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Address: The Impact of Separation of Powers on National Security

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ADDRESS

**THE IMPACT OF SEPARATION OF
POWERS ON NATIONAL
SECURITY**

T. KENNETH CRIBB, JR.,* INTRODUCTION

It may be argued that providing for the common defense is the first duty of the national government. Nothing else the government does matters, unless our citizens can be defended against hostile attack. Not domestic freedom, because without the means for protection, it can be taken away. Not even peace, because without the ability to resist foreign domination, peace is just another formulation for slavery. Tacitus said of the Roman legions, "They have made a desert and call it peace."

The man President Bush has entrusted with the common defense of the United States is our speaker at this session. When Ronald Reagan set out nine years ago to repair years of neglect to our defenses, one of his three or four key allies in the Congress was Dick Cheney, then congressman from Wyoming. From his leadership position in the Republican minority, Congressman Cheney helped forge coalitions that sustained the Reagan defense buildup in the face of a hostile Democratic majority. And the consequences are no less than historic. In conventional terms, the armed forces of the United States have been brought to peak readiness, as demonstrated in the Panama incursion directed by Mr. Cheney. In strategic terms, the credibility of our nuclear deterrent has been restored, with emphasis on technologies such as SDI and Stealth that have leapfrogged Soviet capabilities. In geopolitical terms, we ended our policy of containing communism and moved to the Reagan doctrine of promoting freedom behind communist lines.

The military buildup, with its emphasis on new technologies, intentionally put additional pressure on a communist system already beset by economic crisis, in contrast to the growing prosperity of the free market countries. By the time Gorbachev came to power, he stood atop an edifice that was crumbling beneath his feet. But there was a silver lining for Gorbachev—if only he could acquiesce to American maneuvers com-

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pletely enough, if only the Eastern European captives would revolt quickly enough, he still might be named man of the decade by the discerning editors of *Time* magazine.

President Bush delighted conservatives when he named Dick Cheney as Secretary of Defense. Now a man who was intimately associated with the Reagan buildup, and especially the defense of SDI, would head the Pentagon in a period when the calls for unilateral military concessions would again build. If anyone can manage the military response to the total disarray of our adversaries, without ourselves falling into disarray, that man is our speaker today.

Federalists, I give you the former six-term congressman from Wyoming, the former Chief of Staff to President Ford, and the individual who, as much as anyone in Congress, made Gorbachev the man he is today—Secretary of Defense Dick Cheney.

RICHARD CHENEY*

It is a real pleasure for me to be here. The Federalist Society has made important contributions to the nation's understanding of our constitutional heritage. This particular conference is about one of the Constitution's bedrock principles. As James Madison tells us in *Federalist Number 47*, "no political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty," than the truth underlying the separation of powers.¹

Today, I want to talk about two major separation of powers issues in national security policy: notification of special intelligence activities and war powers. But first, I will begin with a preliminary observation. Edward S. Corwin, the legal scholar, once wrote that the Constitution is an invitation for the executive and legislative branches to struggle over foreign policy. There has been plenty of struggle over the past 200 years, but it would be a mistake to conclude that the Constitution simply distributed the foreign policy powers at random. The powers are distributed according to a fairly consistent set of underlying principles.

Broadly speaking, the Congress was intended to be a collective, deliberative body. The Presidency, in contrast, was designed as a one-person office to ensure that it would be ready for action. Its major characteris-

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1. THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

tics, in the language of *Federalist Number 70*, were to be “decision, activity, secrecy, and dispatch.”² The government works at its best when both branches contribute according to their respective designs. When that happens, the Constitution—to paraphrase a forthcoming Brookings Institution book—can be an invitation to comity and not just to struggle.

Unfortunately, the relationship was one of enormous struggle in the fifteen post-Vietnam years of the Ford, Carter, and Reagan Administrations. Rather than each branch playing to its unique strength, each seemed increasingly to be convinced that the other was trying to do everything by itself. Today—one year into the Administration of President George Bush—I can say that both branches have taken steps to improve the situation.

Congress deserves some of the credit for helping lower the temperature, but I work for the President, and I want to tell you something about the way George Bush has conducted himself. The President has used his powers decisively, prudently, and well. He also has a clear view of his responsibilities and has been willing to assert his constitutional authority in the fields of national security and foreign affairs.

The President genuinely respects the role of Congress, but he also has decided to stand up forthrightly to preserve the powers of his own office. He is convinced that *all* branches have to work well for the government to work well. He is also convinced that *Federalist Number 51* is right: that if he does not stand up for the Presidency, no one else will.³ Paradoxically, it turns out to be easier to reach workable accommodations with Congress when the President is firm.

Unfortunately, the general improvement in atmosphere has not brought about a resolution of all major issues. Let me note two outstanding examples: war powers and the notification of Congress about special intelligence activities.

Under the 1980 amendments to the National Security Act,⁴ the President is required to notify Congress before beginning any significant intelligence activity. But the law also allows for situations in which prior notice will not be given. When that happens, the law requires the President “to fully inform the intelligence committees in a timely fashion.”

You will remember, of course, that one of the big issues of the Iran-

2. THE FEDERALIST NO. 70, at 356.

3. THE FEDERALIST NO. 51, at 249 (J. Madison) (J. Cooke ed. 1961).

4. 50 U.S.C. § 413.

Contra investigation was that President Reagan waited eleven months to inform Congress about the Iran arms sales. After the investigation, many members responded with a classic example of "never again" legislation. By "never again" legislation, I mean legislation that reacts to a past decision by trying to make it impossible for any President to make the same decision again, no matter how the world might change, or whatever future circumstances might arise.

The way Congress is proposing to say "never again" to Iran-Contra is by passing a bill that would require the President under *all* conditions, with *no* exceptions, to notify Congress of *all* special activities within forty-eight hours. In 1988, the bill passed the Senate but did not reach the House floor. In 1989, the issue was revived as part of the Intelligence Authorization Act. That year's round produced a compromise, which the President feels protects his interests. However, Intelligence Committee members have said they will address the issue again in 1990.

Generally, there is no problem with notifying Congress before an operation starts, or very soon afterwards. But no President can accept a statute that conflicts with his constitutional responsibilities. This is not just a hypothetical possibility. For example, preparations for the aborted Desert One rescue attempt during the Iran hostage crisis began months before the helicopters lifted off. Under the draft legislation, you could argue that the President had to notify Congress within forty-eight hours of the *start* of the first phases of the operation, long before the actual rescue attempt. Imagine trying to maintain tight operational security for that long. And while you imagine it, remember that the lives of the hostages and agents were in the balance.

Then there was the courageous Canadian decision to hide and then spirit away from Iran a handful of Americans who were lucky enough not to be captive inside the American Embassy. This included some U.S. intelligence support activities. According to an August 16, 1988 letter from Secretary of Defense Carlucci to Senator David Boren, chairman of the Senate Intelligence Committee, the Canadians asked us to hold off notifying Congress and we did so. It is worth remembering the atmosphere in Teheran at the time. It is clear that the Canadians were putting their entire embassy staff at peril to help us.

When foreign governments place a condition on the United States, we can either accept the condition and go ahead with the operation, or say no to both. In this case, we are talking about allies who were risking their own lives, at no benefit to themselves, to save American lives. Be-

cause the President has the ultimate responsibility for protecting *American* lives, I believe the decision to withhold notification in these kind of cases, as well as others, has to be his and his alone.

Let me stress that what I am talking about here is a rare situation. The problem is that the situations will vary from case to case. If Congress tries to define everything in advance by law, it will fail to provide enough leeway for action that is in our national interest. This is clearly *not* what the Constitution intended. Ultimately, the conflict should be resolved by relying on appropriate political checks and balances instead of unwieldy and inappropriate legal ones.

We believe that the appropriate standards were laid out in an October 30th letter President Bush sent to the Chairman and Vice-Chairman of the Senate Intelligence Committee. In the letter, the President said, and I quote:

I intend to provide in a fashion sensitive to congressional concerns. . . . I anticipate that in almost all instances, prior notice will be given. In those rare instances in which prior notice is not provided, I anticipate that notice will be provided within a few days. Any withholding beyond this period would be based upon my assertion of the authorities granted this office by the Constitution.

Two aspects of the letter are important. The first is that the President has been, and will continue to be, sensitive to Congress' needs. But that sensitivity is only half of the point. The other half is his firmness about protecting the institution of the Presidency. We hope the two aspects together will convince Congress to drop the issue.

I will turn now to war powers. I do not think I have to remind *this* conference that every President since the 1973 War Powers Resolution has believed it to be unconstitutional, impractical, and even dangerous. Of all of the resolution's provisions, the most dangerous is probably the sixty-day clock. That provision purports to take away a President's power to use troops after sixty days, unless Congress affirmatively re-authorizes an extension. Given Congress' tendency to delay and then reach short-term, halfway compromises, a sixty-day clock would tell an adversary how long it has to last to wait us out. A growing number of members of Congress may be coming to understand the sixty-day clock's impracticality, but we are far from an agreement about constitutionality.

Meanwhile, we have a responsibility to try to make the government work, despite the constitutional impasse. For example, every President has rejected the resolution's constitutionality. Therefore, none has issued

reports to Congress that he has been willing to describe as being “under” or “pursuant to” its requirements. But these same Presidents *have* sent reports they describe as being “consistent with” them. The difference between the words “consistent with” and “pursuant to” makes little difference practically, but it makes all the difference when it comes to defending executive power. The intention to notify is expressed, but in a way that preserves Presidential prerogatives.

The most recent report “consistent with” the War Powers Resolution came during Operation Just Cause in Panama. As you know, H-hour in Panama was at one a.m. on the morning of December 20. To remind you of the immediate background: On December 15, at the instigation of General Manuel Noriega, the Panamanian National Assembly declared that a state of war existed between Panama and the United States. On the 16th, a U.S. Marine officer was killed, a U.S. Navy officer was beaten, and the Navy officer’s wife was detained, threatened, and abused.

These events were not isolated. Since February 6, 1988, Americans in Panama have been threatened with serious bodily harm or death almost 100 different times. In addition, there were more than 1,450 violations of the Panama Canal Treaties.

All of this meant that the lives and welfare of American citizens in Panama were increasingly at risk. It also made it clear that the continued safe operation of the Panama Canal, the integrity of the Canal treaties, and the security of American interests flowing from the treaties, were all placed in serious jeopardy. Under these circumstances, the President ordered military operations.

A few hours before H-hour, President Bush notified congressional leaders of his decision. Then, on December 21, well within the forty-eight hour period specified in the resolution, he sent a formal letter of notification.

Most members of Congress have supported our action in Panama. That usually happens when a President’s decision works out well. But there was some criticism about the way the President notified Congress. Some members said that the President should have consulted and not merely informed them. Moreover, the frequently heard congressional definition of consultation is that it should be a meaningful deliberation in a group setting in which the members have an opportunity to advise the President whether he should go ahead with the planned operation.

With all due respect, I cannot accept this position, and I do not think any President could either. Remember: the claim is that the President

has an *obligation* to consult. The word “obligation” is significant. The claim is not merely that it would be useful to consult, or that the President would benefit from getting other opinions. I am sure that President Bush would agree that the advice of the congressional leaders can be very valuable indeed. In practice, he does tend to consult when—to paraphrase the statute—it is possible to do so.

Clearly, however, the issue is not about advice, but about power and authority. Congress can properly *demand* a consultant role in advance of the decision—as opposed to *asking* for one—*only* if the power to make the decision is Congress’ and the President is exercising the power because Congress has delegated it. That *is* the underlying theory of the War Powers Resolution. It is *not* the opinion held by this or any previous President.

Let me emphasize that President Bush often does find it useful to have a give and take with members of Congress. The Administration had an extensive and ongoing quiet dialogue with Congress for months about Panama. But the decision for action finally belongs to the President. He is the one who bears the responsibility for sending young men and women to risk death. If the operation fails, it will be his fault. I have never heard one of my former colleagues stand up after a failed operation to say, “I share the blame for that one; I advised him to go forward.” The sad track record too often shows members hedging their bets at the start of an operation, and waiting to see how it turns out before committing themselves.

If the responsibility for a decision is the President’s, then the responsibility for gathering advice must also be his. However useful it may be to get members together for a group consultation, history shows that hastily called group meetings can produce rampant press speculation about what is going on.

For example, when President Reagan briefed some Senators before the 1986 Libyan bombing raid, the Senators had to dodge reporters’ questions after the meeting. I am not about to claim that this particular chain of events caused security problems. Press speculation about a reprisal raid against Libya was already rampant. Nonetheless, you can easily imagine similar situations in which a group meeting, followed by “no comments,” would raise press suspicions. With today’s worldwide electronic media, those suspicions could easily beat our airplanes to the target.

Of course, Presidents often conclude that a meeting is worth it, despite

the risks. But balancing the risks is a judgment call. That judgment should belong to the person who has to order the risks in the first place.

I realize as soon as I make this point, of course, that many members of Congress will disagree vehemently. We can spend the next ten years fighting over the point, but if we do that, I guarantee you that the country will lose. The United States cannot conduct a successful foreign policy if every constitutional disagreement is pressed to a final confrontation. The legislative and executive have to agree to disagree, and then work together to govern. We made some real gains in 1989, but we shall have to work hard to hold on to those gains and keep moving forward.

The United States is a global power, with global responsibilities. Our post-World War II role has raised the foreign policy stakes for most Americans, and we are now entering a time of unusual uncertainty, opportunity, and risk. We know from our history that no policy can be sustained for the long term, unless it has the active cooperation and participation of both branches. Now, of all times, it is crucial to contain disagreement. When the stakes have to do with the leadership of the free world, we cannot afford to be paralyzed in an intramural stalemate.