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] 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]

[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, 1789), pp. 2487-2721. 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