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Thank You Letter to Representative Dick Cheney

FROM:	EXTENSION	NO.
John L. Helgerson Director of Congressional Affairs		OCA 88-1426 DATE 09 MAY 1988

TO: (Officer designation, room number, and building)	DATE RECEIVED	DATE FORWARDED	OFFICER'S INITIALS	COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)
09 MAY 1988				
1. Executive Director	10 MAY 1988			
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3. Deputy Director of Central Intelligence				
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5. Director of Central Intelligence	10 May	5/11		STAT STAT
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Central Intelligence Agency

Washington, D.C. 20505

OCA 88-1426

18 May 1988

The Honorable Dick Cheney
Permanent Select Committee
on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mr. Cheney:

I read with great interest the paper you presented to the American Bar Association Standing Committee on Law and National Security, as reprinted in the Congressional Record and excerpted in the 3 May Wall Street Journal, concerning the Legislative and Executive roles in Covert Operations. I was especially interested in your analysis of the interplay between the constitutional power of the President and Congress in matters of foreign affairs, the practical and constitutional problems with any law requiring Congressional notification of all Presidential Findings within 48 hours without exception, and your suggested alternative approach to pending legislation mandating such notification.

As you know, I am in agreement with many of the points you make with respect to the proposed 48-hour notification requirement. I believe the Congress should seriously consider your proposed alternative approach that would retain the President's discretion to delay notification in rare cases.

As always, your views are widely read and respected by officers here at CIA. You have my compliments for a most thoughtful and useful analysis.

Sincerely yours,

William H. Webster
Director of Central Intelligence

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CENTRAL INTELLIGENCE AGENCY

Director of Congressional Affairs

9 May 1988

NOTE FOR THE JUDGE:

I recommend you sign this letter to Dick Cheney praising his recent article on the 48-hour bill. Your response borders on the political, but you have already stated, publicly and formally, your similar views on this bill.

Cheney's "alternate framework" is detailed in the first column of the last page of the attached material from the Congressional Record.

John L. Helgerson

Attachment

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THE WALL STREET JOURNAL TUESDAY, MAY 3, 1988

Covert Operations:

By DICK CHENEY

There is a consensus in Washington after Iran-Contra that the process for managing legislative-executive relations on covert operations could be improved. The consensus quickly breaks down, however, as people begin putting forward concrete suggestions.

A bill, already passed by the Senate and moving forward in the House, would require the president under all conditions, with no exceptions, to notify Congress of covert operations within 48 hours of their start. It is a typical example of "never again" thinking by Congress. To make sure the last disaster will never again repeat itself, Congress is willing to deprive future presidents of all possible discretion under conditions Congress cannot possibly foresee.

At the heart of the dispute over this bill is a deeper one over the scope of the president's inherent constitutional power. I believe the president has the authority, without statute, to use the resources placed at his disposal to protect American lives abroad and to serve other important foreign policy objectives short of war.

Congress does have the power, however, to control the money and material resources available to the president for covert actions. Because Congress arguably cannot properly fulfill its legislative function on future money bills without information, some kind of a reporting requirement can be understood as a logical extension of a legitimate legislative power.

Limiting the Money Power

The constitutional question is: What are the limits to what Congress may demand as an adjunct of its appropriations power? Broadly speaking, Congress may not use the money power to achieve purposes that it would be unconstitutional for it to achieve directly. It could not place a condition on the salaries of judges, for example, to prohibit the judges from spending any time to reach a particular constitutional conclusion. In the same way, Congress could not use its clearly constitutional powers over executive-branch resources and procedures to invade an inherently presidential power.

How does this reasoning apply to the proposed 48-hour rule? In 1980, Congress revised the intelligence oversight law to require the president to notify the House and Senate intelligence committees before beginning any significant, anticipated intelligence activity. It justified the requirement on its need for information to fulfill its legislative power to appropriate money.

There is a line of Supreme Court cases, dating back to 1821, upholding Congress's implied power to demand information. But what happens if the power to demand information confronts another implied power held by another branch that is equally well grounded on a constitutional foundation? That was the issue in the executive-privilege case of *U.S. v. Nixon*. In that case, we learned that the decision in any particular case must rest on the competing claims of the two branches at odds with each other. That is how I think the 48-hour rule must be considered.

The 48-hour bill recognizes the president's inherent power to initiate a covert action—as long as that action is limited to resources already available to the president. If Congress ever tries to insist on advance approval, that would surely be overturned as a legislative veto.

But if the president has the inherent power to initiate covert actions, then the same rule that gives Congress the implied power to demand information also gives the president the implied powers he may need to put his acknowledged power into effect. In virtually all cases there is no conflict between the president's power to initiate an action and requiring the president to notify the intelligence committees (or a smaller group of leaders) of that operation in advance. In a few very rare circumstances, however, there can be a direct conflict.

The Carter administrati... gress for about three months ... smuggled out of the Canadian

One good example was the Carter administration's decisions to withhold notification of some Iran hostage rescue operations. In one case, notification was withheld for about three months until six Americans could be smuggled out of the Canadian Embassy in Tehran. In fact, Canada made withholding notification a condition of its participation.

The Iranian hostage examples show that when notification has to be withheld may depend not on how much time has elapsed, but on the character of the operation. There is no question that when other governments place specific security requirements on cooperating with the U.S., the no-exceptions aspect of the 48-hour rule would be equivalent to denying the president his inherent power to act.

What is the constitutional justification for the proposed bill? The best argument, to quote the Senate Intelligence Committee, is that notification is needed "to provide Congress with an opportunity to exercise its responsibilities under the Constitu-

Who's in Charge?

tion." The problem is that there is no legislative power that requires notification under all conditions during any precisely specified time period. All Congress needs to know is whether to continue funding ongoing operations.

Who should have the power to decide that notification would make action impossible? In the rare situation in which a president believes he must delay notification as a necessary adjunct to fulfilling his constitutional mandate, that decision must rest with the president. The president obviously cannot consult with Congress about whether to consult.

You could argue that failure to notify might, in the extreme, deprive Congress of this power. Iran-Contra was such an extreme. But the price of assuring notification within a specific time period is to make some potentially life-saving opera-

...n withheld notifying Con... until six Americans could be ... Embassy in Tehran.

tions impossible. On the scale of risks, there is more reason to be concerned about depriving the president of his ability to act than about Congress's alleged inability to respond. Congress eventually will find out about decisions of any consequence. When that happens, it has the political tools to take retribution. President Reagan learned this dramatically. It is a lesson no future president is likely to forget.

The current approach certainly does have some problems. We have seen that it too often breeds frustration and mistrust in both the legislative and executive branches. This is not a one-sided problem. Congress had every reason to be angry about the way the National Security Council staff deceived us about the Contra resupply effort. But the president has just as much cause to be angry about the way the speaker and the Rules Committee use their scheduling power to delay, prevent or structure floor votes, about the way members can unilaterally decide that a previously covert operation is ripe for public debate, and about the incessant problem of leaks. Each side has good reason to think the other has contributed to a breakdown of comity.

What we need is a modified set of procedures that will permit each side to recognize the other's appropriate constitutional role. In this spirit, I offer the following as a framework for amending the Intelligence Oversight Act.

1) The president should retain the constitutional power to initiate a covert action, even if some members of Congress consider the operation controversial.

2) Requiring notification within 48 hours can be accepted in general, but only if there is an escape clause for the president to invoke unilaterally in exceptional circumstances.

Congress also needs to take steps to improve its own ability to protect secrets. Current procedures almost require an operation's cover to be blown before the operation can be discussed outside of committee. If Congress had adequate security laws and procedures, with stiff penalties for violations, the end result probably would be more frank discussion, not less.

As long as Congress is considering disclosure, let me make one more modest proposal. The U.S. needs only one secretary of state. No member of Congress ever should take it upon himself to negotiate with a foreign government. Fact finding is an acceptable part of a legislator's job. Negotiating is not. All discussions that even might turn into negotiation, therefore, ought to be held only within a context of regular State Department communication and guidance.

A 48-Hour Rule for Congress

To help restore a proper respect for the separation of powers, it might be a good idea to apply something like the 48-hour rule in reverse. Members of Congress should be required to submit written reports to the State Department describing any communications they have with a foreign government within 48 hours after they occur.

Whether or not this proposal is accepted by Congress, it points to an important underlying issue. Legislative-executive relations did break down during the Iran-Contra affair. Congress made the president pay a stiff price for that breakdown, and the president has taken several important steps to improve procedures on his end of Pennsylvania Avenue. But the real problems are two-way. We in Congress ought to look at what we can do to improve our own behavior.

The 48-hour bill would "get back" at President Reagan by tying the hands of all future presidents. That approach will achieve nothing useful. The better way is with procedures that encourage each branch to respect the other's proper role. Comity comes through hard work on a daily basis. But the first step must be mutual respect.

Rep. Cheney (R., Wyo.) is a member of the House Intelligence Committee and was the ranking minority member of the House Committee to Investigate Covert Arms Transactions with Iran.

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Executive Secretary

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EXTENSIONS OF REMARKS

DICK CHENEY'S PAPER ON CONGRESSIONAL OVERSIGHT OF COVERT OPERATIONS

HON. HENRY J. HYDE

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, April 20, 1988

Mr. HYDE. Mr. Speaker, DICK CHENEY is a Congressman respected on both sides of the aisle for his reasoned logic and careful approach to complicated issues. He is one of those Members who "does his homework," a voracious reader knowledgeable on a wide range of issues.

On March 30, Mr. CHENEY presented to the American Bar Association Standing Committee on Law and National Security a paper on "Clarifying Legislative and Executive Roles in Covert Operations." It is a topic on which he is particularly qualified to speak, as he is a member of the House Intelligence Committee, former ranking Republican member of the Iran-Contra Committee and current chairman of the House Republican Conference. Moreover, because DICK has been a Member of the House since 1979, and before that was President Ford's White House Chief of Staff during 1975–77, he has unique exposure to foreign policy decisionmaking and to the interests of both the executive and legislative branches.

Soon we will be considering legislation on whether to impose a requirement that Congress be notified within 48 hours of any covert action. I believe Members would benefit from Congressman CHENEY'S thoughts on this issue. Over the next several days, therefore, I will submit his paper for publication in the CONGRESSIONAL RECORD. The first portion, submitted today, considers the constitutional basis and history of power over foreign affairs, plus the nature of recent legislation providing oversight over covert action. The second segment addresses the proposed 48-hour notice legislation and some problems with it. In the final installment, the underlying issue of how to achieve informed consent or veto without public debate is considered, and Congressman CHENEY offers his own solution as a substitute for the proposed 48-hour legislation.

The material follows:

CLARIFYING LEGISLATIVE AND EXECUTIVE ROLES IN COVERT OPERATIONS—PART I

(By Dick Cheney)

There is probably a consensus at this conference, and in Washington generally, that the process for managing legislative-executive relations with respect to covert operations could be improved. The consensus quickly breaks down, however, as people begin putting forward concrete suggestions. There are two general areas in which proposals seem to concentrate. One has to do with requiring that Congress be notified of all covert operations within 48 hours of their start. The other deals with the broader issue for which notification is a substitute: the conditions under which covert operations should be deprived of their covert character to be made the subject of public debate. I shall discuss each of these subjects today, first criticizing the bills that have been moving through Congress and then concluding with a new set of proposals for grappling with what has become a highly contentious set of issues.

The reason there is so little consensus about solutions is that any idea for improving the oversight process for covert operations must rest on some premises about the appropriate role of the legislative and executive branches in foreign policy more generally. I shall not spend a great deal of time on broad questions of constitutional law. You have already heard from several noted experts in that field. Suffice it to say that I tend to agree with Robert F. Turner's and John Norton Moore's arguments on legislative and executive power.

A few words on the subject will help place the rest of my remarks in context, however. One of the main institutional objectives for the Framers of the Constitution as they worked through the hot summer of 1787 in Philadelphia, was to create an independently powerful executive branch of government—unlike the executive in most states at the time, or under the Articles of Confederation. The Framers specifically wanted an executive who would be able to act with sufficient energy, secrecy and dispatch, to respond to the foreign policy crises the new nation inevitably would face. So they created the Presidency—one person placed clearly in charge of the executive branch—because they knew that when too many people share power and responsibility, decisions become muddy and actions are not taken. Then they gave that single executive the power to be the nation's leader in foreign policy. They made him the "sole organ" for diplomatic communication and gave him broad, discretionary power to deploy the government's resources to protect American lives and interests abroad.

Of course, the Constitutional Convention did not make the President all-powerful. It also gave Congress an important role to play in foreign policy, most obviously by giving the full Congress the power to declare war, tax, appropriate, and regulate foreign commerce, and also by giving the Senate the power to ratify treaties. But by giving Congress an important role to play, the Constitution—contrary to Edward S. Corwin—was not an unbounded "invitation to struggle."[1] Congress and the President were not given the same powers. Rather, each branch was given different powers to influence overlapping policy decisions, with each branch generally being given the powers most appropriate to its own capacities. The expectation was that the President would be able to use his diplomatic monopoly, and his ability to deploy the government's resources, to lead the government by taking concrete actions toward other countries. Congress could always support or oppose the President by granting or denying him the resources needed to follow up on what he had started. But the relationship between initiation and Congressional ratification was to be very different from the domestic field, where Presidential initiation either rests on a statutory delegation, or else must be limited to introducing an idea and then trying to persuade Congress to adopt it.

Since the Vietnam War, as is well known, Congress has gone well beyond its traditional role to develop institutional levers for placing the legislature at every stage of the foreign policy process, from initiation through negotiation and implementation. Nothing could be clearer from the constitutional scheme, for example, than the President's role as the country's "sole eyes and ears" for diplomatic communication. This issue seemed to have been settled during the new government's first months. On October 9, 1789, George Washington answered a letter that the King of France had addressed "to the President and Members of the General Congress" by saying that the task of receiving and answering such letters "has devolved upon me" alone, and not jointly with the Congress. As Judge Sofaer noted in his excellent 1976 book, the Senate twice confirmed this assertion by rejecting motions to request the President to communicate messages of behalf of the United States.[2]

A few years later, the Congress debated the same issue in another guise. Dr. George Logan was accused of meddling in negotiations between the United States and France in 1798. Although there was dispute over the matter, he was suspected by many Federalists of being a secret envoy sent to France to represent the Jeffersonian Democrats. In response, Congress passed a law in 1799, popularly known as the Logan Act, to make it criminal for any citizen of the United States, without the permission of the U.S. government—

"Directly or indirectly [to] commence, or carry on, any verbal or written correspondence or intercourse with any foreign government, or any agent or officer thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States."

The only exception in the act is for individuals seeking to redress a personal injury to themselves.[3]

The Logan Act is still a part of the U.S. Code, with only minor grammatical changes.[4] Although aimed at the most obvious level against private citizens, congressional debate at the time made it clear that the function involved belonged to the *executive* branch, and outrage was expressed not only at Dr. Logan's own role, but at the alleged support he received from members of the opposition political party who did not have the President's blessings. It is significant, as the noted consititutional historian Charles Warren wrote when he was Assistant Attorney General, that the more than two hundred pages of debate about the act are printed in the *Annals of Congress* under the heading, "Usurpation of Executive Authority."[5]

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[1] Edward S. Corwin, *The President: Office and Powers* (1957), p. 171.

[2] Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* (1976), p. 94.

[3] 1 Stat. 613 (1799).

[4] 18 U.S.C. 953.

[5] *Annals of Congress*, Fifth Congress, 3d Sess., (Dec. 3, 1798–March 3, 1799), pp. 2467–2721. See also, Charles Warren, Assistant Attorney General,

Despite this clear legislative history behind a statute almost as old the Republic, members of Congress today feel they can negotiate with foreign leaders directly, in the name of the legislative branch and in opposition to the President. It would be hard to imagine a clearer usurpation of executive authority than House Speaker Jim Wright's meetings with Nicaraguan President Daniel Ortega last November 11-12, without informing or involving the State Department, to discuss and influence a Sandinista cease-fire proposal that was still in draft form. Ortega's draft contained detailed items for ending U.S. military support for the Nicaraguan Democratic Resistance. This was only one of a series of meetings individual House Democratic opponents to the President's policy have held with the Nicaraguan Communists to discuss what the Communists should do in Nicaragua to persuade a majority in Congress to vote against the President's program.

Nor was that the only recent occasion of creative legislative usurpation of executive authority. Some Democratic Senators tried to use the Department of Defense authorization bill in 1987, for example, to try to impose its interpretation of a treaty on the President. Similarly, many Senators tried to use the same bill—as members of Congress have done ever since the War Powers Act was first introduced in the early 1970's—to assert that the executive's power to deploy governmental resources rests solely on statutory grounds, as if there were no constitutionally independent, inherent power for the executive to act against anything short of an armed invasion of the U.S. mainland.

My view of each of these actions is evident from my use of the word "usurpation." It is equally obvious, however, that a significant number of my Democratic colleagues consider each to have been perfectly appropriate. The underlying difference affects any discussion of reforming the laws for congressional oversight of covert operations. Ultimately, we seem to run up against principled differences over the proper constitutional roles of the legislative and executive branches. Congress could take some practical steps—to match ones the executive already has taken—that would help repair the breakdown in comity that occurred during Iran-Contra. I shall suggest a few specific ideas at the end of this essay. Before I present those ideas, however, I shall first say a few words about the way the oversight process now works, and the problems with the bill now working its way through Congress to tighten up so-called "loopholes."

OVERSIGHT OF COVERT OPERATIONS

During the opening months of President Ford's administration, Congress attached the Hughes-Ryan Amendment to the Foreign Assistance Act of 1974. Born out of general post-Vietnam and post-Watergate suspicions of the executive branch, as well as specific congressional opposition to some past operations,[6] the provision sponsored by Sen. Harold Hughes (D-Iowa) and Rep. Leo J. Ryan (D-Cal.) was intended to insure that Congress would be informed of covert operations conducted by or on behalf of the Central Intelligence Agency. As originally written, Hughes-Ryan prohibited the expenditure of any funds by or on behalf of the CIA for any operations in foreign countries, except those solely intended to obtain necessary intelligence, unless (1) the President specifically found that each such activity was important to U.S. national security and (2) each such operation was reported "in a timely fashion" to the appropriate committees of Congress. The amendment specifically named the House Foreign Affairs and Senate Foreign Relations Committees, but the list of appropriate committees also was generally understood to include the two Armed Services Committees, the two appropriations committees and, after they were formed in 1976 and 1977, the Senate and House Select Committees on Intelligence.[7]

Hughes-Ryan quickly caused problems that were evident even to some of its original supporters. By requiring notification to so many committees, the law in effect was requiring the CIA to notify more than half of the Senate, one-quarter of the House, and vast numbers of staff. It was impossible to prevent leaks under such conditions. In fact, wrote former Director of Central Intelligence William Colby, "every new project subjected to this procedure leaked, and the 'covert' part of CIA's covert action seemed almost gone."[8]

In response to this situation, Congress sought, and found, a reasonable middle ground. In 1980, after abandoning its efforts to pass a lengthy and problematic legislative charter for the intelligence community, Congress decided to revise the oversight law to expand the notification condition from the CIA to all departments, agencies and entities of the United States involved in intelligence activities, and to limit the committees receiving notification to the two intelligence committees. In general, the 1980 law—"to the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches"—required the executive branch to notify the intelligence committees (or, under special conditions, the chairmen and ranking minority members of the two committees, and four leaders of the House and Senate) before beginning any significant, anticipated intelligence activity. The law also contemplated, however, that there might be some conditions under which prior notice would not be given. In those situations, it required the President "to fully inform the intelligence committees in a timely fashion."

Under this law, the intelligence committees in fact have become significant players whose support any prudent Administration would do well to encourage. The 1980 law did not challenge the President's inherent constitutional authority to initiate covert actions. In fact, that law specifically denied any intention to require advance congressional approval for such actions. Nevertheless, Congress does have a very strong lever for controlling any operation that lasts more than a short period of time. Operations undertaken without prior approval have to be limited to the funds available through a contingency fund, or other budget devices, all of which are well known to Congress. Legislative control comes from the fact that Congress may constitutionally abolish these flexible tools and require project-by-project funding. Of course, such a decision would be suicidal because it would deprive the President of all discretion and also deprive the country of any ability to react quickly to breaking events. Congress therefore would not ever be likely to use its power to insist on project-by-project funding. Nevertheless, because the Constitution does give Congress this draconian lever, the intelligence committees can and do use the annual budget process to review every single ongoing operation. Any time Congress feels that an operation is unwise, it may step in to prohibit funds in the coming budget cycle from being used for that purpose. As a result, all operations of extended duration have the committee's tacit support (or non-opposition). Considering how many people in Congress and the general public oppose covert operations in principle, this is an important political base for any administration concerned about the country's long-term intelligence capacities.

History of Laws Prohibiting Correspondence With a Foreign Government and Acceptance of a Commission, U.S. Senate, 64th Congress, 2d Sess., S. Doc. 64-696 (1917), p. 7.

[6] See U.S. Senate, 94th Congress, 2d Sess., *Hearings and Final Report of the Select Committee to Investigate Government Operations With Respect to Intelligence* (1976) (Church Committee) and U.S. House of Representatives, 95th Congress, 1st Sess., House Select Committee on Intelligence, *Recommendations of the Final Report* (1977) (Pike Committee).

[7] Pub. L. 93-559, Sec. 32, 88 Stat. 1804 (1974). The present version of Hughes-Ryan, as amended by the 1980 Oversight Act, may be found at 22 U.S.C. 2422.

[8] William Colby, *Honorable Men* (1978), p. 423

A TRIBUTE TO MS. RUTH PACKARD

HON. CURT WELDON

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, April 20, 1988

Mr. WELDON. Mr. Speaker, I would like to take this opportunity to honor a lady of outstanding accomplishment in my community. This week Ms. Ruth Packard, of Media, PA, will be celebrating her 40th year as an active member of the Rose Valley Chorus and Orchestra. For 40 years, Ms. Packard has demonstrated her committment not only to the Rose Valley Chorus and Orchestra, through her constant work in all aspects of its productions, but to the entire community. By serving this theater group so faithfully through the years, Ruth Packard has helped to weave the fabric of a closely knit, caring community.

It is not often that we take the time to recognize an individual's service to the community for low-profile work. But to accomplish things with no need of glory and recognition is to be truly deserving of praise. Ruth Packard is just such a person. Her motives were never selfish—never to gain personal recognition, and I am sure that none will be more surprised than herself to find that her selfless actions have gained her such wide appreciation.

Although Ms. Packard will be retiring as an active member of the Rose Valley Chorus and Orchestra this year, I have no doubt that her involvement over the years will continue to serve as a fine example for all those who care about the community in which they live.

WASHINGTON STATE SENATE RESOLUTION 1988-8715

HON. AL SWIFT

OF WASHINGTON

IN THE HOUSE OF REPRESENTATIVES

Wednesday, April 20, 1988

Mr. SWIFT. Mr. Speaker, last year this House agreed to cut the Coast Guard budget to such an extent that many of the States with coastal regions are suffering from a severe deterioration in their ability to provide maritime safety and law enforcement. It is for this reason that I would like to enter into the RECORD a resolution passed by the Washington State Senate which expresses our State's

DICK CHENEY'S PAPER ON CONGRESSIONAL OVERSIGHT OF COVERT OPERATIONS

HON. HENRY J. HYDE
OF ILLINOIS
IN THE HOUSE OF REPRESENTATIVES

Thursday, April 21, 1988

Mr. HYDE. Mr. Speaker, today I am honored to submit for publication the second of three installments of DICK CHENEY's recent paper for the American Bar Association on how to clarify executive and congressional responsibilities in supervising covert actions. In the first section, submitted for the RECORD yesterday, Mr. CHENEY argued that constitutionally and historically, the President has a monopoly on diplomatic communication and the power to initiate foreign policies, including to lead the Government in concrete actions involving deployment of existing resources; the Congress, on the other hand, through its budgetary control has the power to sustain or veto those initiatives which endure over some period of time. On oversight of covert action, all operations of extended duration in effect have the committees' tacit support, the Iran/Contra program being the notable exception.

In the second segment submitted today, Mr. CHENEY considers the proposed 48-hour rule on notification of covert actions. Existing bills, he argues:

> • • • are typical examples of "never again" thinking by Congress. To make sure • • • [Iran/Contra] disaster will never again • • • itself, Congress is willing to deprive • • • Presidents of all possible discretion • • • conditions Congress cannot possibly foresee. The result is an approach to legislative-executive relations that I consider fatally flawed for interrelated constitutional and practical reasons.

I commend this analysis to other Members and urge them to stay tuned for the final supplement next week. In his conclusion, Congressman CHENEY offers a substitute to proposed legislation which is designed to enhance congressional oversight while not infringing on executive prerogatives.

CLARIFYING LEGISLATIVE AND EXECUTIVE ROLES IN COVERT OPERATIONS—PART II

(By Dick Cheney)

PROPOSED 48-HOUR RULE

The intelligence committees can only review covert operations if they know about them, however. President Reagan did not notify the intelligence committees of the Iran arms sales for eleven months after signing a formal finding to authorize them. I do not think anyone in Congress believes this was timely. The important questions are, how should Congress respond? Should Congress try to close the "timely notification" loophole legislatively? Or are the costs of loophole-closing so severe that it pays to seek more creative and more politically and operationally sensitive ways out of the problem? I favor the second approach. A majority of my colleagues, however, seem to be stuck in a legalistic and largely sterile attempt to close loopholes. I will discuss positive alternatives at the end of this presentation. First, let me indicate what I think is wrong with the dominant mode of congressional thought.

The Senate has recently passed, and the House will soon consider, bills that would require the President under all conditions, with no exceptions, to notify Congress of all covert operations within 48 hours of their start. Those bills, in my opinion, are typical examples of "never again" thinking by Congress. To make sure the last disaster will never again repeat itself, Congress is willing to deprive future Presidents of all possible discretion under conditions Congress cannot possibly foresee. The result is an approach to legislative-executive relations that I consider fatally flawed for interrelated constitutional and practical reasons.

At the heart of the dispute over this bill is a deeper one over the scope of the President's inherent constitutional power. I believe the President has the authority, without statute, to use the resources placed at his disposal to protect American lives abroad and to serve other important foreign policy objectives short of war. The range of the President's discretion does vary, as Justice Jackson said in his famous concurring opinion in the Steel Seizure case. When the President's actions are consonant with express congressional authorizations, discretion can be at its maximum. A middle range of power exists when Congress is silent. Presidential power is at its lowest ebb when it is directly opposed to congressional mandate.[9] What is interesting about this typology, however, is that even when Congress speaks, and the President's power is at its lowest, Jackson acknowledged that there are limits beyond which Congress cannot legislate.[10] Those limits are defined by the scope of the inviolable powers inherent in the Presidential office itself.

Let me now apply this mode of analysis to the sphere of covert action. Congress was legislatively silent about covert action for most of American history, knowing full well that many broad ranging actions had been undertaken at Presidential initiative, with congressionally provided contingency funds.[11] For most of American history, therefore, Presidents were acting in the middle range of the authority Jackson described. Congress does have the power, however, to control the money and material resources available to the President for covert actions. Hughes-Ryan and the 1980 oversight act represent attempts by Congress to place conditions on the President's use of congressionally provided resources. Those conditions, for the most part, have to do with providing information to Congress. Because Congress arguably cannot properly fulfill its legislative function on future money bills without information, the reporting requirements can be understood as logical and appropriate extensions of a legitimate legislative power.

The constitutional question is: what are the limits to what Congress may demand as an adjunct of its appropriations power? Broadly speaking, Congress may not use the money power to achieve purposes that it would be unconstitutional for Congress to achieve directly. It could not place a condition on the salaries of judges, for example, to prohibit the judges from spending any time (i.e., any part of their salaries) to reach a particular constitutional conclusion.[12]

In the same way, Congress could not use its clearly constitutional powers over executive branch resources and procedures to invade an inherently Presidential power. For example, Congress does not have the constitutional power to use an appropriations rider, such as the Boland Amendment, to deprive the President of his authority as the "sole organ of diplomacy" to speak personally, or through any agent of his choice, with another government about any subject at all. I mean this last statement specifically to include asking another government to support the Nicaraguan Democratic Resistance. Congress does have the power to prevent the President from offering another country something of value in return for such support. For example, it could prevent a President from conditioning foreign aid on another country's support for the Contras for fear that U.S. foreign aid, the control over which is in Congress's province, would just become a laundering device. But despite protestations and innuendoes galore during the Iran-Contra hearings, Congress may not prevent the President from using exclusively Presidential powers to achieve results Congress may not like.

How does this reasoning apply to the proposed 48-hour rule? Congress quite properly justified the 1980 notification requirement, as I mentioned earlier, on the need for information as a necessary adjunct to the legislative power to appropriate money. By doing so, Congress stood squarely within a line of cases upholding Congress's contempt power. In the 1821 case of *Anderson* v. *Dunn* the Supreme Court upheld the use of contempt as an implied power needed to implement others given expressely by the Constitution. In a statement that clearly applies to all of the government's branches, the Court said: "There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate."[13]

Using this line of reasoning, the Court argued that even though courts were vested with the contempt power by statute, they would have been able to exercise that power without the aid of a statute. For the same reason, the court held, Congress must have inherent authority to exercise a similar power.[14] Later cases tried to circumscribe Congress's contempt power, but the power itself was always held to be a necessary adjunct to Congress's legislative functions and therefore to rest on an implied constitutional foundation.[15]

So far, the Court's argument would seem to support Congress's right to demand information of the executive. But what happens if that power confronts another implied power held by another branch that is equally well grounded on a constitutional foundation? That was the issue in the executive privilege case of *U.S.* v. *Nixon*.[16] In that case, we learned that the decision in any particular case must rest on the competing claims of the two branches at odds with each other. That is how I think the 48-hour rule must be decided.

The proposed 48-hour bill recognizes the President's inherent power to initiate a covert action, as long as that action is limited to resources already available to the President. That is why the 1980 oversight act and the proposed 48-hour bill both take pains to say that by requiring notification, Congress is not asserting a right to approve Presidential decisions in advance.[17] If Congress ever tries to insist on advance approval, that would surely be overturned as a legislative veto.[18]

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[9] *Youngstown Sheet and Tube Co.* v. *Sawyer* 343 U.S. 579, 635-38 (1952).

[10] *Ibid.* at 645.

[11] For a summary, see U.S. House of Representatives, 100th Congress, First Session, Select Committee to Investigate Covert Arms Transactions with Iran and U.S. Senate, 100th Congress, First Session, Select Committee On Secret Military Assistance to Iran and the Nicaraguan Opposition, *Report of the Congressional Committees Investigating the Iran-Contra Affair*, H. Rept. 100-433, S. Rept. 100-216 (November 1987), pp. 467-69.

[12] For a somewhat analogous but less absurd case, see *Brown* v. *Cal/ano* 627 F. 2d 1231 (1980).

[13] *Anderson* v. *Dunn*, 6 Wheat. 204, 225-26 (1821).

[14] Id. at 628-29.

[15] *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881) read the power narrowly, but *McGrain* v. *Daugherty*, 273 U.S. 135 (1927) and *Sinclair* v. *U.S.*, 279 U.S. 263 (1929) in turn read *Kilbourn* narrowly. Later cases have tended to involve conflicts between the contempt power and the First Amendment. *Wat-*

But if the President has the inherent power to initiate covert actions, then the same rule that gives Congress the right to demand information, and the related contempt power, also gives the President the necessary implied powers he may need to put his acknowledged power into effect. In virtually all cases, there is no conflict between the President's power to initiate an action and requiring the President to notify the intelligence committees, or a smaller group of leaders, of that operation in advance. In a few very, rare circumstances, however, there can be a direct conflict.

According to Admiral Stansfield Turner, who was the Director of Central Intelligence at the time, there were three occasions, all involving Iran, in which the Carter Administration withheld notification during an ongoing operation. Notification was withheld for about three months until six Americans could be smuggled out of the Canadian Embassy in Teheran. As Representative Norman Mineta pointed out in testimony following Turner's, the Canadian government made withholding notification a condition of their participation.[18] Notification was also withheld for about six months in two other Iranian operations during the hostage crisis. Said Turner: "I would have found it very difficult to look . . . a person in the eye and tell him or her that I was going to discuss this life threatening mission with even half a dozen people in the CIA who did not absolutely have to know".[19] In these situations, President Carter thought his constitutional obligation to protect American lives could not have been fulfilled if he had been required to notify Congress within 48 hours. And as the Canadian example makes clear, the choice between not notifying or not going ahead at all is sometimes put on us by people outside U.S. control.

The Iranian hostage examples also show that the situations under which notification may have to be withheld depend not on how much time has elapsed, but on the character of the operations themselves. It is worth emphasizing that the proposed bill would require notification within 48 hours of an operation's start—that is, when the U.S. begins putting people in place, not when the operation is finished. Let us put aside for the moment whether fear of Congressional leaks would be a legitimate reason for withholding notification about a particularly sensitive operation. I believe there is good reason to be concerned about leaks, but am willing to defer argument about whether this concern carries constitutional weight, because there are better examples to make my point. There can be no question that when other governments place specific security requirements on cooperating with the United States, the no-exceptions aspect of the proposed 48-hour rule would be equivalent to denying the President his constitutionally inherent power to act.

Who should have the power to decide that notification would make action impossible? In the rare situation in which a President believes he must delay notification as a necessary adjunct to fulfilling his constitutional mandate, that decision must by its nature rest with the President. The President obviously cannot consult with Congress about whether to consult. That would itself be a form of consultation. If the President could go that far, there would not be a problem and we could just accept the rule.

So, on the one side of the scale, we see that the President's implied power to withhold notification may be a necessary adjunct to the inherent power to act. What is on Congress's side of the scale? In the same report on the 48-hour bill that acknowledged the President's power to initiate action, the Senate Intelligence Committee offered two constitutional justifications for its notification requirement. The first was "to provide Congress with an opportunity to exercise its responsibilities under the Constitution."[21] The second was "to ensure that decisions to undertake covert actions are not left solely to a handful of single-minded executive officials."[22]

The second of these reasons is nothing less than a demand that Congress participate in a decision it has already acknowledged belongs to the President. Prudence undoubtedly should lead to consultation, but the dictates of prudence do not settle questions of constitutional power. The first argument about legislative responsibilities is more weighty, but I would submit that there is no legislative power that requires notification under all conditions, with no exceptions, during any precisely specified time period. All we need to know is whether to continue funding ongoing operations. We have had that information in every case, with the exception of President Carter's and President Reagan's hostage-related Iran initiatives.

I suppose you could argue that failure to notify might, in the extreme, deprive us of our ability to decide about continuing to fund a particular operation. Iran-Contra was such an extreme. But the choice is not one-sided. The price of assuring notification about all operations within a specific time period is to make some potentially life-saving operations impossible. On the scale of risks, I am more concerned about depriving the President of his ability to act than I am about Congress's alleged inability to respond. I feel this way not because I am sanguine about every decision Presidents might take. Rather, it is because I am confident that Congress eventually will find out in this leaky city about decisions of any consequence. When that happens, Congress has the political tools to take retribution against any President whom it feels withheld information without adequate justification. President Reagan learned this dramatically in the Iran-Contra affair. It is a lesson no future President is likely to forget.

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[18] *U.S. v. Nixon* 418 U.S. 683 (1974).

[19] See U.S. Senate Select Committee on Intelligence, 100th Congress, 2d Session, *Intelligence Oversight Act of 1988*, S. Rept. 100-276, pp. 16, 24, 26.

[20] See *INS v. Chadha*, 462 U.S. 919 (1983).

[21] U.S. House of Representatives, Permanent Select Committee on Intelligence, Subcommittee on Legislation, 100th Cong., 1st Sess., Hearings on H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of [illegible]

[22] Id. at 48. See also 44, 49, 54, 61.

[23] *Intelligence Oversight Act of 1988*, S. Rept. 100-276, p. 21.

[24] *Ibid.*, p. 22.

DICK CHENEY'S PAPER ON CONGRESSIONAL OVERSIGHT OF COVERT OPERATIONS

HON. HENRY J. HYDE

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, April 27, 1988

Mr. HYDE. Mr. Speaker, today I am asking that we publish the last portion of DICK CHENEY's paper for the American Bar Association on executive and legislative roles in covert operations. The previous two installments were published in the CONGRESSIONAL RECORD of April 20 and 21.

In his conclusion, Congressman CHENEY, who formerly served as President Ford's White House Chief of Staff, states that the current procedures for handling legislative-executive disputes over covert action are woefully inadequate. He proposes an alternative approach which departs from both past practices and the proposed 48 hour legislation. Before voting on the later, I believe we are obligated to study his seven suggestions as a serious alternative.

CLARIFYING LEGISLATIVE AND EXECUTIVE ROLES IN COVERT OPERATIONS—PART III

(By Dick Cheney)

UNDERLYING ISSUE: SUBSTITUTION FOR PUBLIC DEBATE

Underlying the dispute over notification is a more basic issue. Congress insists on notification because the executive's consultations with the intelligence committees substitute for the open debate and deliberation available in other policy arenas. The committees thus serve as a forum for mediating the tension between the Constitution's two-side concern for security and informed consent. On the whole, they are not simply barriers for Presidents to overcome. In good times, they can help the Presidents build the needed political support for operations when the normal public tools for building such support cannot be used.

But what happens when there is no consent? That is, what if the committee, or a significant proportion of its members, think a particular covert operation is a bad idea. Sometimes, the committee can persuade the executive branch to change its mind. But what if persuasion does not work?

One answer offered by some of my colleagues is that no covert actions should be undertaken unless they are supported by a bipartisan consensus. It sounds good to say foreign policy should be bipartisan, but that is no answer to actual legislative-executive branch conflicts. The fact is that we only have to be concerned about managing conflict when there is no consensus about what should be done. Insisting upon consensus as a precondition for action is equivalent to saying the President should not act in the face of disagreement. In effect, it is equivalent to taking the President's power and giving it to Congress. In fact, demanding consensus could be worse than requiring an up or down vote. If taken seriously, the President would need the support of a super-majority before he could do any thing. A consensus requirement, therefore, would be a decision rule weighted heavily toward the inaction side of any action-versus-inaction dispute. In the real world of breaking events, it is important to recognize that inaction is a form of action or decision.

To require or expect a consensus before action, in other words is only one possible answer to questions that should be articulated more clearly and openly. Some of the questions are: Who should hold what levers at what stage of the process? Under what political and legislative conditions should the presumption be weighted toward the President or toward Congress? That is, what rules should decide who prevails under conditions of stalemate is itself a form of decision that has policy consequences? In normal policy arenas, Presidents can always consider responding to stalemate by trying to persuade the public. For covert actions, it is first necessary to decide the ground rules under which public debate should be permitted or required. My final question therefore is, under what conditions should Congress, on its own initiative, be able to force a debate about particular covert operations into the public arena?

The current procedures for handling legislative-executive disputes are woefully inadequate, in my opinion. As the situation now stands, congressional opponents of a particular operation have two courses available to them if quiet persuasion fails. One is to leak. That method is criticized by everyone in the abstract, but no one can deny that it happens. My colleague Henry Hyde talked about this problem earlier today, and we devoted a chapter of the Iran-Contra minority report to specific examples of congressional leaks.[23] It is no defense on this issue to say the executive branch leaks too. In point of fact, the executive branch does not tend to leak highly compartmented information about ongoing operations. Yes, we do need to have a tightening, and more vigorous prosecution, of the laws governing unauthorized disclosures of classified information by executive branch personnel and others. But the fact that unauthorized behavior occurs in the executive branch does not make the same kind of unauthorized, unilateral behavior appropriate for Congress in interbranch policy conflicts.

The other method currently available to Congress is a fully legitimate one. It is to cut off funding for a particular operation by adding a limitation amendment to an authorization or appropriation bill. That is what Congress did with the Clark Amendment on Angola and the Boland Amendment on Nicaragua. There are two problems with this approach. First, the Boland Amendment was a very small part of a more than 1,200 page government-wide continuing resolution. In order to veto the amendment, the President would have been forced to shut down the whole government just three weeks before an election. This increasingly used procedure, in other words, is meant to, and does, weaken the President's bargaining power.

The second problem with current procedures has to do with who makes the decision to force public debate. I am not talking here about an unauthorized disclosure by a single person, but a decision authorized by a committee majority to take an issue to the full House and Senate floor. We can see the same problem even more clearly by considering a bill my colleague Lee Hamilton introduced in the 99th Congress, H.R. 4976. That bill was reported favorably in 1986, after partisan votes, by both the Intelligence and Foreign Affairs committees[24] and was reintroduced in the 100th Congress by Rep. Matt McHugh as H.R. 3633.

Under the Hamilton bill, the President would have been prevented from helping the Angolan resistance unless Congress first held a public debate and then voted to support such aid. The bill was specific to Angola, but Hamilton made it clear he believed that its principles about public debates and votes should apply to all covert actions about which there is significant controversy. Hamilton thus would have taken the current procedures an additional step. Under current procedures, the Intelligence Committee can use a limitation amendment to insist on a public debate and vote in the first budget cycle after a President initiates an action. Hamilton thus would have deprived the President of his constitutional power to initiate controversial actions by demanding a public debate and vote before the action could begin.

The problem the Hamilton bill shares with the typical limitation amendment is that they both combine deliberation by Congress with public disclosure and debate. Unfortunately, even though public discussion may seem as if it is a motherhood-and-apple-pie issue, it is not neutral with respect to policy results. Like the related consensus requirement, holding a public debate is in itself a decision that precludes some actions and favors others. In fact, the idea of holding a public debate over a covert operation is an oxymoron. There is no way to debate an operation in public and still keep it secret. The decision to debate, therefore, is the same as a decision not to proceed covertly. It could be argued that controversial policies should not be conducted in secret. But since some programs cannot be conducted at all any other way—for example, ones involving the help of other countries and individuals whose support of the United States could be dangerous to them if known—debating an operation can sometimes have the same effect as killing it.

AN ALTERNATIVE APPROACH

I have no quarrel with the idea that Congress may vote to kill an operation with which it disagrees. I have a real problem, however, with the idea that any group of members, well short of a majority of both chambers, can force an operational result by demanding a public debate and vote. There must be a better way to manage legislative-executive conflicts.

The current approach certainly does have some problems. We have seen that it too often breeds frustration and mistrust in both the legislative and executive branches. On issues of deep policy conflict, where each side considers the other's policy not just bad but potentially disastrous, frustration and mistrust too often lead each side to bend the rules or engage in other forms of behavior that breed further mistrust, poisoning future attempts at interbranch cooperation. I want to emphasize here that I am not talking about a one-sided problem. Congress had every reason to be angry about the way the National Security Council staff deceived us about the Contra resupply effort. But the President has just as much cause to be angry about the way the Speaker and the Rules Committee use their scheduling power to delay, prevent or structure floor votes, about the way members can unilaterally decide that a previously covert operation is ripe for public debate, and

[23] *Report of the Congressional Committees, Investigating the Iran-Contra Affair*, Minority Report, ch. 13, pp. 575-79.

[24] U.S. House of Representatives, Permanent Select Committee on Intelligence, 99th Congress, 2d Session, Report to accompany H.R. 4976, Requiring That Any United States Government Support For Military or Paramilitary Operations in Agnola Be Openly Acknowledged and Publicly Debated, H.Rept. 99-508, Part I (March 25, 1986); U.S. House of Representatives, Committee on Foreign Affairs, 99th Congress, 2d Session, Report to accompany H.R. 4976, Requiring That Any United States Government Support For Military or Paramilitary Operations in Angola Be Openly Acknowledged and Publicly Debated, H.Rept. 99-508, Part II (May 16, 1986).

about the incessant problem of leaks. Each side, has good reason to think the other has contributed to a breakdown of comity.

What we need, therefore, is a modified set of procedures that will permit each side to recognize the other's appropriate constitutional role. In this spirit, I offer the following as a framework for amending the Intelligence Oversight Act.

(1) The President should retain the constitutional power to initiate a covert action, even if some Members of Congress consider the operation to be controversial. This principle is accepted in the pending 48-hour bill but not in the principle underlying the Hamilton bill.

(2) Requiring notification within 48 hours can be accepted in general, but only if there is an escape clause for the President to invoke unilaterally in exceptional circumstances.

(3) When the President believes that exceptional circumstances require him not to inform Congress within 48 hours, Congress may want to follow Lloyd Cutler's suggestion and require the President to notify the intelligence committees of the fact that there now exists a finding whose contents temporarily are being withheld.

(4) If Congress wants to consider cutting off funds for a particular operation, the decision to consider this option should not have to be made in public. Instead, such a proposal should be offered in a separate bill that puts all identifying information in a classified annex. Such a bill should have privileged access to the House and Senate floor.

(Alternative to 4) Congress may want to continue using amendments to authorizations and appropriations bills as the vehicles for cutting off a covert operation. I would prefer requiring separate bills, but this may be a necessary political compromise. I firmly believe, however, that such amendments should not be allowed in continuing resolutions unless and until the President is given an item veto. In addition, any limitation amendment should include expedited procedures to guarantee a separate, subsequent, up or down vote on the same operation by the full House and Senate. In all such limitation amendments, subsequent bills, and accompanying reports, as with the separate bills described in (4) above, all identifying information should appear only in a classified annex.

(5) Debate by the full House and Senate should be in executive session, with severe punishment for leaks. I would be willing to go so far as to say that leaking by members of Congress and staff should be considered criminal. The Supreme Court decision in *Gravel* v. *U.S.* made it clear that the Speech and Debate Clause protects members of Congress and staff only in work that relates to their legislative business.[25] I would argue that because all legislative business under these procedures would be conducted in secret, there would be no defensible legislative reason for public disclosure. If Members are skittish about the Speech and Debate Clause, however, I would pursue expulsion and findings of contempt of Congress against members or staff who disclose. In addition, I would require the Speaker of the House and the President Pro Tempore of the Senate to open debate by declaring that the House or Senate is in executive session to discuss sensitive national security information, and that members will be held subject to prosecution, contempt proceedings, or expulsion, for disclosure.

(6) If the President vetoes a bill that cuts off funds for a covert operation, his veto message should be classified, and any override vote should take place in an executive session governed by the same stringent secrecy rules as the initial debate.

(7) If the President fails to muster Congressional support for an operation, or his veto is overridden, it then will be up to the President to decide whether to make a public case for the operation. If the President decides not to do so, all of the preceding steps will remain secret, and the President will be bound by the result.

I believe that the above procedures will go a long way toward restoring the President's constitutional role, while retaining and reaffirming the appropriate sphere for Congressional action. The President could continue to initiate operations and Congress could continue to terminate extended ones of which it disapproves. The main difference is that Congress would not have to blow an operation's cover by deciding to debate it. That would help preserve the President's power in some respects. If stringent secrecy rules were properly enforced, however, these procedures could also, paradoxically, help satisfy Lee Hamilton's desire to see controversial issues more widely discussed within Congress. There is no reason deliveration by Congress necessarily has to mean public disclosure.

The general effect of these procedures, however, would be to set guidelines to replace the vague notions of "controversy" and "consensus." Presidents would still have to maintain significant support in Congress to continue an extended operation under the cover of secrecy, but they would not have to maintain the super-majority of an overwhelming consensus. In general, Presidents would be limited to operations that support the prevailing conventional wisdom about the nation's policy objectives. If the President wanted to change the conventional wisdom, he would have to make a public case for his position. But the decision to go public would rest with the person who wants to take action, not with those who want to stop it. The President has a duty to persuade the public when he wants to marshal support for a new policy direction. But the President also should have the discretion to decide that a particular objective is not worth, or is not consistent with, such an effort. When a President makes the latter decision, Congress has the duty to establish procedures that make it possible for the two branches to proceed cooperatively.

Legislative-executive relations broke down during the Iran-Contra Affair. Congress made the President pay a stiff price for that breakdown, and the President has taken several important steps to improve procedures on his end of Pennsylvania Avenue. Now, we ought to look at what we can do on our end. The way to improve legislative-executive relations is with procedures that encourage each branch to respect the proper role of the other. Comity comes through hard work on a daily basis. But the first step must be mutual respect.

[25] *Gravel* v. *U.S.* 408 U.S. 606 (1971).

ANDREW K. SORDONI III, HONORED FOR COMMUNITY SERVICE

HON. PAUL E. KANJORSKI

OF PENNSYLVANIA

IN THE HOUSE OF REPRESENTATIVES

Wednesday, April 27, 1988

Mr. KANJORSKI. Mr. Speaker, it is my pleasure to draw your attention to Mr. Andres J. Sordoni III, who will be honored tonight by the Greater Wilkes-Barre Society of Fellows and the Anti-Defamation League of B'nai B'rith for his outstanding contribution to the Wyoming Valley community.

I have known Andy Sordoni for as long as I can remember, our families have been friends for generations. Although he easily could have relocated his very successful businesses anywhere in the country, he chose to remain in his native Wyoming Valley. His contributions to the community are so completely interwoven into the fabric of the Wyoming Valley that it is almost impossible to imagine our community without him. He serves as president of the Sordoni Foundation, a philanthropic organization which has provided countless grants for education, health care, economic development, social services, and the fine arts.

Mr. Sordoni is a director and past chairman of the Pennsylvania Chamber of Business and Industry, Pennsylvania for Effective Government, and the Pennsylvania Business Roundtable. He is a director of the Committee for Economic Growth, Geisinger-Wyoming Valley Medical Center, Pennsylvania Economy League, and the public television station, WVIA Channel 44. By supporting economic development efforts in northeastern Pennsylvania, Mr. Sordoni has shown the kind of foresight and enthusiasm which has led to the current economic resurgence in the Wyoming Valley. C-Tec Corp. which Mr. Sordoni chairs, is a leader in the telecommunications industry, as well as cable television, information services, consulting engineering, and facilities management. Mr. Sordoni is also chairman of Sordoni Enterprises, Inc., Sordoni Construction Services, Sterling Industrial Corp., and Whitman Tower, Inc.

Mr. Speaker, Andrew J. Sordoni III, is more than a pillar of the community, he and his family are the foundation. I am pleased to join my friends at the Greater Wilkes-Barre Society of Fellows and the Anti-Defamation League of B'nai B'rith in honoring Mr. Sordoni for his outstanding community service.

NO VICTORY THROUGH SURRENDER

HON. CHARLES B. RANGEL

OF NEW YORK

IN THE HOUSE OF REPRESENTATIVES

Wednesday, April 27, 1988

Mr. RANGEL. Mr. Speaker, syndicated columnist A.M. Rosenthal wrote a column which appeared in the New York Times of Friday, April 22, 1988, entitled "No Victory Through Surrender." In his column Mr. Rosenthal remarks that Democratic Presidential candidate Jesse Jackson was asked on the campaign trail in New York, "since it is so obvious that the country is not winning the war against drugs, why not try legalization?" Mr. Jackson's response was, "you do not win a war by surrender."

Mr. Speaker, Jesse Jackson deserves credit for elevating the issue of drug abuse to the forefront of this year's political campaign.

Mr. Rosenthal in his editorial marshals the arguments of the proponents of legalization, namely that:

Hundreds of thousands of people are forced to break the law because society rejects their particular narcotic of choice while accepting alcohol and tobacco. Hundreds of millions of dollars spent on law en-

ROUTING SLIP

TO:

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2	DDCI		X		
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9	Chm/NIC				
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Remarks D/OCA to have response prepared for DCI signature.

STAT

Executive Secretary
3 May 88
Date

3637 (10-81)

To: The Director 6 MAY 1988

From: John Helgerson

✓ We plan to prepare an answer for your signature.
Once all parts are received.

___ We plan to prepare an answer for my signature.

___ No answer expected or required

John, I prefer to_____

EXTENSIONS OF REMARKS

DICK CHENEY'S PAPER ON CONGRESSIONAL OVERSIGHT OF COVERT OPERATIONS

HON. HENRY J. HYDE
OF ILLINOIS
IN THE HOUSE OF REPRESENTATIVES

Wednesday, April 20, 1988

Mr. HYDE. Mr. Speaker, DICK CHENEY is a Congressman respected on both sides of the aisle for his reasoned logic and careful approach to complicated issues. He is one of those Members who "does his homework," a voracious reader knowledgeable on a wide range of issues.

On March 30, Mr. CHENEY presented to the American Bar Association Standing Committee on Law and National Security a paper on "Clarifying Legislative and Executive Roles in Covert Operations." It is a topic on which he is particularly qualified to speak, as he is a member of the House Intelligence Committee, former ranking Republican member of the Iran-Contra Committee and current chairman of the House Republican Conference. Moreover, because DICK has been a Member of the House since 1979, and before that was President Ford's White House Chief of Staff during 1975-77, he has unique exposure to foreign policy decisionmaking and to the interests of both the executive and legislative branches.

Soon we will be considering legislation on whether to impose a requirement that Congress be notified within 48 hours of any covert action. I believe Members would benefit from Congressman CHENEY's thoughts on this issue. Over the next several days, therefore, I will submit his paper for publication in the CONGRESSIONAL RECORD. The first portion, submitted today, considers the constitutional basis and history of power over foreign affairs, plus the nature of recent legislation providing oversight over covert action. The second segment addresses the proposed 48-hour notice legislation and some problems with it. In the final installment, the underlying issue of how to achieve informed consent or veto without public debate is considered, and Congressman CHENEY offers his own solution as a substitute for the proposed 48-hour legislation.

The material follows:

CLARIFYING LEGISLATIVE AND EXECUTIVE ROLES IN COVERT OPERATIONS—PART I

(By Dick Cheney)

There is probably a consensus at this conference, and in Washington generally, that the process for managing legislative-executive relations with respect to covert operations could be improved. The consensus quickly breaks down, however, as people begin putting forward concrete suggestions. There are two general areas in which proposals seem to concentrate. One has to do with requiring that Congress be notified of all covert operations within 48 hours of their start. The other deals with the broader issue for which notification is a substitute: the conditions under which covert operations should be deprived of their covert character to be made the subject of public debate. I shall discuss each of these subjects today, first criticizing the bills that have been moving through Congress and then concluding with a new set of proposals for grappling with what has become a highly contentious set of issues.

The reason there is so little consensus about solutions is that any idea for improving the oversight process for covert operations must rest on some premises about the appropriate role of the legislative and executive branches in foreign policy more generally. I shall not spend a great deal of time on broad questions of constitutional law. You have already heard from several noted experts in that field. Suffice it to say that I tend to agree with Robert F. Turner's and John Norton Moore's arguments on legislative and executive power.

A few words on the subject will help place the rest of my remarks in context, however. One of the main institutional objectives for the Framers of the Constitution as they worked through the hot summer of 1787 in Philadelphia was to create an independently powerful executive branch of government—unlike the executive in most states at the time, or under the Articles of Confederation. The Framers specifically wanted an executive who would be able to act with sufficient energy, secrecy and dispatch, to respond to the foreign policy crises the new nation inevitably would face. So they created the Presidency—one person placed clearly in charge of the executive branch—because they knew that when too many people share power and responsibility, decisions become muddy and actions are not taken. Then they gave that single executive the power to be the nation's leader in foreign policy. They made him the "sole organ" for diplomatic communication and gave him broad, discretionary power to deploy the government's resources to protect American lives and interests abroad.

Of course, the Constitutional Convention did not make the President all-powerful. It also gave Congress an important role to play in foreign policy, most obviously by giving the full Congress the power to declare war, tax, appropriate, and regulate foreign commerce, and also by giving the Senate the power to ratify treaties. But by giving Congress an important role to play, the Constitution—contrary to Edward S. Corwin—was not an unbounded "invitation to struggle."[1] Congress and the President were not given the same powers. Rather, each branch was given different powers to influence overlapping policy decisions, with each branch generally being given the powers most appropriate to its own capacities. The expectation was that the President would be able to use his diplomatic monopoly, and his ability to deploy the government's resources, to lead the government by taking concrete actions toward other countries. Congress could always support or oppose the President by granting or denying him the resources needed to follow up on what he had started. But the relationship between initiation and Congressional ratification was to be very different from the domestic field, where Presidential initiation either rests on a statutory delegation, or else must be limited to [illegible]

[1] Edward S. Corwin, *The President: Office and Powers* (1957), p. 171.

introducing an idea and then trying to persuade Congress to adopt it.

Since the Vietnam War, as is well known, Congress has gone well beyond its traditional role to develop institutional levers for placing the legislature at every stage of the foreign policy process, from initiation through negotiation and implementation. Nothing could be clearer from the constitutional scheme, for example, than the President's role as the country's "sole eyes and ears" for diplomatic communication. This issue seemed to have been settled during the new government's first months. On October 9, 1789, George Washington answered a letter that the King of France had addressed "to the President and Members of the General Congress" by saying that the task of receiving and answering such letters "has devolved upon me" alone, and not jointly with the Congress. As Judge Sofaer noted in his excellent 1976 book, the Senate twice confirmed this assertion by rejecting motions to request the President to communicate messages of behalf of the United States.[2]

A few years later, the Congress debated the same issue in another guise. Dr. George Logan was accused of meddling in negotiations between the United States and France in 1798. Although there was dispute over the matter, he was suspected by many Federalists of being a secret envoy sent to France to represent the Jeffersonian Democrats. In response, Congress passed a law in 1799, popularly known as the Logan Act, to make it criminal for any citizen of the United States, without the permission of the U.S. government—

"Directly or indirectly [to] commerce, or carry on, any verbal or written correspondence or intercourse with any foreign government, or any agent or officer thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States."

The only exception in the act is for individuals seeking to redress a personal injury to themselves.[3]

The Logan Act is still a part of the U.S. Code, with only minor grammatical changes.[4] Although aimed at the most obvious level against private citizens, congressional debate at the time made it clear that the function involved belonged to the executive branch, and outrage was expressed not only at Dr. Logan's own role, but at the alleged support he received from members of the opposition political party who did not have the President's blessings. It is significant, as the noted consititutional historian Charles Warren wrote when he was Assistant Attorney General, that the more than two hundred pages of debate about the act are printed in the *Annals of Congress* under the heading, "Usurpation of Executive Authority."[5]

[2] Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* (1976), p. 94.
[3] 1 Stat. 613 (1799).
[4] 18 U.S.C. 953.
[5] *Annals of Congress*, Fifth Congress, 3d Sess., (Dec. 3, 1798-March 3, 1799), pp. 2487-2721. See also, Charles Warren, Assistant Attorney General, [illegible]

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Despite this clear legislative history behind a statute almost as old the Republic, members of Congress today feel they can negotiate with foreign leaders directly, in the name of the legislative branch and in opposition to the President. It would be hard to imagine a clearer usurpation of executive authority than House Speaker Jim Wright's meetings with Nicaraguan President Daniel Ortega last November 11-12, without informing or involving the State Department, to discuss and influence a Sandinista cease-fire proposal that was still in draft form. Ortega's draft contained detailed items for ending U.S. military support for the Nicaraguan Democratic Resistance. This was only one of a series of meetings individual House Democratic opponents to the President's policy have held with the Nicaraguan Communists to discuss what the Communists should do in Nicaragua to persuade a majority in Congress to vote against the President's program.

Nor was that the only recent occasion of creative legislative usurpation of executive authority. Some Democratic Senators tried to use the Department of Defense authorization bill in 1987, for example, to try to impose its interpretation of a treaty on the President. Similarly, many Senators tried to use the same bill—as members of Congress have done ever since the War Powers Act was first introduced in the early 1970's—to assert that the executive's power to deploy governmental resources rests solely on statutory grounds, as if there were no constitutionally independent, inherent power for the executive to act against anything short of an armed invasion of the U.S. mainland.

My view of each of these actions is evident from my use of the word "usurpation." It is equally obvious, however, that a significant number of my Democratic colleagues consider each to have been perfectly appropriate. The underlying difference affects any discussion of reforming the laws for congressional oversight of covert operations. Ultimately, we seem to run up against principled differences over the proper constitutional roles of the legislative and executive branches. Congress could take some practical steps—to match ones the executive already has taken—that would help repair the breakdown in comity that occurred during Iran-Contra. I shall suggest a few specific ideas at the end of this essay. Before I present those ideas, however, I shall first say a few words about the way the oversight process now works, and the problems with the bill now working its way through Congress to tighten up so-called "loopholes."

OVERSIGHT OF COVERT OPERATIONS

During the opening months of President Ford's administration, Congress attached the Hughes-Ryan Amendment to the Foreign Assistance Act of 1974. Born out of general post-Vietnam and post-Watergate suspicions of the executive branch, as well as specific congressional opposition to some past operations,[6] the provision sponsored by Sen. Harold Hughes (D-Iowa) and Rep. Leo J. Ryan (D-Cal.) was intended to insure that Congress would be informed of covert operations conducted by or on behalf of the Central Intelligence Agency. As originally written, Hughes-Ryan prohibited the expenditure of any funds by or on behalf of the CIA for any operations in foreign countries, except those solely intended to obtain necessary intelligence, unless (1) the President specifically found that each such activity was important to U.S. national security and (2) each such operation was reported "in a timely fashion" to the appropriate committees of Congress. The amendment specifically named the House Foreign Affairs and Senate Foreign Relations Committees, but the list of appropriate committees also was generally understood to include the two Armed Services Committees, the two appropriations committees and, after they were formed in 1976 and 1977, the Senate and House Select Committees on Intelligence.[7]

Hughes-Ryan quickly caused problems that were evident even to some of its original supporters. By requiring notification to so many committees, the law in effect was requiring the CIA to notify more than half of the Senate, one-quarter of the House, and vast numbers of staff. It was impossible to prevent leaks under such conditions. In fact, wrote former Director of Central Intelligence William Colby, "every new project subjected to this procedure leaked, and the 'covert' part of CIA's covert action seemed almost gone."[8]

In response to this situation, Congress sought, and found, a reasonable middle ground. In 1980, after abandoning its efforts to pass a lengthy and problematic legislative charter for the intelligence community, Congress decided to revise the oversight law to expand the notification condition from the CIA to all departments, agencies and entities of the United States involved in intelligence activities, and to limit the committees receiving notification to the two intelligence committees. In general, the 1980 law—"to the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches"—required the executive branch to notify the intelligence committees (or, under special conditions, the chairmen and ranking minority members of the two committees, and four leaders of the House and Senate) before beginning any significant, anticipated intelligence activity. The law also contemplated, however, that there might be some conditions under which prior notice would not be given. In those situations, it required the President "to fully inform the intelligence committees in a timely fashion."

Under this law, the intelligence committees in fact have become significant players whose support any prudent Administration would do well to encourage. The 1980 law did not challenge the President's inherent constitutional authority to initiate covert actions. In fact, that law specifically denied any intention to require advance congressional approval for such actions. Nevertheless, Congress does have a very strong lever for controlling any operation that lasts more than a short period of time. Operations undertaken without prior approval have to be limited to the funds available through a contingency fund, or other budget devices, all of which are well known to Congress. Legislative control comes from the fact that Congress may constitutionally abolish these flexible tools and require project-by-project funding. Of course, such a decision would be suicidal because it would deprive the President of all discretion and also deprive the country of any ability to react quickly to breaking events. Congress therefore would not ever be likely to use its power to insist on project-by-project funding. Nevertheless, because the Constitution does give Congress this draconian lever, the intelligence committees can and do use the annual budget process to review every single ongoing operation. Any time Congress feels that an operation is unwise, it may step in to prohibit funds in the coming budget cycle from being used for that purpose. As a result, all operations of extended duration have the committee's tacit support (or non-opposition). Considering how many people in Congress and the general public oppose covert operations in principle, this is an important political base for any administration concerned about the country's long-term intelligence capacities.

History of Laws Prohibiting Correspondence With a Foreign Government and Acceptance of a Commission, U.S. Senate, 64th Congress, 2d Sess., S. Doc. 64-696 (1917), p. 7.

[6] See U.S. Senate, 94th Congress, 2d Sess., *Hearings and Final Report of the Select Committee to Investigate Government Operations With Respect to Intelligence* (1976) (Church Committee) and U.S. House of Representatives, 95th Congress, 1st Sess., House Select Committee on Intelligence, *Recommendations of the Final Report* (1977) (Pike Committee).

[7] Pub. L. 93-559, Sec. 32, 88 Stat. 1804 (1974). The present version of Hughes-Ryan, as amended by the 1980 Oversight Act, may be found at 22 U.S.C. 2422.

[8] William Colby, *Honorable Men* (1978), p. 423.

DICK CHENEY'S PAPER ON CONGRESSIONAL OVERSIGHT OF COVERT OPERATIONS

HON. HENRY J. HYDE

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Thursday, April 21, 1988

Mr. HYDE. Mr. Speaker, today I am honored to submit for publication the second of three installments of DICK CHENEY's recent paper for the American Bar Association on how to clarify executive and congressional responsibilities in supervising covert actions. In the first section, submitted for the RECORD yesterday, Mr. CHENEY argued that constitutionally and historically, the President has a monopoly on diplomatic communication and the power to initiate foreign policies, including to lead the Government in concrete actions involving deployment of existing resources; the Congress, on the other hand, through its budgetary control has the power to sustain or veto those initiatives which endure over some period of time. On oversight of covert action, all operations of extended duration in effect have the committees' tacit support, the Iran/Contra program being the notable exception.

In the second segment submitted today, Mr. CHENEY considers the proposed 48-hour rule on notification of covert actions. Existing bills, he argues:

> • • • are typical examples of "never again" thinking by Congress. To make sure the [Iran/Contra] disaster will never again repeat itself, Congress is willing to deprive future Presidents of all possible discretion under conditions Congress cannot possibly foresee. The result is an approach to legislative-executive relations that I consider fatally flawed for interrelated constitutional and practical reasons.

I commend this analysis to other Members and urge them to stay tuned for the final supplement next week. In his conclusion, Congressman CHENEY offers a substitute to proposed legislation which is designed to enhance congressional oversight while not infringing on executive prerogatives.

CLARIFYING LEGISLATIVE AND EXECUTIVE ROLES IN COVERT OPERATIONS—PART II

(By Dick Cheney)

PROPOSED 48-HOUR RULE

The intelligence committees can only review covert operations if they know about them, however. President Reagan did not notify the intelligence committees of the Iran arms sales for eleven months after signing a formal finding to authorize them. I do not think anyone in Congress believes this was timely. The important questions are, how should Congress respond? Should Congress try to close the "timely notification" loophole legislatively? Or are the costs of loophole-closing so severe that it pays to seek more creative and more politically and operationally sensitive ways out of the problem? I favor the second approach. A majority of my colleagues, however, seem to be stuck in a legalistic and largely sterile attempt to close loopholes. I will discuss positive alternatives at the end of this presentation. First, let me indicate what I think is wrong with the dominant mode of congressional thought.

The Senate has recently passed, and the House will soon consider, bills that would require the President under all conditions, with no exceptions, to notify Congress of all covert operations within 48 hours of their start. Those bills, in my opinion, are typical examples of "never again" thinking by Congress. To make sure the last disaster will never again repeat itself, Congress is willing to deprive future Presidents of all possible discretion under conditions Congress cannot possibly foresee. The result is an approach to legislative-executive relations that I consider fatally flawed for interrelated constitutional and practical reasons.

At the heart of the dispute over this bill is a deeper one over the scope of the President's inherent constitutional power. I believe the President has the authority, without statute, to use the resources placed at his disposal to protect American lives abroad and to serve other important foreign policy objectives short of war. The range of the President's discretion does vary, as Justice Jackson said in his famous concurring opinion in the Steel Seizure case. When the President's actions are consonant with express congressional authorizations, discretion can be at its maximum. A middle range of power exists when Congress is silent. Presidential power is at its lowest ebb when it is directly opposed to congressional mandate.[9] What is interesting about this typology, however, is that even when Congress speaks, and the President's power is at its lowest, Jackson acknowledged that there are limits beyond which Congress cannot legislate.[10] Those limits are defined by the scope of the inviolable powers inherent in the Presidential office itself.

Let me now apply this mode of analysis to the sphere of covert action. Congress was legislatively silent about covert action for most of American history, knowing full well that many broad ranging actions had been undertaken at Presidential initiative, with congressionally provided contingency funds.[11] For most of American history, therefore, Presidents were acting in the middle range of the authority Jackson described. Congress does have the power, however, to control the money and material resources available to the President for covert actions. Hughes-Ryan and the 1980 oversight act represent attempts by Congress to place conditions on the President's use of congressionally provided resources. Those conditions, for the most part, have to do with providing information to Congress. Because Congress arguably cannot properly fulfill its legislative function on future money bills without information, the reporting requirements can be understood as logical and appropriate extensions of a legitimate legislative power.

The constitutional question is: what are the limits to what Congress may demand as an adjunct of its appropriations power? Broadly speaking, Congress may not use the money power to achieve purposes that it would be unconstitutional for Congress to achieve directly. It could not place a condition on the salaries of judges, for example, to prohibit the judges from spending any time (i.e., any part of their salaries) to reach a particular constitutional conclusion.[12]

In the same way, Congress could not use its clearly constitutional powers over executive branch resources and procedures to invade an inherently Presidential power. For example, Congress does not have the constitutional power to use an appropriations rider, such as the Boland Amendment, to deprive the President of his authority as the "sole organ of diplomacy" to speak personally, or through any agent of his choice, with another government about any subject at all. I mean this last statement specifically to include asking another government to support the Nicaraguan Democratic Resistance. Congress does have the power to prevent the President from offering another country something of value in return for such support. For example, it could prevent a President from conditioning foreign aid on another country's support for the Contras for fear that U.S. foreign aid, the control over which is in Congress's province, would just become a laundering device. But despite protestations and innuendoes galore during the Iran-Contra hearings, Congress may not prevent the President from using exclusively Presidential powers to achieve results Congress may not like.

How does this reasoning apply to the proposed 48-hour rule? Congress quite properly justified the 1980 notification requirement, as I mentioned earlier, on the need for information as a necessary adjunct to the legislative power to appropriate money. By doing so, Congress stood squarely within a line of cases upholding Congress's contempt power. In the 1821 case of *Anderson* v. *Dunn* the Supreme Court upheld the use of contempt as an implied power needed to implement others given expressly by the Constitution. In a statement that clearly applies to all of the government's branches, the Court said: "There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to their exercise; not substantive and independent, indeed, but auxiliary and subordinate."[13]

Using this line of reasoning, the Court argued that even though courts were vested with the contempt power by statute, they would have been able to exercise that power without the aid of a statute. For the same reason, the court held, Congress must have inherent authority to exercise a similar power.[14] Later cases tried to circumscribe Congress's contempt power, but the power itself was always held to be a necessary adjunct to Congress's legislative functions and therefore to rest on an implied constitutional foundation.[15]

So far, the Court's argument would seem to support Congress's right to demand information of the executive. But what happens if that power confronts another implied power held by another branch that is equally well grounded on a constitutional foundation? That was the issue in the executive privilege case of *U.S.* v. *Nixon*.[16] In that case, we learned that the decision in any particular case must rest on the competing claims of the two branches at odds with each other. That is how I think the 48-hour rule must be decided.

The proposed 48-hour bill recognizes the President's inherent power to initiate a covert action, as long as that action is limited to resources already available to the President. That is why the 1980 oversight act and the proposed 48-hour bill both take pains to say that by requiring notification, Congress is not asserting a right to approve Presidential decisions in advance.[17] If Congress ever tries to insist on advance approval, that would surely be overturned as a legislative veto.[18]

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[9] *Youngstown Sheet and Tube Co.* v. *Sawyer* 343 U.S. 579, 635-38 (1952).

[10] *Ibid.* at 645.

[11] For a summary, see U.S. House of Representatives, 100th Congress, First Session, Select Committee to Investigate Covert Arms Transactions with Iran and U.S. Senate, 100th Congress, First Session, Select Committee On Secret Military Assistance to Iran and the Nicaraguan Opposition, *Report of the Congressional Committees Investigating the Iran-Contra Affair*, H. Rept. 100-433, S. Rept. 100-216 (November 1987), pp. 467-69.

[12] For a somewhat analogous but less absurd case, see *Brown* v. *Califano* 627 F. 2d 1221 (1980).

[13] *Anderson* v. *Dunn*, 6 Wheat. 204, 225-26 (1821).

[14] Id. at 628-29.

[15] *Kilbourn* v. *Thompson*, 103 U.S. 168 (1881), read the power narrowly, but *McGrain* v. *Daugherty*, 273 U.S. 135 (1927) and *Sinclair* v. *U.S.*, 279 U.S. 263 (1929) in turn read *Kilbourn* narrowly. Later cases have tended to involve conflicts between the contempt power and the First Amendment, *Wat-*

But if the President has the inherent power to initiate covert actions, then the same rule that gives Congress the right to demand information, and the related contempt power, also gives the President the necessary implied powers he may need to put his acknowledged power into effect. In virtually all cases, there is no conflict between the President's power to initiate an action and requiring the President to notify the intelligence committees, or a smaller group of leaders, of that operation in advance. In a few very rare circumstances, however, there can be a direct conflict.

According to Admiral Stansfield Turner, who was the Director of Central Intelligence at the time, there were three occasions, all involving Iran, in which the Carter Administration withheld notification during an ongoing operation. Notification was withheld for about three months until six Americans could be smuggled out of the Canadian Embassy in Teheran. As Representative Norman Mineta pointed out in testimony following Turner's, the Canadian government made withholding notification a condition of their participation.[19] Notification was also withheld for about six months in two other Iranian operations during the hostage crisis. Said Turner: "I would have found it very difficult to look . . . a person in the eye and tell him or her that I was going to discuss this life threatening mission with even half a dozen people in the CIA who did not absolutely have to know".[20] In these situations, President Carter thought his constitutional obligation to protect American lives could not have been fulfilled if he had been required to notify Congress within 48 hours. And as the Canadian example makes clear, the choice between not notifying or not going ahead at all is sometimes put on us by people outside U.S. control.

The Iranian hostage examples also show that the situations under which notification may have to be withheld depend not on how much time has elapsed, but on the character of the operations themselves. It is worth emphasizing that the proposed bill would require notification within 48 hours of an operation's start—that is, when the U.S. begins putting people in place, not when the operation is finished. Let us put aside for the moment whether fear of Congressional leaks would be a legitimate reason for withholding notification about a particularly sensitive operation. I believe there is good reason to be concerned about leaks, but am willing to defer argument about whether this concern carries constitutional weight, because there are better examples to make my point. There can be no question that when other governments place specific security requirements on cooperating with the United States, the no-exceptions aspect of the proposed 48-hour rule would be equivalent to denying the President his constitutionally inherent power to act.

Who should have the power to decide that notification would make action impossible? In the rare situation in which a President believes he must delay notification as a necessary adjunct to fulfilling his constitutional mandate, that decision must by its nature rest with the President. The President obviously cannot consult with Congress about whether to consult. That would itself be a form of consultation. If the President could go that far, there would not be a problem and we could just accept the rule.

So, on the one side of the scale, we see that the President's implied power to withhold notification may be a necessary adjunct to the inherent power to act. What is on Congress's side of the scale? In the same report on the 48-hour bill that acknowledged the President's power to initiate action, the Senate Intelligence Committee offered two constitutional justifications for its notification requirement. The first was "to provide Congress with an opportunity to exercise its responsibilities under the Constitution."[21] The second was "to ensure that decisions to undertake covert actions are not left solely to a handful of single-minded executive officials."[22]

The second of these reasons is nothing less than a demand that Congress participate in a decision it has already acknowledged belongs to the President. Prudence undoubtedly should lead to consultation, but the dictates of prudence do not settle questions of constitutional power. The first argument about legislative responsibilities is more weighty, but I would submit that there is no legislative power that requires notification under all conditions, with no exceptions, during any precisely specified time period. All we need to know is whether to continue funding ongoing operations. We have had that information in every case, with the exception of President Carter's and President Reagan's hostage-related Iran initiatives.

I suppose you could argue that failure to notify might, in the extreme, deprive us of our ability to decide about continuing to fund a particular operation. Iran-Contra was such an extreme. But the choice is not one-sided. The price of assuring notification about all operations within a specific time period is to make some potentially lifesaving operations impossible. On the scale of risks, I am more concerned about depriving the President of his ability to act than I am about Congress's alleged inability to respond. I feel this way not because I am sanguine about every decision Presidents might take. Rather, it is because I am confident that Congress eventually will find out in this leaky city about decisions of any consequence. When that happens, Congress has the political tools to take retribution against any President whom it feels withheld information without adequate justification. President Reagan learned this dramatically in the Iran-Contra affair. It is a lesson no future President is likely to forget.

[18] *U.S. v. Nixon* 418 U.S. 683 (1974).

[19] See U.S. Senate Select Committee on Intelligence, 100th Congress, 2d Session, *Intelligence Oversight Act of 1988*, S. Rept. 100-276, pp. 16, 24, 26.

[20] See *INS v. Chadha*, 462 U.S. 919 (1983).

[21] U.S. House of Representatives, Permanent Select Committee on Intelligence, Subcommittee on Legislation, 100th Cong., 1st Sess., Hearings on H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of

[22] Id. at 45. See also 46, 49, 58, 61.

[23] *Intelligence Oversight Act of 1988*, S. Rept. 100-276, p. 21.

[24] *Ibid.*, p. 22.

DICK CHENEY'S PAPER ON CONGRESSIONAL OVERSIGHT OF COVERT OPERATIONS

HON. HENRY J. HYDE

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Wednesday, April 27, 1988

Mr. HYDE. Mr. Speaker, today I am asking that we publish the last portion of DICK CHENEY's paper for the American Bar Association on executive and legislative roles in covert operations. The previous two installments were published in the CONGRESSIONAL RECORD of April 20 and 21.

In his conclusion, Congressman CHENEY, who formerly served as President Ford's White House Chief of Staff, states that the current procedures for handling legislative-executive disputes over covert action are woefully inadequate. He proposes an alternative approach which departs from both past practices and the proposed 48 hour legislation. Before voting on the later, I believe we are obligated to study his seven suggestions as a serious alternative.

CLARIFYING LEGISLATIVE AND EXECUTIVE ROLES IN COVERT OPERATIONS—PART III

(By Dick Cheney)

UNDERLYING ISSUE: SUBSTITUTION FOR PUBLIC DEBATE

Underlying the dispute over notification is a more basic issue. Congress insists on notification because the executive's consultations with the intelligence committees substitute for the open debate and deliberation available in other policy arenas. The committees thus serve as a forum for mediating the tension between the Constitution's two-side concern for security and informed consent. On the whole, they are not simply barriers for Presidents to overcome. In good times, they can help the Presidents build the needed political support for operations when the normal public tools for building such support cannot be used.

But what happens when there is no consent? That is, what if the committee, or a significant proportion of its members, think a particular covert operation is a bad idea. Sometimes, the committee can persuade the executive branch to change its mind. But what if persuasion does not work?

One answer offered by some of my colleagues is that no covert actions should be undertaken unless they are supported by a bipartisan consensus. It sounds good to say foreign policy should be bipartisan, but that is no answer to actual legislative-executive branch conflicts. The fact is that we only have to be concerned about managing conflict when there is no consensus about what should be done. Insisting upon consensus as a precondition for action is equivalent to saying the President should not act in the face of disagreement. In effect, it is equivalent to taking the President's power and giving it to Congress. In fact, demanding consensus could be worse than requiring an up or down vote. If taken seriously, the President would need the support of a super-majority before he could do any thing. A consensus requirement, therefore, would be a decision rule weighted heavily toward the inaction side of any action-versus-inaction dispute. In the real world of breaking events, it is important to recognize that inaction is a form of action or decision.

To require or expect a consensus before action, in other words is only one possible answer to questions that should be articulated more clearly and openly. Some of the questions are: Who should hold what levers at what stage of the process? Under what political and legislative conditions should the presumption be weighted toward the President or toward Congress? That is, what rules should decide who prevails under conditions of stalemate is itself a form of decision that has policy consequences? In normal policy arenas, Presidents can always consider responding to stalemate by trying to persuade the public. For covert actions, it is first necessary to decide the ground rules under which public debate should be permitted or required. My final question therefore is, under what conditions should Congress, on its own initiative, be able to force a debate about particular covert operations into the public arena?

The current procedures for handling legislative-executive disputes are woefully inadequate, in my opinion. As the situation now stands, congressional opponents of a particular operation have two courses available to them if quiet persuasion fails. One is to leak. That method is criticized by everyone in the abstract, but no one can deny that it happens. My colleague Henry Hyde talked about this problem earlier today, and we devoted a chapter of the Iran-Contra minority report to specific examples of congressional leaks.[23] It is no defense on this issue to say the executive branch leaks too. In point of fact, the executive branch does not tend to leak highly compartmented information about ongoing operations. Yes, we do need to have a tightening, and more vigorous prosecution, of the laws governing unauthorized disclosures of classified information by executive branch personnel and others. But the fact that unauthorized behavior occurs in the executive branch does not make the same kind of unauthorized, unilateral behavior appropriate for Congress in interbranch policy conflicts.

The other method currently available to Congress is a fully legitimate one. It is to cut off funding for a particular operation by adding a limitation amendment to an authorization or appropriation bill. That is what Congress did with the Clark Amendment on Angola and the Boland Amendment on Nicaragua. There are two problems with this approach. First, the Boland Amendment was a very small part of a more than 1,200 page government-wide continuing resolution. In order to veto the amendment, the President would have been forced to shut down the whole government just three weeks before an election. This increasingly used procedure, in other words, is meant to, and does, weaken the President's bargaining power.

The second problem with current procedures has to do with who makes the decision to force public debate. I am not talking here about an unauthorized disclosure by a single person, but a decision authorized by a committee majority to take an issue to the full House and Senate floor. We can see the same problem even more clearly by considering a bill my colleague Lee Hamilton introduced in the 99th Congress, H.R. 4976. That bill was reported favorably in 1986, after partisan votes, by both the Intelligence and Foreign Affairs committees [24] and was reintroduced in the 100th Congress by Rep. Matt McHugh as H.R. 3633.

Under the Hamilton bill, the President would have been prevented from helping the Angolan resistance unless Congress first held a public debate and then voted to support such aid. The bill was specific to Angola, but Hamilton made it clear he believed that its principles about public debates and votes should apply to all covert actions about which there is significant controversy. Hamilton thus would have taken the current procedures an additional step. Under current procedures, the Intelligence Committee can use a limitation amendment to insist on a public debate and vote in the first budget cycle after a President initiates an action. Hamilton thus would have deprived the President of his constitutional power to initiate controversial actions by demanding a public debate and vote before the action could begin.

The problem the Hamilton bill shares with the typical limitation amendment is that they both combine deliberation by Congress with public disclosure and debate. Unfortunately, even though public discussion may seem as if it is a motherhood-and-apple-pie issue, it is not neutral with respect to policy results. Like the related consensus requirement, holding a public debate is in itself a decision that precludes some actions and favors others. In fact, the idea of holding a public debate over a covert operation is an oxymoron. There is no way to debate an operation in public and still keep it secret. The decision to debate, therefore, is the same as a decision not to proceed covertly. It could be argued that controversial policies should not be conducted in secret. But since some programs cannot be conducted at all any other way—for example, ones involving the help of other countries and individuals whose support of the United States could be dangerous to them if known—debating an operation can sometimes have the same effect as killing it.

AN ALTERNATIVE APPROACH

I have no quarrel with the idea that Congress may vote to kill an operation with which it disagrees. I have a real problem, however, with the idea that any group of members, well short of a majority of both chambers, can force an operational result by demanding a public debate and vote. There must be a better way to manage legislative-executive conflicts.

The current approach certainly does have some problems. We have seen that it too often breeds frustration and mistrust in both the legislative and executive branches. On issues of deep policy conflict, where each side considers the other's policy not just bad but potentially disastrous, frustration and mistrust too often lead each side to bend the rules or engage in other forms of behavior that breed further mistrust, poisoning future attempts at interbranch cooperation. I want to emphasize here that I am not talking about a one-sided problem. Congress had every reason to be angry about the way the National Security Council staff deceived us about the Contra resupply effort. But the President has just as much cause to be angry about the way the Speaker and the Rules Committee use their scheduling power to delay, prevent or structure floor votes, about the way members can unilaterally decide that a previously covert operation is ripe for public debate, and

[23] *Report of the Congressional Committees, Investigating the Iran-Contra Affair*, Minority Report, ch. 13, pp. 575-79.

[24] U.S. House of Representatives, Permanent Select Committee on Intelligence, 99th Congress, 2d Session, Report to accompany H.R. 4976, Requiring That Any United States Government Support For Military or Paramilitary Operations in Angola Be Openly Acknowledged and Publicly Debated, H.Rept. 99-508, Part I (March 25, 1986); U.S. House of Representatives, Committee on Foreign Affairs, 99th Congress, 2d Session, Report to accompany H.R. 4976, Requiring That Any United States Government Support For Military or Paramilitary Operations in Angola Be Openly Acknowledged and Publicly Debated, H.Rept. 99-508, Part II (May 16, 1986).

about the incessant problem of leaks. Each side has good reason to think the other has contributed to a breakdown of comity.

What we need, therefore, is a modified set of procedures that will permit each side to recognize the other's appropriate constitutional role. In this spirit, I offer the following as a framework for amending the Intelligence Oversight Act.

(1) The President should retain the constitutional power to initiate a covert action, even if some Members of Congress consider the operation to be controversial. This principle is accepted in the pending 48-hour bill but not in the principle underlying the Hamilton bill.

(2) Requiring notification within 48 hours can be accepted in general, but only if there is an escape clause for the President to invoke unilaterally in exceptional circumstances.

(3) When the President believes that exceptional circumstances require him not to inform Congress within 48 hours, Congress may want to follow Lloyd Cutler's suggestion and require the President to notify the intelligence committees of the fact that there now exists a finding whose contents temporarily are being withheld.

(4) If Congress wants to consider cutting off funds for a particular operation, the decision to consider this option should not have to be made in public. Instead, such a proposal should be offered in a separate bill that puts all identifying information in a classified annex. Such a bill should have privileged access to the House and Senate floor.

(Alternative to 4) Congress may want to continue using amendments to authorizations and appropriations bills as the vehicles for cutting off a covert operation. I would prefer requiring separate bills, but this may be a necessary political compromise. I firmly believe, however, that such amendments should not be allowed in continuing resolutions unless and until the President is given an item veto. In addition, any limitation amendment should include expedited procedures to guarantee a separate, subsequent, up or down vote on the same operation by the full House and Senate. In all such limitation amendments, subsequent bills, and accompanying reports, as with the separate bills described in (4) above, all identifying information should appear only in a classified annex.

(5) Debate by the full House and Senate should be in executive session, with severe punishment for leaks. I would be willing to go so far as to say that leaking by members of Congress and staff should be considered criminal. The Supreme Court decision in *Gravel* v. *U.S.* made it clear that the Speech and Debate Clause protects members of Congress and staff only in work that relates to their legislative business.[25] I would argue that because all legislative business under these procedures would be conducted in secret, there would be no defensible legislative reason for public disclosure. If Members are skittish about the Speech and Debate Clause, however, I would pursue expulsion and findings of contempt of Congress against members or staff who disclose. In addition, I would require the Speaker of the House and the President Pro Tempore of the Senate to open debate by declaring that the House or Senate is in executive session to discuss sensitive national security information, and that members will be held subject to prosecution, contempt proceedings, or expulsion, for disclosure.

(6) If the President vetoes a bill that cuts off funds for a covert operation, his veto message should be classified, and any override vote should take place in an executive session governed by the same stringent secrecy rules as the initial debate.

(7) If the President fails to muster Congressional support for an operation, or his veto is overridden, it then will be up to the President to decide whether to make a public case for the operation. If the President decides not to do so, all of the preceding steps will remain secret, and the President will be bound by the result.

I believe that the above procedures will go a long way toward restoring the President's constitutional role, while retaining and reaffirming the appropriate sphere for Congressional action. The President could continue to initiate operations and Congress could continue to terminate extended ones of which it disapproves. The main difference is that Congress would not have to blow an operation's cover by deciding to debate it. That would help preserve the President's power in some respects. If stringent secrecy rules were properly enforced, however, these procedures could also, paradoxically, help satisfy Lee Hamilton's desire to see controversial issues more widely discussed within Congress. There is no reason deliberation by Congress necessarily has to mean public disclosure.

The general effect of these procedures, however, would be to set guidelines to replace the vague notions of "controversy" and "consensus." Presidents would still have to maintain significant support in Congress to continue an extended operation under the cover of secrecy, but they would not have to maintain the super-majority of an overwhelming consensus. In general, Presidents would be limited to operations that support the prevailing conventional wisdom about the nation's policy objectives. If the President wanted to change the conventional wisdom, he would have to make a public case for his position. But the decision to go public would rest with the person who wants to take action, not with those who want to stop it. The President has a duty to persuade the public when he wants to marshal support for a new policy direction. But the President also should have the discretion to decide that a particular objective is not worth, or is not consistent with, such an effort. When a President makes the latter decision, Congress has the duty to establish procedures that make it possible for the two branches to proceed cooperatively.

Legislative-executive relations broke down during the Iran-Contra Affair. Congress made the President pay a stiff price for that breakdown, and the President has taken several important steps to improve procedures on his end of Pennsylvania Avenue. Now, we ought to look at what we can do on our end. The way to improve legislative-executive relations is with procedures that encourage each branch to respect the proper role of the other. Comity comes through hard work on a daily basis. But the first step must be mutual respect.

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[25] *Gravel* v. *U.S.* 408 U.S. 606 (1971).