

## REMARKS OF C. BOYDEN GRAY\*

I am very pleased to be here. This is a very good opportunity for me to speak to an influential group of people on a very important subject which needs elucidation—how intelligence operations can be pursued successfully by a democratic society. I do have to admit at the outset to having a personal bias on this subject. While most of my professional career has been spent dealing with domestic issues, primarily antitrust when I was in private practice, and deregulation since I joined the Vice President's staff, I came from a background that imbued me with some feel for the problems of intelligence and national security. My father was Secretary of the Army under President Truman and, even after he left the government, became a special assistant to Truman. He later served as President Eisenhower's last National Security Advisor, following Dillon Anderson, who was a partner in Baker & Botts here in Houston. President Kennedy appointed him to the President's Foreign Intelligence Advisory Board where he served for sixteen years until President Carter abolished it in 1977.

I also know something about individual liberty, and the impact of congressional investigations on it—the issue that Victoria Toensing spoke about earlier. Many years after my father left public service, he was called before the Church committee, investigating U.S. intelligence. In my view, the committee, animated by a desire to prove that the U.S. intelligence community was something of a rogue elephant, treated him badly. They ambushed him, did not give him any right to a lawyer, did not give him any opportunity to review the documents that they sprung on him, and did not give him any right to rebut certain unjustified assertions that they made afterwards. On the whole, it was an enormously bitter experience for him, so I think I have a personal knowledge of how the congressional hearing process can impinge on individual liberties.

I want to start my talk with a brief comment on constitutional matters bearing on intelligence and intelligence oversight. As the discussion this morning bears out, constitutional issues are extremely important. Moreover, the constitutional and historical analyses are not abstract or

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\* Hon. C. Boyden Gray has been appointed by President-elect Bush as the White House Counsel. He has served as a counselor to Vice President Bush since 1981. In this capacity, he has had extensive experience dealing with a broad range of regulatory, constitutional and foreign policy matters. Mr. Gray graduated with high honors from Harvard and the University of North Carolina Law School. He clerked for Justice Warren and spent a number of years as a partner with the Washington, D.C. law firm of Wilmer, Cutler & Pickering.

unrelated to the discussion of the pragmatic intelligence issues that have been raised today. In fact, the language that the Framers used and the way they looked at issues is surprisingly relevant to today's headlines. If you go back and reread the *Federalist Papers*, in my opinion, you would notice that the key issues discussed were how can a democracy deal with factions and how, given the natural tendency of any legislature to arrogate to itself all powers, can the principle of the separation of powers and executive authority be preserved.

The situation is much the same today as it was 200 years ago, and the people who wrote the *Federalist Papers* certainly would not find that much change. As far as the foreign affairs powers are concerned, there is no question that under the Constitution both of the political branches were supposed to have a role. It is clear, however, from the constitutional structure, writings of Locke, Montesquieu and Blackstone—which, as we know, served as the “political bibles” of the Founding Fathers—and the Founding Fathers' own pronouncements, that the original meaning of the Constitution was to vest the totality of foreign affairs powers in the executive branch, with a few, specific and narrowly construed powers vested in Congress. One of the ironies is that the Founders, given their shared learning experience and common educational base, thought that there was no need to belabor the foreign affairs powers of the executive branch, so they said very little about them. The President has the executive power, and that is it, period. It was thought that you had better spell out congressional foreign affairs powers in more detail, because the Founders were worried that Congress would be prone to overreaching, and so they wanted to constrain Congress from doing so.

What happened though is that, in the contemporary round of arguments over who has the plenary foreign affairs power, what was viewed 200 years ago as a limitation is now viewed as a grant, and what was perceived as a grant is now construed as a limitation. In fact—and I am oversimplifying here a bit, but I think the point is valid—congressional advocates often point out that there are a lot more words in the Constitution about congressional authority than there are about the President's authority; therefore, Congress allegedly has as much, if not more, foreign affairs power than the executive branch. Of course, this turns reality on its head, at least as this reality was viewed by the Founders 200 years ago.

We have heard today John Marshall's quote about the President being the sole organ of our nation's external relations and the sole representative in dealing with foreign nations. Jefferson also wrote that the transaction of business with foreign nations is an executive power altogether; it therefore belongs to the head of that department, except for

such portions of it that are specifically committed to the Congress, and the exceptions are to be construed narrowly. So, under the Constitution, congressional foreign affairs powers are to be construed narrowly, not broadly.

Another oft-wielded argument of congressional supremacists is that Congress, by virtue of its power of the purse, can regulate any executive activity it sees fit. Yes, the appropriations power is an enormous power, but it is not unlimited. There is a limit to how far the appropriations power takes you. Clearly, the exercise of that power is subject to all the constitutional constraints on federal power. In other words, Congress cannot do through its use of the appropriations power indirectly what it could not do directly. Likewise, congressional power to oversee and to review what the executive branch has done simply is not the same thing as the power to preview, micromanage, or dictate what the executive branch will do. That does not mean that Congress will not try to micromanage; of course it will. It is up to the executive branch to resist. Perhaps it has not resisted enough, but one cannot draw from this the conclusion that Congress properly has the power to micromanage executive foreign policy activities.

Aside from the question of how the Framers allocated foreign affairs powers, there is the issue of what scheme can work, in the sense of protecting our national security in a turbulent world. We also have to be clear about the genesis of Presidential-congressional tensions over foreign policy—they date back to the Presidency of George Washington. It simply would not do to claim that it is the alleged rise of the imperial Presidency under Nixon that spoiled things. Nor is it true that the Iran-Contra Affair is the major cause of foreign policy struggles between the Executive and Congress in the Reagan-Bush administration. I think there are plenty of other issues that divide the Executive and Congress.

Take, for example, the current debate over how to construe the INF Treaty and the ongoing debate over the “broad” interpretation of the 1972 ABM Treaty which is connected to the current INF treaty debate. These issues are illustrative of how far Congress has strayed. Does the Senate have a right, coequal to that of the executive branch, to interpret a treaty after it has been ratified? To me, the answer is so obviously no; it is not even worthy of elaboration. But the Senate is asserting that authority.

The trade authority presents another example of tension. There is no question that, under the Constitution, Congress has the right to regulate trade between nations. But to the extent that the trade authority impinges on foreign policy, Congress has to recognize and defer to some

degree to the executive branch, and it is not really doing that now. Instead, in response to special interests, and often without much regard for our broad national interests, Congress is asserting its authority to regulate foreign commerce to the utmost. This has caused us many problems in general, and difficulties in Central America in particular.

The 1985 Farm bill is an example of this problem. I can vividly recall when Arthur Liman, after being named counsel to the joint congressional Iran-Contra committee, came to Washington. One of the first offices he visited was the Office of the Vice President. His purpose was not to investigate us; rather, he wanted to get a sense of how Washington worked and how the White House operated. I want to say parenthetically here that, contrary to allegations you may have read in the papers, neither the Vice President nor his staff had anything to do with the Contra resupply operation. The only resupply operation that anybody in the office ever had anything to do with were the successful efforts on two occasions to resupply newsprint to *La Prensa*, permitting that newspaper to reopen after the Sandinistas had shut it down by denying it paper for its presses.

We had an interesting conversation, and Liman said: "I gather that there was a lot of tension between the White House and Congress in the fall and winter of 1985-86." Don Gregg, the Vice President's National Security Advisor, noted that indeed there was a lot of tension over funding levels for the Contras. I added that the 1985 Farm bill was also a source of tension, and that the NSC economic staff advisor vigorously but unsuccessfully argued for the President's veto of that bill. I asked Liman if he could guess why the advisor argued for a veto of the 1985 Farm bill. Liman jokingly answered that it was obvious: twenty billion dollars in farm subsidies could have been better spent funding the Contras. Then I said that he was far off the mark and that the answer was the sugar quotas, prescribed by the 1985 bill. In retrospect, I do not believe that he understood what I was talking about.

Yet, Congress' imposition of the sugar quotas—not without some cooperation from the executive branch—went a long way towards destroying one of the few viable economic enterprises that existed in Central America and the Caribbean. It is not a gross exaggeration to say that the only free trade Congress has permitted with Central America is trade in narcotics.

In contrast, Soviets now buy most of their sugar from Central America, apparently to the tune of some 600 million dollars a year. It is a very nice foreign aid program for them, but we ought to be doing that, not the Soviets. When that 600 million dollars is added to the current economic and military aid given by the Soviets, the total annual revenue

probably exceeds one billion dollars, and this massive Soviet penetration of an area of tremendous strategic importance to the United States has been left unanswered by the U.S. Congress.

Let me also address another myth tied to the question of Presidential-congressional relations in foreign policy. The Congress has defended its increasing role in foreign affairs on the grounds that only it represents the people properly. The President is only elected once every four years they argue, but Congressmen are elected once every two years. I would deny the validity of this assertion. I think Congress, and especially the House, is most unrepresentative of the American people. Over the last two, three, or four decades, congressional incumbents have been re-elected at a rate of over ninety percent; in 1986 it rose to ninety-eight percent. It is highly unlikely the Founding Fathers intended for that kind of tenure for the House of Representatives. The only reason anyone leaves the Congress these days is because he or she gets bored.

Given these trends, to say that Congress responds to the people better than does the President is, I think, just erroneous. It does respond to the special interests, there is no question about that, as illustrated by analyses of patterns of giving by numerous PACs (political action committees). Critics have looked at the size of congressional staffs, the perks, the travel, and the franking privileges available to Congressmen; these add up to more than half a million dollars a year, giving incumbents tremendous built-in advantages over challengers. Add to this congressional gerrymandering and you will get a House of Representatives that is not very representative of the people. I think it is quite representative of the special interests, but that is another thing. It is therefore difficult to see how such a body can claim to have a higher moral claim to oversee covert activities than the President of the United States, who is actually elected by the people.

So, now some discussion about the Boland amendments as an example of how Congress actually seeks to micromanage covert operations, and what often comes out of it. I do not want to take too much time to go over it, but the Boland amendments, taken as a whole, do not really reflect the views of the people of the United States; rather, they represent an outcome of an inside struggle within the Congress over who controls the intelligence turf. This in turn resulted from the approach taken by the Administration, and never really opposed by the Congress, to address the issue of supporting the Nicaraguan freedom fighters covertly rather than overtly. Let us go through the history of it a little bit. The Boland amendment—the one that really cut off U.S. funding of the Contras—went into effect in October of 1984, and it was not long after that that Ortega went to Moscow, embarrassing many liberals who voted to cut off

aid to his opposition. As a result, there was a lot of backpedaling in Congress, and the first instance occurred with the vote of humanitarian aid in the Spring of 1985.

Boland himself pointed out that the Contras were receiving considerable aid from private citizens and foreign countries. He said that if you add it all up—the twenty-seven million dollars the House was voting on, plus the money the Contras were getting privately—the total was more than Congress had given them before the Boland amendment was enacted. Did he win? No, he lost. A few months later, Congress adopted the Pell amendment which dealt with solicitation of aid for the Contras from foreign countries. There, Congress essentially approved the solicitation of Contra aid from third countries, so long as the U.S. did not push for the aid by making it a condition to the grant of U.S. aid to the country being solicited.

Then came the Intelligence Authorization Act of 1986, where Congress voted some fourteen million dollars in highly valuable military aid to the Contras. This aid took the form of the most coveted kinds of intelligence assistance, satellite assistance, communications equipment, intelligence advice, counterintelligence advice, military advice, and some transportation. It resulted in an intelligence finding that was signed by the President on January 9, 1986, about a week before the famous Iran arms sale finding. In fact, all the findings were signed and all the proper procedures were followed by the executive branch—I think the “Hill people” here would agree with that. And yet, if you look in the Iran-Contra chronologies published in *The Post*, *The Times*, or whatnot you will never see any reference to the 1986 Act. By in large, this is because the Act is almost a secret. You cannot really find out all that is in it since the annex to the Act is classified.

We tried unsuccessfully for a long, long time to get the transcript of the Senate and House Select Intelligence Committees’ deliberations and a transcript of the conference committee discussing the relevant portions of the Act. And why is that? I don’t know. Perhaps, the reason is that many members of Congress sought plausible deniability, because they had funded the Contras and they did not really want their liberal friends on the outside to know. The result was a congressional support for keeping the war covert. Well, it is very hard to debate publicly an action which the Congress itself wants kept covert.

What are the lessons from all this? I think it has been said this morning that the Nicaraguan policy—that is, the Contra resupply issue—and the whole question of intelligence oversight—the Boland amendments—were mishandled because they became a pawn in the overall struggle between the two political branches over control of foreign

policy. In retrospect, one could probably say the executive branch made some mistakes in the way these issues were handled. Perhaps, the Administration should have been more open about its policy, but this was difficult when many in Congress wanted aid kept covert. I might add here that the media also contributed to the covert nature of the Nicaraguan policy by denying the President's request on two occasions for prime-time coverage of an appeal to Congress for overt military aid.

I think another factor is—to go back to the point that David Rivkin made—that *Bowsher v. Synar* says the Constitution does not contemplate an active role for Congress in the supervision of officers charged with executing the laws that Congress enacts, and yet, that is what has been happening under the guise of congressional oversight of intelligence. Michael O'Neil and others, I think, would admit that they actually sat down on a weekly or monthly basis with CIA's General Counsel Sporkin and others and actually oversaw what was going on in Central America. It may be that Lt. Colonel North was not completely forthcoming in his dealings with Congress; that was certainly wrong, but I do not think congressional staffers should have been seeking to micromanage covert operations to begin with. I do not think they had that right. I do not think the Constitution contemplates their playing that role. You cannot run a war by committee. It is like drafting a brief: the worst briefs are the ones written by a committee of lawyers.

Let me try to sum it up by saying that congressional micromanagement has gone too far. It only became possible, I believe, because of the tenured nature of the Congress and the growth in congressional staff. I think there are too many congressional staffers with too little to do. Is this a question of creating work to keep yourself busy? We would be better off if congressional oversight was truly kept as oversight; but when it treads into sharing operational details, it simply will not work.

Was the Central America policy a failure? Would it not have been a failure if there had been better oversight? I do not know. Failure can be a self-fulfilling prophesy. The fact of the matter is, without the resupply effort for which some people may go to jail the present Speaker of the House would not have had the leverage to play a mediator in the current negotiations between the Sandinistas and the Contras. I am not going to discuss the question of whether it was even a proper role for the Speaker to play. It may be that people ought to pay more attention to the fact that we would not have the leverage to negotiate with the Sandinistas what we have been negotiating, which includes trying to keep *La Prensa* open, if it had not been for efforts to keep the Contras resupplied. We may not succeed, especially given the totalitarian nature of the Sandinista

regime and all the restrictions on aid to the Contras imposed by Congress, but at least now we have a fighting chance.

Foreign policy cannot be run by committee. I do not think the Founders intended the Congress to have a role in the operational details of intelligence operations; the right to review does not mean the right to preview. If we do not get the right balance reestablished, we could perhaps still get along because there are very talented people in both branches—it is not a question of the goodwill, the intelligence or the integrity of the people involved. But I do not believe that we can have a successful foreign policy over the long haul without reestablishing a constitutionally proper relationship between the two branches.