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CONGRESSIONAL RECORD — Extensions of Remarks

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HENRY HYDE'S SPEECH ON
LEAKS AND CONGRESSIONAL
OVERSIGHT

HON. ROBERT H. MICHEL

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Thursday, March 31, 1988

Mr. MICHEL. Mr. Speaker, on Wednesday, March 30, 1988, my distinguished Illinois colleague and our good friend, HENRY HYDE, delivered a speech before a conference cosponsored by the American Bar Association Standing Committee on Law and National Security, the George Mason University School of Law, the Stucant Bar Association, and the International Law Society. I want to insert Mr. HYDE'S remarks in the RECORD at this point because I believe what he has to say about "Leaks" and Congressional Oversight" reflects his usual good judgment, common sense, and uncommon wisdom.

"LEAKS" AND CONGRESSIONAL OVERSIGHT
(By Henry J. Hyde)

The grave effects of unauthorized disclosures upon U.S. intelligence and our foreign policy is a problem we had better begin thinking about with some urgency.

The seriousness and universality of "leaks" are obvious. Yet many continue to maintain there's no "proof" that Congress leaks or that it leaks significantly. And, even when acknowledging problems in the executive branch or Congress, powerful legislative figures habitually object to virtually every initiative for investigating and punishing these occurrences, while failing to offer alternative solutions. My proposal for a Joint Intelligence Committee, which would replace the existing two House and Senate committees and reduce the number of Members and staff with access to intelligence information, has been resisted since 1984, when I first introduced the idea. Other suggestions, e.g., increasing use of the polygraph for investigative purposes, strengthening nondisclosure agreements and legal action against disclosers or the media, are branded as paranoia and violations of first amendment rights. But the critics never offer a better solution, and most seem content to drift with the tide—or, more accurately, the tidal wave.

If the Iran/Contra affair had one salutary effect, it was to highlight policymakers' fear of leaks and distrust of congressional discretion, and to expose dramatically the destructive effects this can have. Maximum compartmentalization within the executive branch and failure to notify Congress of the Iran initiative invited judgmental errors and courted political disaster. These steps were taken out of determination to explore a policy option considered potentially promising only if, by avoiding normal procedures, it could be kept secret. An unanswered question is how many times the opposite happens—how many times are innovative approaches to difficult foreign policy problems rejected or not even considered because their success depends upon a secrecy which probably could not be maintained?

Regardless of claims that Congress must be considered innocent until proven guilty of security lapses, damage to the oversight process occurred as soon as a widespread perception developed that the legislative branch could not be trusted. This perception has seriously affected executive branch cooperation with intelligence oversight committees. A similar attitude is harbored by allied intelligence services who decide

whether to trade information with U.S. intelligence, what quality of information they will provide and whether they will actively cooperate with us in other ways. In testifying against proposals for mandatory and more detailed prior notifications to Congressional Intelligence Committees, Secretary of Defense Frank Carlucci, who formerly was a Deputy Director of Central Intelligence under President Carter and more recently served as President Reagan's National Security Adviser, stated that foreign governments cooperating on special activities are wary because they don't trust Congress to keep secrets.¹

"It is a matter of perceptions," said Mr. Carlucci. "Other Governments are extraordinarily sensitive on this point . . ."

"If our intelligence assets around the world, particularly cooperating organizations, perceive that the CIA is obliged to disclose whatever the [Intelligence Committees] may want, then it is very clear based on my experience that our intelligence assets would dry up."

Carlucci said he knew of "numerous" occasions when foreign governments had said they would not share information if CIA provided it to Congress.²

Congressmen by nature have strong political views, cater to and depend on the press, and are not imbued with the security habits of intelligence professionals. Thus, they naturally fall under suspicion. And let's not forget that congressional oversight in the aftermath of Vietnam and Watergate strained relations between Congress and the intelligence community almost to the breaking point. Ex-CIA Director Colby recalls in his memoirs that every new covert action disclosed to Congress in 1975 was leaked. "And the 'covert' part of CIA's covert action seemed almost gone."³ The notorious laxity of the Church and Pike investigations tainted the more rigorous Intelligence Committees which took their place.

No less a journalistic authority on leaks than Daniel Schorr noted in a Washington Post article . . . that it has never been suggested that a Member of Congress could be disciplined other than by Congress itself. This is relevant because (I don't think that I am baring any great journalistic secrets) the exposure of covert intelligence questions is frequently a form of congressional whistleblowing. A leak often occurs when a clandestine plan runs into substantial opposition during a briefing for congressional committees.⁴ Schorr went on to cite a number of specific examples involving reported congressional leaks of information on Angola, Chile, Nicaragua, El Salvador, and Libya.

Recently, there have been several known and serious disclosures on each of the Oversight Committees. Those who nonetheless continue categorically to defend the committees' records apparently depend upon congressional courtesy to forestall a "name names" rebuttal. In the congressional Select Committees' final report on the Iran-Contra affair, the minority report devoted a chapter to the need to patch leaks.⁵ It pointed

out the early history of problems with unauthorized disclosures in Congress and gave more recent examples of alleged congressional leaks published in other sources, including use of the threat of disclosure by several individuals in order to block executive branch actions of which they disapproved. That the majority report didn't consider leaks a fundamental issue is in itself a real measure of the problem.

From the outset of the congressional Iran-Contra probe, there was a steady stream of leaks. Interestingly, House Chairman Lee Hamilton and his Senate counterpart, Daniel Inouye, followed their best instincts on how to keep secrets when it came time to depose Admiral Poindexter. As the minority report observes:

"The two Select Committees recognized that the Admiral's testimony on the diversion of funds was the pivotal, and potentially most explosive political question of this whole investigation. As a result, extraordinary steps were taken to protect the information. Specifically, only three staff attorneys and no members of either committee participated in the secret questioning. The success of these procedures speaks volumes on how to protect secrets."⁶

Officially "proven" sourcing of leaks on the Hill or elsewhere, however, is extremely rare. Only a handful of leaks ever have been traced through investigation to the culpable individual, so lack of proof hardly establishes that Congress has a good record.

A Senate intelligence committee study released to the press reportedly found that in selected leaks of classified information, journalists referenced congressional sources only 8-9% of the time, but cited Reagan administration officials 66% of the time. This research methodology is suspect, since journalists are alleged frequently to protect their most vulnerable sources, and persons on the intelligence oversight committees would in many cases be particularly exposed by virtue of being the only knowledgeable "congressional" sources. Let us take the Senate study at face value, however, and also generously assume that Congress has 2,500 people with clearances as opposed to 2.2 million in the executive branch and military. Reliance on the Senate study forces us to conclude that Congress maintains just over 0.1% the number of executive branch clearances, but is responsible for 8-9% of the leaks on national security issues. Specifically, on average, a cleared person in Congress is 60 times more likely than his counterparts elsewhere to engage in unauthorized disclosures.

Evidence that news leaks quite commonly originate on the Hill also was developed in a summer 1987 survey among the readership of the periodical, American Politics. The journal, circulated almost entirely within the Washington area, asked its readership to respond to a wide-ranging poll which included the question, "Have you ever leaked information to the news media?" over 900 persons, considered to be a reliable cross-section of the readership, responded. Results on the leak question were considered so dramatic that they were published early and separately, in an August 1987 article entitled "Leak City."⁷ More than one in four

¹ Bill Gertz, "Carlucci: Cohen Bill Will Plug CIA Sources," Washington Times, Dec. 17, 1987.

² Bob Woodward and Walter Pincus, "Carlucci Warns of Veto on Covert-Action Notice," Washington Post, Dec. 17, 1987.

³ William Colby, "Honorable Men" (1978), p. 423.

⁴ Daniel Schorr, "Cloak and Dagger Relics," Washington Post, Nov. 14, 1985, A23.

⁵ "Report of the Congressional Committees Investigating the Iran-Contra Affair" (Washington, DC: GPO, 1987), pp. 575-79.

⁶ Ibid, p. 579.

⁷ Results on the leak portion are published in Robert Garcia, "Leak City," American Politics, August 1987, pp. 23-24. Methodology is explained and some additional pertinent information is given in Robert Garcia, "And Other Results of the First Annual 'Inside the Beltway' Readers Poll," American Politics, Sept. 1987, pp. 14-17. Respondents on the leak section included, *inter alia*, 16 politicians, 193 Capitol Hill staffers, six members of the Diplomatic Corps and 66 Federal employees.

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persons—over 28%—conceded at some time having shared a secret with the media. Capitol Hill staffers, sporting a 31% rating, were higher than average. But they were pikers compared to the "politician" category, alone at the pinnacle of the chart, in which 62% of 16 respondents admitted to having leaked information. This contrasted with 23% in the "Federal employees" category. Media information sources tended to have higher salary and educational levels. Contrary to some recent accusations, conservatives were found to leak less than liberals and moderates. And, in delicious irony, leakers named journalists as the group they trusted the least. (Among respondents as a whole, "politicians" had a slight edge over journalists in competition for this award.)

The situation has been allowed to deteriorate so far that the task of changing this permissive culture is now monumental. Success will come very slowly indeed, and will result only from a persistent and aggressive attack across a broad front, in both Congress and the executive branch.

One option is stricter security procedures and increased compartmentalization. Capitol Hill is very quick to claim this is the preferred solution for the executive branch problems, thereby avoiding the need to grapple with difficult civil and press liberties issues. But Congress is loathe to apply this option to its own operations by consolidating its oversight into one joint committee. However, consolidation and compartmentalization is a far more promising option for the congressional Intelligence Committees than for policy agencies. Effective congressional oversight doesn't require Intelligence Committees with 32 (plus 4 ex-officio) members and 55-plus staff. Moreover, additional staff, as well as 31 Senators and Congressmen serving on the Defense Appropriations Subcommittees in both Houses of Congress, also have access to extremely sensitive intelligence. Altogether, therefore, 67 Members of Congress are in the "loop" for such information.

For the policy agencies, who already have cut back on access to classified material, further restrictions on the dissemination of information may be helpful in some cases. But if compartmentalization is not carefully applied, the additional advantages could be limited and the drawbacks serious. Already there is concern that the most sensitive intelligence goes only to top policymakers who are too busy to read or act upon it. Analysts who are supposed to make sense of collected intelligence cannot do their job if pertinent information is withheld from them. Finished intelligence analyses, in turn, are less useful if they are not distributed to those with an interest in the subject. If policy action is considered or attempted, the circle of knowledgeable parties inevitably widens so that some people will become involved who may disagree with the proposed action or who for some other reason will be inclined to leak; and there will be too many people involved at this stage to have much hope of finding the leaker. Even the Ollie North Iran/Contra operation, compartmentalized as it was, eventually involved great numbers of people within and outside the Government. In fact, the Iran overture was indeed leaked rather early in a little-noticed Jack Anderson column, by some still unknown person. Future use of established covert action and policy deliberation procedures, insisted upon by the Tower Review Board and in congressional reports on the Iran/Contra affair, will ensure that a sizable number of people always are involved.

But rather than accept for itself the medicine that it has sometimes proposed for the

executive branch, Congress is now proposing that it expand the definition of its own "need to know." In what Secretary Carlucci has aptly labeled a misguided effort to "close every conceivable loophole" despite resulting damage to U.S. foreign policy, the Intelligence Committees now are promoting legislation requiring that they almost immediately receive information on every single covert action undertaken. We should instead be confident that the political fallout from the Iran/Contra affair has provided far greater assurance than ever before that notification will not be withheld temporarily unless there is very good reason. Indeed, the executive branch doubtless in the future will take pains to share critical information and attendant political risks with Congress.

If the first thing Congress should do is to vote down this mandatory early notification legislation and the second is to form a compact Joint Oversight Committee, the third must be to study carefully our options for action and legislation to prevent future Government leaks and to investigate and punish them when they occur.

The law on punishing those disclosing classified information is frequently an effective barrier to successful prosecution. Specifically, it is extremely hard to prove in leak cases, as the law generally requires, that there was "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation."⁵

Government prosecutors are faced with a similar hurdle when it comes to convicting journalists who reveal the identities of undercover intelligence personnel. The law governing this kind of disclosure requires the Government to prove that such an individual engaged in "a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States."⁶

In short, although there are inherent difficulties in apprehending a leaker, neither Congress nor the executive branch can claim that vigorous or competent attempts to do so have been undertaken or that punishment is swift and sure.

Given the difficulty of identifying those who have leaked classified material, we should also face the question of whether, under what circumstances, and how we should take action against the known party to the deed—the reporter and media outlet in question. Although the media sometimes have exercised restraint in these issues, here again the culture has become so permissive that potential damage to U.S. intelligence collection and foreign policy often receive short shrift when authors and editors are deciding whether or not to publish. Moreover, like the leakers themselves, journalists purporting to weigh carefully the national security implications of such writings often display notoriously poor judgment in this regard. Yet they contend that they alone should be the judge and, for instance, hold in their hands agents' lives and the future effectiveness of intelligence collection systems costing billions of dollars of taxpayer money. I believe it is beyond dispute, moreover, that the excuse of "the public's right to know," used as a defense in these cases, is a rationale that would be rejected by the vast majority of the public itself.

Ideally, the press should agree among themselves on some explicit or implicit code

of conduct to curtail these abuses. At present, however, this seems unlikely. As the media appears more and more inclined toward "investigative" reporting and advocacy journalism, the demand for leaks appears to be rising in tandem with the supply. We can also expect a further escalation of disputes over release of classified materials as satellite photography of sensitive events and installations becomes available to the media.

In the 1970's, investigative reporter Seymour Hersh reportedly told a Navy War College seminar that as a reporter his job was to break into the Pentagon if he could and steal all the classified documents he could, and that their job was to stop him.⁷ We have to ensure somehow that the Government and the media remain fundamentally on the same side where national security is concerned. But the media is becoming more rather than less aggressive with regard to acquisition or publication of classified information. And its enormous collective resources instantly are marshalled to stigmatize as unconstitutional extremism any suggestion that the press must be held legally accountable if it does not police itself more effectively.

Unwilling to grapple with these intractable, messy, and politically volatile problems, some people insist that the damage we have suffered is overstated, and that no matter how great it may be, it does not justify tampering with press liberties or even congressional prerequisites. But if our Government cannot keep a secret and Congress displays no sense of urgency in solving this problem, we will become ever more severely crippled in a dangerous world where the margin for error is fast disappearing.

⁵ Chapter 37 (Espionage and Censorship) of Title 18, United States Code, section 793.

⁶ National Security Act of 1947 (50 U.S.C. 422), Title VI, section 602.