repression, are working together to replace apartheid with a democratic system;

In Poland, Czechoslovakia, Hungary and other countries of eastern Europe where there has been an extraordinary growth in independent democratic action, a process that is now spreading even to the Soviet Union itself.

These are but a few of the countries in which we have been active, all of which are listed in the annual report that we have submitted to the subcommittee. Among the many projects described, there are some that already have had an especially broad and significant impact. I would like to call the subcommittee's attention to:

The Institute for Liberty and Democracy in Peru, where pioneering work with the vast informal sector of microentrepreneurs has produced a new free-market approach to development in the Third World that is beginning to transform development theory and policy around the world;

Conciencia in Argentina, a women's civic action movement that is spreading to fifteen other Latin American countries and has been established in the Philippines as well;

Libro Libre in Costa Rica, a movement of democratic intellectuals, which has produced a new democratic literature for Central America and which represents the first coherent attempt to promote democratic ideas in the region;

The International Coalition for Human Rights in Cuba, headed by Armando Valladares who just recently led the successful fight for the establishment of a United Nations commission to investigate Cuban human rights violations.

The Chinese Intellectual, a journal of independent opinion circulating in China whose editor has now established a major intellectual center in Beijing which is working to further the process of reform and opening.

The third and final factor that accounts for the progress and acceptance of the Endowment is the very nature of the world situation in which we find ourselves. This situation is clearer to us now, after the experience of Nicaragua, than it was before. What we have all learned and, I think, can agree upon is that an anti-Communist dictator (such as Somoza) is not a bulwark against Communism, nor is the removal of such a dictator a guarantee of democracy. If we don't build up the democratic forces—systematically, over time, with adequate resources—then there will not be a strong democratic alternative when the authoritarian system collapses, as inevitably it must. In a word, we will have only ourselves to blame if we find ourselves with no option other than retreat or the use of force, and we will pay the price—as we have—in money, in division that strains the political fabric of our society, and possibly in lives as well.

There is even a more basic reason for the relevance of the Endowment today. We live in a state of strategic parity with our main rival, the Soviet Union. There may be violent conflicts at the margins of the world political system, but the overall balance is likely to be preserved. This means that the use of

force will continue to decrease as an instrument of policy, and competition will increasingly shift to the realm of politics. We must have the capability to engage effectively in this competition.

Ironically, while democracy is the most broadly accepted and legitimate political idea in the world today, we have never done very well at explaining and defending it. In fact, we have all but abandoned the field of political competition to our ideological rivals, who have usurped the banner of democracy for their own anti-democratic ends.

We're now beginning to wake up to this unpleasant reality, but we still have a long way to go. True, there has been a democratic revival during this decade, and conditions are still favorable for democratic advance. But this is no cause for complacency. It was only a little more than a decade ago that democracy was thought to be in decline, and it will not take many setbacks for pessimism to return once again.

In the meantime, we should accept the fact that political competition will not disappear, that democracy has dedicated opponents who have hardly given up the fight, and that we must therefore have the wherewithal to defend and promote our values in a world of diverse cultures and competing political philosophies.

I believe that the Endowment is potentially the most effective instrument we have for advancing our values in the world. It is cost-effective, activist, engaged. It not only provides concrete assistance to democrats on the frontlines of political struggle, but sends a message of solidarity and democratic commitment. We are gaining good will even as we assist our friends and thereby advance our own interests as well.

We hope that as we continue to progress, you will continue to weigh our needs against the enormity of the challenge we face and the promise this new institution offers for serving the finest ideals and highest interests of our country.

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,

[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 Commit-

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]

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

---

tee 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. *Dougherty*, 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, *Watkins* v. *U.S.*, 354 U.S. 178 (1957) and *Barenblatt* v. *U.S.*, 360 U.S. 109 (1959).

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

[17] 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.

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

[19] 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 Covert Actions to the Congress, April 1 and 8, June 10, 1987, p. 158.

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

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

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

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.