competing groups claimed to be the legitimate government of Rhode Island and turned to the courts to resolve the crisis. The Court found that there were no judicially cognizable standards for determining which of the two was lawful. The President had already indicated which one he deemed to be legitimate, and the Court held that the President's decision was a purely political determination.[115] The petitioners claimed that the Court could decide the issue based on the Guaranty Clause, which requires the United States to guarantee a republican form of government to the states. In *Luther*, however, the Court said that there were no standards by which to make such a decision. Although the text of the *Luther* opinion is somewhat cryptic, the *Baker* court later identified the specific factors that had created a political question in *Luther*:

> the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President[;] . . . the need for finality in the executive's decision; and the

110. 369 U.S. 186 (1962).
111. *Id.* at 192.
112. *Id.* at 211.
113. *Id.* at 226.
114. 48 U.S. (7 How.) 1 (1849).
115. *Id.* at 44.

> lack of criteria by which a court could determine which form of government was republican.[116]

In *Nixon v. United States*, the Court based a finding of nonjusticiablility on structural arguments about the separation of powers.[117] The case involved a federal district court judge who was impeached and tried before a Senate committee, rather than the full Senate.[118] The court held that the constitutional phrase "the Senate shall have the sole power to try impeachments" is a textual commitment that gives the Senate the power to structure impeachment trials as it sees fit.[119] In addition, the Court reasoned that the "sole power to try" language was so vague and imprecise that it did not "afford any judicially manageable standard of review."[120] As such, the issue could not be reviewed by a court.

Based on these authorities, a dispute over reporting requirements does not appear to present a political question. Because neither the oversight power nor reporting requirements are the subject of a specific clause in the Constitution, there is no clear textual commitment to a coordinate branch. The formal task of a court would thus be to determine whether imposing the disputed report falls outside of Congress's enumerated legislative powers. As discussed above, a "well developed and familiar" body of case law on the limits of the oversight power already exists,[121] giving the Court ample standards on which to base its decision. On the other hand, the Court would also likely consider the fact that, as in *Luther*, it has no formal mechanism for compelling the President to prepare a disputed report, and presidential disobedience would weaken the Court's apparent authority.[122] On balance, however, this risk is comparatively small given the lack of a textual commitment and the existing cases on the oversight power. It is thus unlikely that a court would use the political question doctrine to decline to consider a case involving a disputed reporting requirement.

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116. *Baker*, 369 U.S. at 222.
117. 506 U.S. 224 (1993).
118. *Id.* at 226.
119. *Id.* at 230-32.
120. *Id.* at 230.
121. *See supra* Part II.
122. *Cf.* President Andrew Jackson's reported response to the Supreme Court's ruling in favor of the Cherokee Tribe in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832): "John Marshall has made his decision, now let him enforce it." The quote has been recounted by numerous courts and commentators, including most famously in 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 219 (1922).

B. A Legal Framework for Evaluating the Constitutionality of Challenged Reporting Requirements

Because the political question doctrine does not suggest that the enforceability of reporting requirements is a nonjusticiable question, a two-step analysis should be employed to determine whether an individual requirement is constitutional.[123] In step one, a court called on to resolve a dispute over the constitutionality of an individual requirement should determine the type of information required in the report. This step involves determining whether the information relates to a function that has been treated as traditionally legislative in nature or whether it also includes traditionally executive functions. In step two, the court should apply the appropriate standard of review. Subsection 1, *infra*, concludes that if the information in the required report relates to a traditionally legislative function, the court should treat the requirement as presumptively valid in step two and review it with extreme deference. On the other hand, Subsection 2, *infra,* argues that if the report involves a mixture of legislative and executive functions, the court should apply stricter scrutiny to the requirement in step two.

1. Easy Cases: Requirement Clearly Falls Within the Limits of the Oversight Power

Most of the reports required by Congress fall well within the limits of its legitimate oversight activity. The *Watkins* court stated that "[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of Congress."[124] Ample jurisprudence on the powers of Congress exists to allow courts to determine whether the report in question is adequately related to congressional powers to legislate and appropriate.[125] These are "easy cases." A report that is related, for example, to the implementation of recently enacted legislation could, almost by definition, help Congress determine whether that legislation is effective and what, if any, legislative changes are needed. Such a report would thus clearly fall within the congressional oversight power and would be upheld as constitutional by a court. Similarly, a requirement that is incontrovertibly related to any of Congress's other enumerated powers[126]

123. A two-step analysis is made necessary by the fact that, as discussed in Part I, *supra*, reporting requirements cover an extraordinary variety of topics and issues. As discussed in the remainder of this Part, the type of information called for in a report will determine which standard is applied in step two of the analysis.

124. Watkins v. United States, 354 U.S. 178, 187 (1957).

125. *See supra* Part II.

126. *See* U.S. CONST. art. I, §8.

would present an easy case in which the reporting requirement would likely be upheld.

In determining whether the relationship between congressional power and the specifics of the reporting requirement is sufficiently close, the rational basis test applied by the Supreme Court in other contexts[127] seems to be the most appropriate standard for a reviewing court to apply in step two of the framework. Under a rational basis review, Congress's reporting requirement would be upheld so long as it was rationally connected to an enumerated power. This standard would not be difficult for the legislature to meet, provided that the Court applied the test in its traditional form, rather than resorting to a seemingly stronger version of it.[128]

Armed with a finding of constitutionality, Congress could continue to insist on the reporting requirement. It could even credibly threaten agency heads who refused to comply with the statute and the order of a court with sanctions ranging from a contempt of Congress citation to impeachment.[129] This is an unlikely scenario, however. Given the realities of litigation and politics, any report that would actually be challenged would not likely present an "easy case."

2. Hard Cases: Requirement Involves a Power that is Neither Purely Legislative nor Purely Executive

Applying the *Watkins* "related to . . . a legitimate task of Congress" standard described above will not produce convincing results in all cases. There are areas such as war-making and foreign affairs where neither Congress nor the Executive Branch has exclusive constitutional power.[130] Though Congress could argue that reports in these areas of

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127. *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

128. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (applying the rational basis test in a particularly rigorous manner in an equal protection challenge to a local zoning ordinance requiring special use permits for group homes for the mentally retarded).

129. Beyond the threat of contempt, however, Congress and the President each have numerous mechanisms by which to compel each other to take action. Both need each other (in terms of advancing their agenda and ensuring that the government continues to operate), and this fact, much more than a court order, is likely to result in the settlement of a dispute over a reporting requirement.

130. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 261 (Nov. 2001).

> Although 'the executive Power' contains substantial foreign affairs powers, it is checked by substantial limitations: the grant of some formerly 'executive' foreign affairs powers to Congress, the sharing of some 'executive' powers with the Senate, Congress's power over appropriations and foreign affairs legislation, and the Presi-

shared responsibility are required to assist it in determining whether further legislation is needed, the burden imposed by the reports is often very high and the value speculative. As such, a finding that these reports are constitutional because they are a valid exercise of the legislative oversight function is likely to be little more than a conclusory statement if a court employs the rational basis standard.

In instances where the report involves a power that is not purely executive or purely legislative, the second step in the analysis of the constitutionality of a specific reporting requirement must involve a less deferential standard of review if the analysis is to be satisfactory. Such a step should involve balancing the claimed legislative interest in having the information against the executive interest in retaining the information. Indeed, United States Attorney General William French Smith recommended a similar approach in a 1982 response to a congressional subcommittee's subpoena of a large number of documents held by the Environmental Protection Agency ("EPA").[131] The EPA administrator, Anne Gorsuch, refused to turn over a number of the requested documents, claiming that they were confidential and covered by executive privilege.[132] President Reagan subsequently ordered Gorsuch not to turn over the documents as well.[133]

In a letter to the President, Attorney General Smith said that the congressional oversight interest should be weighed against the Executive Branch's interest in protecting "predecisional" advice and documents.[134] Smith went on to elaborate that Congress's oversight powers are stronger when "specific legislative proposals are in question" than when "the congressional interest is a generalized one of ensuring that the laws are well and faithfully executed . . . ."[135] He concluded that a specific and narrow request for information supported by a well articulated need "will

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dent's lack of independent lawmaking power.

Id.; *see also* C. Jeffrey Tibbels, Comment, *Delineating the Foreign Affairs Function in the Age of Globalization*, 23 SUFFOLK TRANSNAT'L L. REV. 389, 393 (1999) ("In a historical context, foreign affairs authority has not been the sole preserve of the Executive but, rather, has migrated from Congress to the Executive and back again during various stages of American political development.").

131. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1133 (3d ed. 2001). *See also* Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987).

132. ESKRIDGE, *supra* note 131, at 1133.

133. *Id.*

134. 43 Op. Att'y Gen. 327 (October 13, 1981); *see also* United States v. Nixon, 418 U.S. 683 (1974) (weighing the Executive Branch's interest in preserving the predecisional information contained on the Watergate tapes against the special prosecutor's demonstrated need for the tapes for prosecutorial purposes).

135. Op. Att'y Gen., *supra* note 134, at 331.

weigh substantially more heavily in the constitutional balancing" than an overbroad and unspecific one.[136]

Attorney General Smith's analysis should be applied to potential future disputes involving reporting requirements. Specifically, the scope and specificity of the report should be measured against the burden that would be placed on the Executive by having to discover and analyze the information required by the report and any interest of the Executive in keeping the relevant information out of the public domain.

The question of whether a reporting requirement is constitutional is thus much more complicated than merely concluding that the oversight power is broad enough to include it. While the political question doctrine would not likely result in a case being found nonjusticiable, a careful separation of powers analysis might lead a court to find that a specific reporting requirement is unconstitutional. The reality of reporting requirements and of the modern administrative state does not suggest a bright line rule that allows the permissible to be neatly separated from the impermissible. Instead, the result is more likely to turn on a less satisfying balancing of the relative interests involved.

IV. WHEN OVERSIGHT BECOMES POLICY: A CASE STUDY ON THE REPORTING REQUIREMENTS IN THE SUDAN PEACE ACT

The framework proposed above is best understood in the context of a recently enacted statute containing multiple reporting requirements. In addition, the history of the requirements highlights that it can be difficult to determine whether a reporting requirement has been imposed for the purpose of evaluating the utility of additional legislation. The history emphasizes the problems inherent in an area of shared constitutional responsibility, especially foreign relations.

A. The Legislative History of the Sudan Peace Act

Sudan[137] is occupied by a predominantly Arab Muslim population in the north and a predominantly Christian population in the south.[138] Since gaining its independence from Great Britain in 1956, the country has remained extremely volatile, moving from one civil war to an-

136. *Id.*

137. Known formally as The Republic of The Sudan. *See* the Government of Sudan's Official Web Site, *System of Government*, *at* http://www.sudan.gov.sd/English/system%20of%20rule.htm (last modified Aug. 29, 2004).

138. CONGRESSIONAL RESEARCH SERV., 108TH CONG., THE SUDAN PEACE PROCESS 1 (2003), *available at* http://www.ecosonline.org/back/pdf_reports/2003/sudanreport2003.pdf (June 4, 2003).

other.[139] The current civil war has been ongoing since 1983.[140] The roots of the conflict are complex, but can be reduced broadly to religious and ethnic differences.[141] Specifically, the government in the northern city of Khartoum has pursued an agenda of Islamic fundamentalism and oppression of non-Muslim populations.[142] While the southerners have been able to organize only a basic resistance force, the government has received enormous financial gains from the recent discovery of oil in the country, allowing it to continue its military operations and acquire increasingly sophisticated weaponry.[143] During the spring and summer of 2004, the war shifted and took on a new front in the Darfur region of Sudan.[144] A small group of rebels rose up against the government and were quickly and brutally suppressed by Arab militias known as Janjaweed, which had allegedly been dispatched by the Sudanese government.[145] The fighting precipitated a devastating humanitarian crisis and the displacement of more than one million civilians.[146] U.S. Secretary of State Colin Powell testified before Congress that the Bush administration believed the situation constituted genocide.[147] By the fall of 2004, the U.S. and the international community had done relatively little to address the situation in Darfur. They had instead provided modest support to the ef-

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139. *Id.*

140. *Id.* Over two million people, overwhelmingly from the South, have been killed over the past twenty years either directly or indirectly because of the war and millions more have been displaced within the country. *Id.* at 1. *See also* CONGRESSIONAL RESEARCH SERV., 108TH CONG., SUDAN: HUMANITARIAN CRISIS, PEACE TALKS, TERRORISM, AND U.S. POLICY 1 (2003), *available at* http://www.fas.org/ man/crs/IB98043.pdf (April 23, 2003).

141. *See* CONGRESSIONAL RESEARCH SERV., *supra* note 138.

142. *Id.* at 1-3; *see also Path to Peace in Sudan: Hearing before the House Comm. on Int'l Relations*, 107th Cong. 74 (2002) (statement of Ken Isaacs, Samaritan's Purse International).

143. *See* Isaacs, *supra* note 142 ("From the National Islamic Front perspective, oil revenue serves to bankroll their helicopter gunships, tanks, armored vehicles, and weapons factories."); *see also* Sue Lautze, *The War the World Isn't Watching*, L.A. TIMES, Sept. 24, 2000, at M2.

144. *See generally* HUMAN RIGHTS WATCH, *Background*, *in* EMPTY PROMISES? CONTINUING ABUSES IN DARFUR, SUDAN, *available at* http://hrw.org/backgrounder/africa/sudan/2004/3.htm#_Toc79855620 (Aug. 11, 2004).

145. *Id. See also* Eric Reeves, Editorial, *Regime Change in Sudan*, WASH. POST, Aug. 23, 2004, at A15 (providing an excellent analysis of the mechanics of the fighting and the involvement of the Government of Sudan).

146. HUMAN RIGHTS WATCH, *supra* note 144.

147. *See* David S. Cloud, *Powell Cites Sudan for Genocide But Calls U.N. Sanctions Unlikely*, WALL ST. J., Sept. 10, 2004, at A6. Both houses of Congress have passed resolutions reaching the same conclusion. *See* Declaring Genocide in Darfur, Sudan, H.R. Con. Res. 467, 108th Cong. (2004) (enacted); A Concurrent Resolution Declaring Genocide in Darfur, Sudan, S. Con. Res. 133, 108th Cong. (2004) (enacted). The European Union (EU) has conducted its own investigation and, despite overwhelming evidence to the contrary, has "found no evidence" of genocide. *See EU Finds No Evidence of Genocide in Darfur*, L.A. TIMES, Aug. 10, 2004, at A9.

forts of a consortium of African governments known as the African Union.[148]

Prior to the development of the Darfur crisis, members of the U.S. House and Senate sought to address the devastation in southern Sudan by developing legislation called the Sudan Peace Act. Early versions were introduced during the 106th Congress in 1999,[149] but the sponsors were unable to resolve various House-Senate disputes, including whether to statutorily codify economic sanctions put in place against the country in 1997 by Executive Order 13,067.[150] In the 107th Congress, a surprising coalition of conservative Christians and African-American leaders came together to draw more attention to the crisis in Sudan and generate support for the Sudan Peace Act,[151] which had been reintroduced by Representative Tom Tancredo (R-CO).[152] This legislation, H.R. 931, was substantially similar to earlier versions of the bill, but did not include any sanctions provisions at all.[153] The debate on the issue in Congress and public policy circles became increasingly focused on a proposal known as capital market sanctions.[154] Recognizing that oil development was providing the financial resources needed by the Sudanese government to prosecute the war, the proposal sought to impair foreign investment in the country's oil sector until the war was over. Specifically, no corporation would be allowed to use U.S. capital markets to raise funds that would be used for oil or gas extraction in Sudan.[155]

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148. *See U.S. to Support African Union's Darfur Mission*, AGENCE FRANCE-PRESSE, Oct. 19, 2004, *available at* 2004 WL 96181120; Press Release, The White House, Statement on the Expanded African Union (AU) Mission in Sudan (Oct. 18, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/10/20041018-20.html.

149. H.R. 2906, 106th Cong. (1999); S. 1453, 106th Cong. (1999).

150. Exec. Order No. 13,067, 62 Fed. Reg. 59989 (Nov. 3, 1997). *See also* 146 CONG. REC. H10640, H10642 (Oct. 24, 2000) (statement of Rep. Smith, explaining the addition of the economic sanctions amendment to the Sudan Peace Act by the House).

151. *See All Things Considered* (NPR radio broadcast, May 25, 2001) ("A broad coalition of Catholics, Protestants, Reformed Jews and most recently African-American pastors has formed around the issue, creating some odd bedfellows. On Good Friday, the Reverend Walter Fauntroy, the former Democratic congressional delegate from Washington [D.C.], and black talk show host Joe Madison chained themselves to the door of the Sudanese Embassy with Michael Horowitz, a former aide to President Ronald Reagan. After their arrest . . . Ken Starr of anti-Clinton fame and Johnnie Cochran of O.J. Simpson fame [defended them].").

152. In the interest of disclosure, I served as Legislative Aide to Rep. Tancredo during most of the Sudan Peace Act's movement through the legislative process. While a moderate amount has been written about the bill and its progress through both houses, any historical errors are mine alone.

153. H.R. 931, 107th Cong. (2001).

154. The concept had wide support among outside organizations and was passionately and articulately championed by Professor Eric Reeves, an English professor at Smith College. *See* Eric Reeves, Editorial, *Capital Crime in Sudan*, WASH. POST, Aug. 20, 2001, at A15.

155. *See id.* Sanctions involving U.S. capital markets had never been proposed before, and were opposed strongly by the Bush Administration and many free-market Republicans. *See*

Ultimately, the House International Relations Committee approved a bill that did not include sanctions provisions.[156] During consideration on the House floor, Representative Spencer Bachus (R-AL) offered an amendment to add the capital market sanctions to the bill,[157] which was adopted by a voice vote.[158] The Sudan Peace Act passed the House with the amendment on June 13, 2001, by a vote of 422–2.[159] The Bush administration and several Senators vigorously opposed the Bachus Amendment because of the precedent they felt it would have set of directly involving politics in the nation's capital markets.[160]

As the 107th Congress neared a close, the House reached a compromise with the Senate and the administration that substituted a reporting requirement for the capital market sanctions. Specifically, the provision requires the Secretary of State to provide Congress with:

> (1) a description of the sources and current status of Sudan's financing and construction of infrastructure and pipelines for oil exploitation, the effects of such financing and construction on the inhabitants of the regions in which the oil fields are located, and the ability of the Government of Sudan to finance the war in Sudan with the proceeds of the oil exploitation;
>
> (2) a description of the extent to which that financing was secured in the United States or with involvement of United States citizens.[161]

In addition, a separate requirement in § 9 of the bill provides that:

Neil King Jr. & Michael Schroeder, *House Bill to Push Human Rights in Sudan Vexes Wall Street*, WALL ST. J., Aug. 27, 2001, at A16.

156. *See* H.R. 2052, 107th Cong. (2001) (version reported to the House by the House International Relations Committee on June 8, 2001). As described above, the addition of a capital market sanctions amendment in committee would have created political problems for many members. In addition, however, a capital market sanctions amendment would also have triggered subsequent referrals to several other House committees, making it unlikely that the bill would ever reach the House floor. *See* Rule XII(2)(c), Rules of the House of Representatives, 108th Cong. 9 (Jan. 7, 2003), *available at* http://www.house.gov/rules/108rules.pdf (permitting the Speaker of the House to refer a bill to additional committees for consideration based on changes made by the committee of primary jurisdiction).

157. *See* 147 CONG. REC. H3092-13 (daily ed. June 13, 2001) (statement of Rep. Bachus).

158. *Id.* at H3112-13.

159. *Id.* at 3113 (roll call vote number 160).

160. *See* Reeves, *supra* note 154; *Congress to Drop Sanctions in Sudan Bill*, OIL DAILY, Oct. 8, 2002.

161. Sudan Peace Act, Pub. L. No. 107-245, § 8, 116 Stat. 1504, 1509 (2002). It is also worth noting that the bill as a whole, which is a mere seven pages in length, contains no fewer than ten distinct reporting requirements.

> (a) SENSE OF CONGRESS. It is the sense of the Congress that the President should continue to increase the use of non-OLS agencies in the distribution of relief supplies in southern Sudan.
>
> (b) REPORT. Not later than 90 days after the date of enactment of this Act, the President shall submit to the appropriate congressional committees a detailed report describing the progress made toward carrying out subsection (a).[162]

On October 21, 2002, President Bush signed the Sudan Peace Act into law.[163]

B. The Reporting Requirements in the Sudan Peace Act

Reporting requirements are rarely welcomed by the Executive Branch,[164] and the reports included in the Sudan Peace Act were likely no different. Given the controversial nature of the capital market sanctions and the delicate nature of the negotiations in the region, it is not impossible to imagine the administration either refusing to comply with one or more of the requirements or only complying in part.[165] Of the two reporting requirements mentioned above, the first, involving information about oil revenues flowing to the Government of Sudan, seems clearly to be an "easy case" within the framework proposed in Part IV, *supra*. The second requirement, however, involves a recitation of how the President has used non-Operation Lifeline Sudan ("OLS")[166] agencies to distribute relief supplies and presents an example of a "hard case."

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162. Sudan Peace Act § 9.

163. *See* Statement by President George W. Bush upon Signing H.R. 5531, The Sudan Peace Act, 2002 U.S.C.A.A.N. 1018 (Oct. 21, 2002).

164. *See generally Paperwork Reduction*, *supra* note 13.

165. It is important to note that this is purely conjecture provided for the sake of illustration. The author is not aware of any suggestions anywhere that the Bush Administration considered not complying with the reporting requirements at issue here.

166. OLS is a multilateral, but only modestly successful, food relief program administered primarily under the auspices of the United Nations. *See* UNITED NATIONS, OPERATION LIFELINE SUDAN, *at* http://www.un.org/av/photo/subjects/sudan.htm (last visited Oct. 7, 2004) (acknowledging that "[a]lthough OLS has saved lives and assisted hundreds of thousands of people, its mission is far from over").

1. The Easy Case: Section 8 of the Sudan Peace Act and the Financing and Construction of Infrastructure and Pipelines for Oil Exploitation

The reporting requirement set forth in § 8 is factual in nature, and requires the State Department to compile specific information about Sudan's oil industry and the sources of its financing.[167] The provision itself is actually comprised of multiple complex compound sentences containing eight different substantive subject areas: (1) financing; (2) construction; (3) infrastructure; (4) pipelines; (5) the effects of the financing and construction on the inhabitants; (6) the ability of the Sudanese government to finance the war; (7) the extent to which the financing was secured in the United States; and (8) the involvement of United States citizens. The result is a reporting requirement that, if read literally, actually contains nearly a dozen separate subrequirements.[168]

The foregoing list shows how a relatively short reporting requirement can be written so as to demand a lengthy and complex report. The burden of the requirement on the State Department would be higher than it might first appear if the agency strictly adheres to the requirements of the provision. The list is also a somewhat pedantic means of demonstrating that the report almost certainly must include some information that the State Department has not already compiled for its own use and would not have collected absent the Sudan Peace Act. While the burden placed on the State Department by the requirement is certainly not as high as some of the reports described in Part II, *supra*, it is significant nonetheless.

This burden, however, appears to be constitutional. Given the legislative history of the Sudan Peace Act as a whole, § 8 clearly arose out of the capital market sanctions provisions that were included in the House's version of the bill but removed by the Senate. As such, the reporting requirement is strongly related to recently enacted legislation, and would easily survive a rational basis review. Further, the requirement will arguably aid Congress in determining whether the proposed but rejected sanctions are still needed in order to help interrupt the flow of funds from

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167. Sudan Peace Act § 8.

168. A list of the sub-requirements would include (1) the sources of Sudan's financing of infrastructure; (2) the sources of Sudan's financing of pipelines; (3) the current status of Sudan's financing of infrastructure; (4) the current status of Sudan's financing of pipelines; (5) the current status of the construction of infrastructure; (6) the current status of the construction of pipelines; (7) the effects of the financing on the inhabitants of oil field regions; (8) the effects of the construction on the inhabitants of oil field regions; (9) the ability of the GOS to finance the war with the proceeds of the oil exploitation; (10) the extent to which financing was secured in the U.S.; (11) the extent to which U.S. citizens were involved in the financing.

the United States into the Sudanese government's war chest.[169] Because this requirement is justified by Congress's oversight powers as articulated in *Watkins*, no further analysis as to its constitutionality is needed. Were the balancing test articulated above to be applied, however, it too would weigh in Congress's favor, given the presence of many of the factors that strengthen Congress's interest in the information.[170]

2. The Hard Case: Section 9 and The President's Use of Non-OLS Agencies

The reporting provision contained in § 9 requires the President to explain in a "detailed" report how he has responded to the "sense of Congress" that food aid to Sudan should increasingly be delivered outside of OLS channels. Given the foregoing description of reporting requirements and the congressional oversight power, this should strike observers as somewhat odd. In this instance, Congress does not have clear authority to regulate the operations of OLS, nor did it attempt to actually do so in the Sudan Peace Act. Instead, the provision requires a comprehensive report on an area in which Congress shares its limited authority with the President.

Congress might try to defend the requirement by arguing that it was enacted to help evaluate whether legislation is needed to address the problems that have been identified with OLS. Such an argument is unconvincing, however, given its speculative nature and Congress's limited authority over OLS itself. This is precisely the type of case in which the balancing test described in Part III.B.2, *supra*, is helpful. Here, the legislative interest in the information is relatively low, given the generalized nature of the inquiry and the absence of specific legislative proposals aimed at reforming OLS. Indeed, given the reporting requirement's proximity to a "sense of Congress" provision, it appears that the true purpose of the requirement is to influence the Executive Branch's foreign policy making with respect to OLS. The Executive Branch's interest in not releasing the information in the requirement, by contrast, is potentially very strong. The provision of food aid through OLS channels is likely to be the subject of ongoing negotiations between the State Department, the Government of Sudan, and other parties involved in the peace process. As such, the reporting requirement may seek information that has predecisional aspects, as well as information that the administra-

169. Note that this is particularly true in this case because the requirement is only for a one-time report, rather than a recurring report that is to be prepared and submitted periodically.

170. Those factors include the fact that a specific legislative proposal is clearly involved, and the request is relatively narrowly tailored. *Cf.* Op. Att'y Gen., *supra* note 134.

tion may simply not wish to release for strategic reasons while negotiations are ongoing. Accordingly, with respect to the second reporting requirement, the balance would appear to weigh heavily in favor of the Executive Branch.

The Sudan Peace Act is a relatively straightforward piece of legislation that demonstrates the ease with which Congress can step into murky constitutional waters through the use of reporting requirements. The waters are made even murkier by the fact that the Act involves international relations, an area where both Congress and the President have some responsibility. The framework proposed in Part III, *supra*, is useful in determining which of the requirements in the Act are legitimate and which, if any, would likely be held unconstitutional. In particular, the requirements in the Act that appear to have been created in order to influence the Executive Branch—rather than to gather information about potential future legislation—would be much less likely to be upheld. Accordingly, § 8 presents an "easy case" that is likely to be upheld, while § 9 would likely not be upheld by a court.

CONCLUSION

The modern Congress depends on information in order to legislate. The public and the rest of the federal government expect the Congress to act on a range of subjects of extraordinary breadth. The public also expects Congress to keep tabs on the rest of the federal government, and especially on the executive agencies that it creates. That task—the task of oversight—has become increasingly challenging as the federal bureaucracy continues to take on an ever-widening range of complex and sophisticated functions.

Congress uses reporting requirements as a tool for oversight at a staggering pace, and it shows no signs of slowing down. While many reporting requirements provide valuable insights and information to the Legislative Branch, many others quickly become outdated or redundant. Although most of the reports appear to rest on solid constitutional ground, there is a potentially significant number that probably exceed the oversight powers granted to Congress. As such, a resentful executive agency would likely have sufficient grounds for challenging the constitutionality of such a report.

The Sudan Peace Act demonstrates the difficulties that even seemingly straightforward reporting requirements might pose. Indeed, while some of the requirements in the Act are clearly adequately related to the oversight power of Congress, at least one appears to be constitutionally problematic. Moreover, the Sudan Peace Act also demonstrates that Congress is most likely to employ questionable reporting requirements in

areas such as international relations, where it lacks the constitutional power to take truly meaningful action.