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Congress’s Right to Counsel in Intelligence Oversight

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IN INTELLIGENCE OVERSIGHT

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ABSTRACT

This article examines Congress’s ability to consult its lawyers and other expert staff in conducting oversight. For decades, congressional leaders have acquiesced in the executive branch’s insistence that certain intelligence information not be shared with congressional staffers, even those staffers who have high-level security clearances. As a result, Congress has been hobbled in its ability to understand and analyze key executive branch programs. This policy became particularly controversial with the Bush administration’s warrantless surveillance program. Senate Intelligence Committee Vice-Chair Jay Rockefeller noted the “profound oversight issues” implicated by the surveillance program and lamented the fact that he felt constrained not to consult the committee’s staff, including its counsel. This article puts this issue into the larger context of Congress’s right to access national security-related information, and discusses congressional mechanisms for protecting the confidentiality of that information. The article also provides the most comprehensive history of congressional disclosures of national security-related information. That history suggests that the foremost danger to confidentiality lies with disclosure to members of Congress, not to staff. The article identifies several constitutional arguments for Congress’s right to share information with its lawyers and other expert staff, and explores ways to achieve this reform.

TABLE OF CONTENTS

Introduction...............................................................................................2
I. Congress’s Right to Information.........................................................6
   A. Congress’s Access to Information in General ............................6
   B. Congress’s Access to Intelligence Information ......................10

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INTRODUCTION

The Executive Branch limits the distribution of information about its national security and intelligence-related activities. Holding such information closely is necessary because the efficacy of some of these activities depends on their secrecy. The more widely such information is distributed, the more likely it is to fall into the hands of people who will undermine such activities by engaging in countermeasures. But overly strict limits on distribution of information will prevent the government from accomplishing its programmatic goals. The information must be distributed to those within the executive branch who can use the information to help ensure our security,2 and to those in the legislative branch who, in our system of separated powers, have the responsibility to monitor the executive branch.

When the Bush Administration launched its program of warrantless surveillance in 2001, it held information about that program

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2 The 9/11 Commission concluded that the Executive Branch’s restrictions on the distribution of information about terrorism actually undermined our security by preventing some government officials from acting on the knowledge in ways that could prevent future acts of terrorism. THE 9/11 COMMISSION REPORT 417-18 (2004).
particularly closely. The Administration disclosed the existence of the program to only eight members of Congress: the chairs and ranking members of the House and Senate intelligence committees, and the Republican and Democratic leaders of the House and Senate. This group is colloquially known as “the gang of eight.”

The Administration instructed these members that they must not share any information about the program with their staff members, including their staff lawyers. One of the gang of eight, then-Senate intelligence committee Vice Chair Jay Rockefeller, thought that the programs “raise[d] profound oversight issues,” and lamented the fact that “given the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to evaluate . . . these activities.”

He noted these concerns in a handwritten letter to Vice President Cheney and kept a copy of the letter in a secure Senate intelligence committee facility. There is no indication that Sen. Rockefeller complained to the other members of the gang of eight about the surveillance program or about these restrictions on consulting staff. It is unclear whether any other member of the gang of eight contested these restrictions on their ability to consult lawyers and other staff before the New York Times exposed the program in 2005.

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1 The Bush Administration took a similar – although not identical – approach in disclosing its torture policy to a limited number of members of Congress. See Member Briefings on Enhanced Interrogation Techniques (EITs) (listing 40 CIA briefings about the torture program from September 2002 to March 2009 to intelligence committee members and staffers) (available at http://www.fas.org/irp/congress/2009_cr/eit-briefings.pdf).

2 The full name of the House and Senate intelligence committees are the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence.

3 The ranking member (i.e., minority member with the most seniority) of the Senate Intelligence committee has the title of Vice Chair of the Committee. S. Res. 400 § 2(b), 94th Cong., 2nd Sess. (1976).


7 Rep. Silvestre Reyes, who was ranking member and later chair of the House Intelligence Committee, also complained about this inability to consult legal counsel, but it is unclear whether he
While no statute or congressional rule addresses whether the gang of eight can share this information with their counsel or other staff, the executive branch has for nearly thirty years insisted that the gang of eight not do so, and they have acquiesced in this insistence.\(^{10}\) Congressional acquiescence to restrictions on consulting congressional staff and lawyers is inconsistent with our system of separated powers and is legally unnecessary. In the view of our founders, individual liberty can be ensured and government power could be checked by setting up a system in which “\[a\]mbition must be made to counteract ambition.”\(^{11}\) Within this structure, each branch is given “the necessary constitutional means . . . to resist encroachments of the others.”\(^{12}\) In practice, eight members of Congress, by themselves and without any staff support, have proven to be incapable of opposing or even scrutinizing closely an executive branch activity, warrantless surveillance, that may well have violated the law.\(^{13}\)

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\(^{11}\) Federalist Papers, No. 51.

\(^{12}\) Federalist Papers, No. 51.

\(^{13}\) To date, there has been no authoritative pronouncement outside the executive branch regarding the legality of this warrantless surveillance program. Prior to the New York Times’ disclosure of the program, the executive branch avoided outside legal scrutiny of the program by instructing the Congressional gang of eight not to consult their lawyers and by assuring the Chief Judge of the Foreign Intelligence Surveillance Court that the executive branch would not use the information gathered through this surveillance program in its applications to the Court for FISA warrants. Carol D. Leonnig, Secret Court’s Judges Were Warned About NSA Spy Data: Program May Have Led Improperly to Warrants, WASH. POST, Feb. 9, 2006.

After the disclosure of the program, scores of individuals filed lawsuits, claiming that the government had illegally monitored their communications. In almost all of these cases, the
As a legal matter, congressional acquiescence to restrictions on consulting its own staff, including its lawyers, is unnecessary. This article develops the legal argument that where Congress has the right to access information about executive branch programs, Congress also has the right to consult its lawyers and other expert staff in order to assess the legality of those programs.\footnote{This article does not address situations where the executive branch asserts that executive privilege exempts it from disclosing particular information with Congress. See, e.g., James G. Hudec, \textit{Unlucky SHAMROCK – The View From the Other Side}, STUD. IN INTEL. 85, 91 (Winter/Spring 2001) (recounting the Ford Administration’s assertion of executive privilege to prevent executive branch employees from testifying before Bella Abzug’s House Subcommittee on Government Information and Individual Rights regarding Operation SHAMROCK); Jason Vest, \textit{Getting an Earful}, GOVT. EXEC., March 15, 2006. \footnotemark}

If Congress is going to act as a co-equal branch with its own responsibilities in the national security sphere,\footnote{See, e.g., U.S. CONST. Art. I, § 8 (granting Congress the power to declare war, make rules concerning captures on land and water, raise and support armies, provide and maintain a navy, and make rules for government and regulation of the land and naval forces).} it must resist Executive Branch attempts to dictate the terms on which Congress receives and processes national security information where those terms prevent the legislative branch from fulfilling its constitutional role.

Part I of this article provides background information about Congress’s right to access information, including information from the executive branch. It also explains how Congress has delegated the responsibility for engaging in oversight of the executive branch’s intelligence activities to the intelligence committees and the circumstances under which responsibility is further limited to the gang of eight. Part II discusses the mechanisms that Congress uses to protect the confidentiality of intelligence-related information received from the executive branch; shows how these mechanisms can assuage concerns about confidentiality; and discusses Congress’s record of keeping intelligence secrets. Part III develops several distinct arguments supporting this article’s thesis: that if Congress has the right to particular

\footnote{In the first case to reach a federal appellate court, \textit{ACLU v. NSA}, the Sixth Circuit reversed a district court’s grant of summary judgment for the plaintiffs, dismissing plaintiffs’ claims because they could not establish that they had been subjected to surveillance in light of the state secrets privilege. 493 F.3d 644, 653 (6th Cir. 2007). In a lawsuit involving the al Haramain Foundation, Judge Vaughn Walker of the Northern District of California ruled that FISA preempts the states secrets doctrine, \textit{In re National Security Agency Telecommunications Records Litigation}, 564 F Supp 2d 1109, 1111 (N D Cal 2008), and found that plaintiffs had provided sufficient circumstantial evidence to make out a prima facie case that that they had been subjected to surveillance. Al Haramain v. Bush, 595 F.Supp.2d 1077, 1085 (N.D. Ca. 2009).}
information, then it must also have the right to share that information with its lawyers. Court decisions have recognized that government officers must be able to consult their staffs in order to carry out constitutional duties, and that lawyers in particular play a critical role in ensuring that each branch of government carries out its function in our system of separated powers. Part IV sketches out two possible paths through which Congress can end its acquiescence to executive domination and assert its rightful role in intelligence oversight, and recommends that the congressional intelligence committees amend their internal rules to clarify that the gang of eight can share information with its cleared staff and lawyers.

I. CONGRESS’S RIGHT TO INFORMATION

A. CONGRESS’S ACCESS TO INFORMATION IN GENERAL

Congress’s constitutional duties include creating legislation, appropriating funds for executive branch operations, and monitoring whether the executive branch carries out its responsibilities effectively and in accordance with the law. In order to legislate responsibly and monitor adequately, Congress must be able to access information. The Supreme Court has recognized Congress’ authority “to conduct investigations is inherent in the legislative process,”16 and that gathering information is “an essential and appropriate auxiliary to the legislative function.”17 In particular, the Court recognizes that Congress’ power of investigation reaches “probes into departments of the Federal Government to expose corruption, inefficiency or waste.”18 The executive branch has acknowledged Congress’s legitimate need for

It is the proper duty of a representative body to look diligently into every affair of government . . . . . Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct.
information from the executive branch in light of its oversight and legislative responsibilities. 19

Congress has used a variety of methods to obtain information from the executive branch. On an ad hoc basis, it holds hearings and requests voluntary disclosures; issues subpoenas to compel testimony and the production of documents; and uses its leverage in the appropriations and appointments processes to extract information from the executive branch. 20 On a more systematic basis, it statutorily requires the executive branch to provide Congress with reports on its activities. 21 Congress has enacted numerous statutes that require the executive branch to disclose information to Congress (as well as to the public). 22

At times, the executive branch objects to particular congressional demands for information. These objections may be practical or legal. The executive branch may claim that the information request is so broad that it is onerous; that there are legitimate reasons to keep this information secret (even from Congress); or that a legal privilege (such as executive privilege) prevents compulsory disclosure. 23

While the executive branch sometimes frames its objection to disclosure in terms of legal arguments about executive privilege, congressional-executive branch information disputes rarely result in litigation. 24 Instead, members of Congress and/or their staffs negotiate with executive branch officials in order to accommodate both Congress’s need for the information and the executive branch’s need for secrecy. These negotiations may result in one or another side standing down or

19 Memorandum to the Attorney General, dated December 17, 1986, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, entitled ‘The President’s Compliance with the ‘Timely Notification’ Requirement of Section 501(b) of the National Security Act.’

20 Denis McDonough, Mara Rudman & Peter Rundlet, Center for American Progress, No Mere Oversight 25 (2006) (each staffer interviewed for this study “recalled at least one annual instance in which a committee member threatened to statutorily withhold funding as a lever for sharing of information necessary for oversight that would not otherwise have been forthcoming”)

21 Louis Fisher, Congressional Access to Information: Using Legislative Will and Leverage, 52 Duke L.J. 323 (2002) (identifying Congress’s use of the appointments, appropriations and impeachment powers and GAO investigations in addition to congressional subpoenas and contempt proceedings)

22 For an analysis of the statutes that require the executive branch to share intelligence information with Congress, see the following section.

23 When the executive branch claims that information is privileged, it refuses to disclose the information to anyone in Congress. This article focuses on situations where the executive branch is not claiming that information is privileged, but instead is providing it to at least certain members of Congress with the restriction that those members not share the information with staff members.

significantly reducing its information demand or its secrecy claim, depending on the political salience of the information at issue. These disputes are usually resolved through political negotiations that accommodate conflicting institutional interests rather than through the application of absolute legal principles as laid down by courts.

On those rare occasions when congressional-executive branch information disputes do result in litigation, courts almost never resolve the question of whether the executive branch must disclose particular information to Congress.\textsuperscript{25} Lower courts have ruled on these congressional-executive information disputes only five times,\textsuperscript{26} and the Supreme Court never has. Courts generally refrain from deciding these cases on their merits, instead encouraging the parties to negotiate a resolution. In 1983, for example, the Reagan administration asked a court to issue a declaratory judgment that the administration did not need to disclose environmental enforcement documents after the House of Representatives had voted to hold EPA Administrator Anne Gorsuch in contempt for her failure to provide requested documents. The federal district court ruled that it would be improper to exercise its discretion to decide this case, and encouraged “the two branches to settle their differences without further judicial involvement.”\textsuperscript{27} That is exactly what the parties did, and the House ultimately gained access to all the

\textsuperscript{25} See Peter M. Shane, Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information, 44 ADMIN. L. REV. 197 (1992).
\textsuperscript{26} Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir 1974) (dismissing committee’s suit seeking a declaratory judgment that the President must comply with information demand because another congressional committee already obtained most of that information and was pursuing impeachment proceedings, making this committee’s request merely cumulative); United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977) (in a case where the executive branch sought to enjoin a company from complying with a congressional subpoena, setting out tentative procedures under which congressional staff would gain access to some but not all of the requested information); United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983) (dismissing executive branch’s suit seeking declaratory judgment that EPA need not comply with congressional subpoena); Walker v. Cheney, 230 F. Supp. 2d 51 (D.D.C. 2002) (dismissing for lack of standing Comptroller General’s suit seeking declaratory judgment that Vice President produce documents related to energy task force); Committee on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (in a case where committee sought a declaratory judgment that current and former White House advisors must appear and provide internal documents, granting the committee’s motion for partial summary judgment that the advisors are not immune from congressional process). See MORTON ROSENBERG, CONG. RESEARCH SERV., PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 1 (2008) (identifying Senate Select Committee, AT&T, and US House of Representatives as congressional-executive information disputes in which the executive branch asserted executive privilege).
requested documents, subject to an agreement to keep the contents of certain documents confidential.\textsuperscript{28}

While the process for settling these information disputes is not usually judicial, neither is it lawless. The political negotiation of information disputes occurs in the shadow of shared national security power, as defined by the constitution and multiple statutes. While the Constitution vests in the President the executive power and the role of Commander in Chief of the armed forces,\textsuperscript{29} it vests in Congress the power to declare war, to make rules for the government and regulation of the armed forces, and to make all laws that are necessary and proper for carrying out governmental powers.\textsuperscript{30} Through statutes Congress has required the executive branch to share with it vast amounts of information. But with respect to certain sensitive information – information that the executive branch claims could harm the nation’s security if disclosed – the statutes either explicitly give the executive branch the discretion not to disclose or are written ambiguously, in effect providing such discretion. The next section discusses the evolving statutory requirement that the executive branch disclose to Congress information about intelligence activities. As that discussion will show, while Congress has put in place statutory requirements, it has used ambiguous language, and the executive branch continues to assert unilateral authority not to disclose.

Congressional-executive disputes over intelligence-related information have almost all been mediated through this political process, and have only rarely reached the courts. One of those rare examples occurred in the 1970s and resulted from an investigation of warrantless surveillance by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce.\textsuperscript{31} The subcommittee subpoenaed AT&T to produce documents related to the government’s warrantless surveillance; the Justice Department sued to enjoin AT&T from complying with the subpoena; and the subcommittee chair intervened on behalf of the House of Representatives.\textsuperscript{32} While the


\textsuperscript{29} U.S. CONST. Art. II §§ 1-2.

\textsuperscript{30} U.S. CONST. Art. I § 8.

\textsuperscript{31} United States v. AT&T, 567 F.2d 121 (D.C. Cir. 1977). But see L. BRITT SNIDER, CENTRAL INTELLIGENCE AGENCY, SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE (1997) (“No case has reached US courts that involved a refusal by the executive to turn over intelligence information requested by Congress . . .”).

\textsuperscript{32} 567 F.2d at 123.
D.C. Circuit initially refrained from deciding the case on the merits and directed the political branches to attempt to settle the matter, in 1977 it required the executive branch to provide subcommittee staff with limited access to some of the information, directing the district court to consider contested documents. The following year, the parties settled the dispute, with the subcommittee obtaining access to some of the disputed information.

B. **CONGRESS’S ACCESS TO INTELLIGENCE INFORMATION**

Congress performs most of its work through its committees, so responsibility for the Justice Department can be found in the House and Senate Judiciary Committees and the Subcommittees on Commerce, Justice, Science, and Related Agencies of the Appropriations Committees. Up until the mid-1970s, congressional oversight of intelligence was handled by intelligence subcommittees of the House and Senate Armed Services and Appropriations Committees. Their oversight was quite lax. The subcommittees had only minimal staff.

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33 United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976).
36 See WOODROW WILSON, CONGRESSIONAL GOVERNMENT 69 (1885) (“Congress in its committee rooms is Congress at work.”).
and the intelligence agencies provided oral (rather than written) briefings. In the Senate, only one staff member was allowed to attend the briefings. The subcommittees did not have secure facilities to store classified documents, so they did not keep written records of executive branch’s briefings or of subcommittee meetings. Staff members who wanted to examine documents had to travel to CIA headquarters in Langley, Virginia, and were prohibited from removing any documents or even their own notes about the documents. The members of Congress who chaired the intelligence subcommittees apparently saw themselves as allies (rather than adversaries) of the intelligence agencies, and saw no need for additional staff resources or more formal oversight mechanisms.

refers to this lax oversight approach as “institutional oversight,” id. at 19-24, while other analysts refer to it as “undersight;” William E. Conner, Congressional Reform of Covert Action Oversight Following the Iran-Contra Affair, 2 DEFENSE INTELLIGENCE J. 35, 40 (1993); see also L. BRITT SNIDER, THE AGENCY AND THE HILL: CIA’S RELATIONSHIP WITH CONGRESS, 1946-2004, 55 (2008) (describing congressional oversight before the mid-1970s as “ad hoc and informal”); “overlook instead of oversight;” Loch K. Johnson, Playing Hardball with the CIA, in THE PRESIDENT, THE CONGRESS, AND THE MAKING OF FOREIGN POLICY 53 (Paul E. Peterson, ed.) (1994); or “minimal.” Frederick M. Kaiser, Congress and the Intelligence Community: Taking the Road Less Traveled, in THE POSTREFORM CONGRESS (Roger H. Davidson, ed.) 280 (1992) (quoting Sen. Leverett Saltonstall, a member of two intelligence subcommittees, referring to Congressional “reluctance . . . to seek information and knowledge on subjects which I personally, as a member of Congress and as a citizen, would rather not have . . .”).

During this era, Congress engaged in intelligence oversight only in response to intelligence failures so large that reached the newspapers, such as the Soviets’ shooting down the U-2 plane and the failed invasion of Cuba at the Bay of Pigs. CECIL V. CRABB AND PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY 137-38, 142-43 (1980); Loch K. Johnson, Accountability and America’s Secret Foreign Policy: Keeping a Legislative Eye on the Central Intelligence Agency, 1 FOR. POL. ANAL. 99 (2005) (contrasting Congress’s energetic responses to scandals affecting the intelligence community with its more lax routine oversight).

39 L. BRITT SNIDER, THE AGENCY AND THE HILL: CIA’S RELATIONSHIP WITH CONGRESS, 1946-2004 (2008) (asserting that “the lack of a professional staff capable of independently probing and assessing what the Agency was being directed to do . . . hampered the CIA subcommittees.”).

40 CECIL V. CRABB AND PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY 141 (1980) (“Only one staff member – the much overworked staff director of the Senate Armed Service Committee – was permitted to attend the meetings, and he was forbidden to brief any other senators on what transpired.”)


42 Senator Richard Russell, who chaired the CIA subcommittees of both the Armed Services and Appropriations Committees, wrote: It is difficult for me to foresee that increased staff scrutiny of CIA operations would result in either substantial savings or a significant increase in available intelligence information. . . . If there is one agency of the government in which we must take some matters on faith, without a constant examination of its methods and sources, I believe this agency is the CIA.
This arrangement changed in the mid-1970s, amid public revelations of intelligence agency abuses. In December 1974, Congress passed the Hughes-Ryan Amendment, formalizing the regulation of covert actions, which are currently defined as government activities intended “to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” The Hughes-Ryan Amendment required that any covert action be supported by a Presidential finding that the action was “important to the national security” and that the President report “in a timely fashion, a description and scope of such [actions] to the appropriate committees of the Congress.” While the statute did not spell out which were the “appropriate committees,” that phrase was understood to include the House and Senate Foreign Relations, Armed Services and Appropriations committees. Together, these committees had more than 160 members.

That same month, Seymour Hersh started publishing a series of newspaper articles detailing extensive illegal activity by intelligence agencies. Hersh’s articles led to the creation of ad hoc investigative committees in the Senate (colloquially known as the “Church committee” for its chair, Sen. Frank Church) and the House (known as the “Pike committee” for its chair, Rep. Otis Pike). Those committees
hired large staffs, including lawyers and investigators; held hearings; and wrote lengthy reports revealing widespread illegal activities by the intelligence agencies. Among their recommendations was a call for enhanced congressional oversight of the intelligence community.

In May, 1976, less than a month after the Church committee issued its final report, the Senate created the Senate Select Committee on Intelligence and passed a non-binding sense of the Senate resolution that department heads should keep that committee “fully and currently informed” of the agency’s intelligence activities. The following year, the House created its own intelligence committee. President Carter partially endorsed the Senate resolution by issuing an executive order requiring intelligence agencies to keep the intelligence committees “fully and currently informed” of their activities, but that Order also included limiting language that could justify nondisclosure of sensitive information, indicating that such reporting must be undertaken “consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect sources and methods.”

In 1980, Congress codified the requirement that the executive branch keep the intelligence committees “fully and currently informed” of intelligence activities (including covert actions), but it also included

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48 The Church Committee issued 17 volumes of reports and hearings. CECIL V. CRABB AND PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY 149 (1980); see SELECT COMMITTEE TO STUDY GOVERNMENT OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. Rep. No. 94-755 (1976). The Pike Committee issued recommendations; HOUSE SELECT COMMITTEE ON INTELLIGENCE, RECOMMENDATIONS OF THE FINAL REPORT OF THE HOUSE SELECT COMMITTEE ON INTELLIGENCE, 94th Congress, 2d Session, 1976; but its report on its findings were not officially published because the House of Representatives voted not to issue the report. See infra text accompanying note xxxx.

49 S. Res. 400, 94th Cong., § 11(a); CECIL V. CRABB AND PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY 152 (1980).

50 H. Res. 658, 95th Cong. The House Resolution did not purport to require intelligence agencies to keep the House Intelligence Committee “fully and currently informed.” Frederick M. Kaiser, Congress and the Intelligence Community: Taking the Road Less Traveled, in THE POSTREFORM CONGRESS (Roger H. Davidson, ed.) 288 (1992).


52 Exec. Order No. 12036, § 3-4.

limiting language similar to that in Carter’s Executive Order.\textsuperscript{54} This additional language raises the possibility that the executive branch can withhold information about intelligence activities from the intelligence committees.\textsuperscript{55} But another provision of the same statute asserts that “[n]othing in this Act shall be construed as authority to withhold information from the congressional intelligence committees on the grounds that providing the information to the intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.”\textsuperscript{56} When Congress re-codified the duties of the Director of Central Intelligence (DCI) in 1992, it set out in statute a requirement that DCI to “provide national intelligence” to Congress.\textsuperscript{57} But the requirement that Congress imposed with one hand it took away with another, indicating that this requirement applied only “where appropriate,” a term that Congress made no effort to define.\textsuperscript{58} When Congress reorganized the Intelligence Community in 2003, creating the office of Director of National

\textsuperscript{54} The statute imposes the reporting obligation “[t]o the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches for the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods.” 50 U.S.C. § 413(a). The Senate Report accompanying this legislation “recognized that in extremely rare circumstances a need to preserve essential secrecy may result in a decision not to impart certain sensitive aspects of operations or collection programs to the oversight committees in order to protect extremely sensitive intelligence sources and methods.” S.Rep. 96-730, 96th Cong., 2nd Sess.

\textsuperscript{55} As Congress was considering this legislation, the CIA General Counsel set forth the executive branch’s understanding that this limiting language permits the President not to make disclosures “in the exercise of his constitutional authority or in rare circumstances” to protect intelligence sources and methods. William E. Conner, Congressional Reform of Covert Action Oversight Following the Iran-Contra Affair, 2 DEFENSE INTELLIGENCE J. 35, 44 (1993). In 2006, the Bush Administration argued that this same provision justified its limited disclosures to Congress. Letter from Assistant Attorney General William Moschella to Sen. Arlen Specter (Feb. 3, 2006) (available at http://www.usdoj.gov/ag/readingroom/surveillance17.pdf) (arguing that this provision “gives the Executive Branch flexibility to brief only certain members of the intelligence committees where more widespread briefings would pose an unacceptable risk to the national security”).

\textsuperscript{56} 50 U.S.C. § 413(e) (emphasis added).


Intelligence (DNI), it required the DNI to “ensur[e] that national intelligence is provided” to Congress, and omitted the “where appropriate” language. Yet the effect of this new statute is unclear, for it does not purport to mandate that the DNI share all national intelligence with Congress. Like the earlier version, this statutory mandate for information disclosure leaves substantial discretion in the hands of the executive branch to determine which information to disclose.

With respect to covert actions, the 1980 statute modified the Hughes-Ryan Amendment’s requirement that the executive branch notify “the appropriate committees of the Congress,” (which by 1980 numbered eight) so that such notice need be given only to the intelligence committees. This had the effect of significantly decreasing the number of members of Congress to whom notice was given, assuaging the executive branch’s concern about the potential for leaks. It implicitly required intelligence agency heads to provide prior notification of such actions to the full intelligence committees, but explicitly permitted prior notice to be limited to the gang of eight (the chairs and ranking members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate) if “the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States.” If the President hadn’t provided prior notice, the statute required the President to “fully inform the intelligence committees in a timely fashion” about these actions and to “provide a statement of reasons for not giving prior notice.”

60 The eight committees subject to Hughes-Ryan notification were the House and Senate committees on intelligence, armed services, foreign affairs and appropriations.
62 The statute does not explicitly require the Executive Branch to provide the intelligence committees with prior notification of covert actions, but refers to covert actions as “significant anticipated intelligence activities,” Pub. L. 96-450, § 407 (emphasis added), and the statute’s two mentions of “prior notice” seem to assume that prior notice is generally required. See 50 U.S.C. § 413(a)(1), (b). See also S. Rep. 96-730, 96th Cong., 2nd Sess., p. 4 (noting that the legislation repeals the Hughes-Ryan Amendment’s requirement that the Executive Branch report covert actions to Congress “in a timely fashion,” and asserting that it replaced that provision with a requirement that the intelligence committees be given prior notice of covert actions); L. BRITT SNIDER, THE AGENCY AND THE HILL: CIA’S RELATIONSHIP WITH CONGRESS, 1946-2004 59-60 (2008) (noting that the statute “contemplated [that the intelligence committees] would be advised in advance” of covert actions).
In January 1986, President Reagan issued Presidential findings in connection with the sale of arms to Iran, but failed to notify either the gang of eight or the full intelligence committees for more than ten months, until those operations were revealed in a Lebanese newspaper. Eventually, the Justice Department’s Office of Legal Counsel issued an opinion reviewing these events and asserting that this delay notification was legal despite the statutory requirement that notice be given “in a timely fashion.” The opinion reasoned that in light of the President’s constitutional authority as Commander in Chief, “the vague phrase ‘in a timely fashion’ should be construed to leave the President . . . with virtually unfettered discretion to choose the right moment for making the required notification.” In 1989 and 1990, Congressional intelligence committees asked the first President Bush to repudiate the OLC opinion. Bush responded by avoiding a direct confrontation with the intelligence committees while at the same time not conceding any executive power. Bush indicated that “in almost all instances,” he would provide prior notice; that in “those rare instances where” he did not provide prior notice, he “anticipate[d] that notice will be provided within a few days;” and that if he withheld notice for longer than that, he would be doing so “based upon my assertion of authorities granted this office by the Constitution.” In effect, Bush asserted that the constitution granted him authority to act contrary to the statutory requirement of “timely” notice.

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66 Memorandum to the Attorney General, dated December 17, 1986, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, entitled ‘The President’s Compliance with the ’Timely Notification’ Requirement of Section 501(b) of the National Security Act.’

67 Memorandum to the Attorney General, dated December 17, 1986, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, entitled ‘The President’s Compliance with the ‘Timely Notification’ Requirement of Section 501(b) of the National Security Act.’

68 Letter from George Bush to the Chairman of the House Intelligence Committee, reprinted in H. Conf. Rept. 102-166.

69 Under the analysis in Justice Jackson’s *Youngstown* concurrence, this would fall into Jackson’s third category: executive power that exists after Congress has legislated a prohibition. *Youngstown Sheet & Tube v. Sawyer* (Jackson, J., concurring).
In 1991, responding to the recommendations of the Joint Committee that investigated the Iran-Contra scandal, Congress enacted legislation requiring that presidential findings in support of covert actions may not authorize covert actions that have already occurred, must be in writing, and must be provided to the chairs of the intelligence committees. But Congress left in place the non-specific “timely fashion” requirement rather than replacing it with a more specific requirement. The conference report accompanying this legislation asserted that reenactment of “the phrase ‘in a timely fashion,’ should not in any way be taken to imply agreement or acquiescence in the” OLC memorandum’s position, and that the phrase should properly be understood to mean “within a few days.” At the same time, though, the conference report disclaimed any congressional ability to authoritatively interpret this law. The report asserted that “[n]either the legislative [n]or executive branch authoritatively interpret the Constitution, which is the exclusive province of the judicial branch.” Yet this assertion ignored the fact that with respect to many issues related to intelligence activities, the judicial branch never has the opportunity to interpret the Constitution. In the national security sphere, it is often the case that the responsibility of interpreting the Constitution falls on the political branches rather than the judicial branch. In this case of a statutory mandate for “timely notification,” when faced with a President who asserted constitutional authority to ignore a statutory requirement, Congress blinked.

While some of Congress’s constraints on the executive branch include the potential for criminal liability, there is no criminal liability for failure to notify Congress of intelligence activities. When the executive branch fails to notify Congress, it may pay a political price, depending on the political salience of the issue. This dynamic was illustrated in the spring of 1984, when news reports revealed that the CIA

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70 William E. Conner, Congressional Reform of Covert Action Oversight Following the Iran-Contra Affair, 2 DEF. INTEL. J. 35 (1993).
72 H. Conf. Rept. 102-166 (“the President’s stated intention . . . to make a notification ‘within a few days’ . . . is consistent with what the conferees believe is its meaning and intent”).
73 H. Conf. Rept. 102-166.
had engaged in a covert action to mine Nicaragua’s harbors. The leadership of the Senate intelligence committee asserted that the administration had not informed the committee, and the chair wrote a public letter excoriating the Director of Central Intelligence for this failure. Congress responded by cutting off financial support for the military aid to the Nicaraguan Contras. More recently, the more second Bush administration’s failure to notify the full intelligence committees of its warrantless surveillance programs did not result in any legislative setbacks.

While Congress has imposed statutory requirements that the executive branch share information with Congress, these requirements are fundamentally ambiguous. They have the effect of leaving the executive branch with the discretion to disclose or not. The consequences of nondisclosure are merely political. While the executive

75 Vice Chair Daniel Moynihan “said he first learned of the American role in the mining in an article in The Wall Street Journal.” Bernard Gwertzman, Moynihan to Quit Senate Panel Post in Dispute on CIA, N.Y.TIMES, April 16, 1984.
78 Cynthia McKinney, a member of the House of Representatives who had lost her bid for re-election, introduced Articles of Impeachment against George W. Bush on Dec. 8, 2006, but her bill did not attract any co-sponsors. H. Res. 1106, 109th Cong. 2nd Sess. (2007).
79 For an example of this ambiguity, see SENATE SELECT COMMITTEE ON INTELLIGENCE, LEGISLATIVE OVERSIGHT OF INTELLIGENCE ACTIVITIES: THE U.S. EXPERIENCE, S. Rpt. 103-88 (2004) at 10 (asserting that “the [intelligence] committees, as a matter of law and principle, recognize no limitation on their access to information,” while in the next sentence acknowledging that “no law can readily compel full access to information if intelligence agencies are convinced that such access will result in catastrophic disclosures of information on their sensitive sources and methods”). See also Memorandum to the Attorney General, dated December 17, 1986, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, Department of Justice, entitled ‘The President's Compliance with the ‘Timely Notification’ Requirement of Section 501(b) of the National Security Act' (describing ambiguities in statutory requirement for timely notification).
branch shares a wide range of intelligence information with Congress,\(^80\) it also asserts its authority not to disclose to Congress some intelligence information.\(^81\) The intelligence committees have “been willing to limit access to particularly sensitive information to members and/or a few senior staff [and] to limit the number of committee members with access to especially sensitive information.”\(^82\) While some of these limits – such as gang of eight notification for covert actions – are statutorily authorized, other limits – such as restrictions on consulting staff – have no statutory basis.\(^83\)

**C. CONGRESS’S ABILITY TO CONSULT STAFF IN CONNECTION WITH INTELLIGENCE**

The Church and Pike committees had large staffs,\(^84\) and those staff members underwent security background checks so that they could gain access to intelligence information.\(^85\) Those security-cleared staff members did the footwork that enabled the Church and Pike committees to conduct extensive hearings and produce lengthy reports about intelligence abuses. The National Security Agency initially took the position that its information was so sensitive that it would be provided only to chair and ranking member, rather than to staffers, but it eventually abandoned this position and provided information to committee staffers.\(^86\) Those staffers were instrumental in uncovering the

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\(^{80}\) Alfred Cumming, Congressional Research Service, Congress as a Consumer of Intelligence Information 8 (Jan. 15, 2009) (in 2004, the CIA provided Congress with 1000 briefings and 4000 documents).

\(^{81}\) Alfred Cumming, Congressional Research Service, Congress as a Consumer of Intelligence Information (Jan. 15, 2009) (the executive branch does not generally share with Congress intelligence sources or methods, raw intelligence, or the President’s Daily Brief).


\(^{83}\) Intelligence committee leaders have also acquiesced in the executive branch’s desire to limit some information to the “gang of four,” the committee chairs and ranking members. There is no support in statute, committee or chamber rules for these limited notifications. Alfred Cumming, Congressional Research Service, “Gang of Four” Congressional Intelligence Notifications (July 14, 2009).

\(^{84}\) The Church Committee had 135 staff members, LOCH JOHNSON, A SEASON OF INQUIRY: THE SENATE INTELLIGENCE INVESTIGATION 25 (1985), and the Pike Committee had 32 staff members, FRANK J. SMIT, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 1947-1994, 136 (2nd ed. 1994).

\(^{85}\) See infra § II.A.

\(^{86}\) L. Britt Snider, Unlucky SHAMROCK: Recollections from the Church Committee’s Investigation of NSA, STUD. IN INTEL. (Winter 1999-2000). The NSA initially indicated that the answers to the committee’s written interrogatories were so sensitive that they would be provided only the chair and ranking member. After a news leak regarding the NSA’s surveillance of international
Members of Congress delegate to their staff members the initial fact-finding and analysis that result in hearings, reports, and ultimately legislation. While members may provide the vision and goals for this work, it is staff members who carry out essential functions in investigating the executive branch’s activities and in enabling members to understand the legal framework in which those activities occur. In addition to the lawyers and investigators who work on particular committees, Congress also has at its disposal the over 3000 staff members who work indirectly for Congress through its Government Accountability Office (GAO). The GAO audits and analyzes the operation of the executive branch, responding to specific requests for such analysis from members of Congress. GAO employees engage in long-term -- if often low-profile -- investigations and analyses of executive branch programs, producing hundreds of detailed and often technical reports every year.88

Congressional staff -- including the GAO -- have enabled Congress to carry out its oversight functions in a robust fashion. Despite -- or perhaps because of -- this record of robust, staff-enabled oversight, the executive branch has insisted that Congress not consult its staff in connection with certain intelligence information. The executive branch asserts that the GAO does not have the authority to analyze intelligence activities.89 During the Reagan administration, the Justice Department’s Office of Legal Counsel (OLC) asserted that while GAO’s mandate is to evaluate executive branch programs that have been authorized by statute, intelligence activities are undertaken pursuant to the President’s constitutional foreign policy responsibilities rather than pursuant to statute.90 In light of the statutory authorization for and regulation of intelligence operations, this OLC opinion is not particularly persuasive.

communications, however, the NSA wanted to get out “its side of the story,” and it briefed Church Committee staff on this surveillance. Id. at text accompanying n.5.
87 L. Britt Snider, Unlucky SHAMROCK: Recollections from the Church Committee’s Investigation of NSA, STUD. IN INTEL. (Winter 1999-2000).
88 In Fiscal Year 2008, the GAO had 3150 employees and provided Congress with over 1200 reports (including written testimony) analyzing executive branch programs.
90 Investigative Authority of the General Accounting Office, 12 Op. Off. Legal Counsel 171, 172 (1988) (GAO’s statutory mandate covers “only . . . activities carried out pursuant to statute, and not activities carried out pursuant to the Executive’s discharge of its own constitutional responsibilities.”).
Nonetheless, Congress has acquiesced in the executive branch’s insistence that intelligence oversight be conducted only by the intelligence committees and not by the GAO.91

Since enactment of the gang of eight notification procedures in 1980, the executive branch has asserted that the members of the gang of eight may not consult their staff members – even those with high-level security clearances – regarding the covert action information that the executive branch provides them. The members of the gang of eight have acquiesced to the executive branch position on this issue. The intelligence oversight statutes are silent on this question, as are the intelligence committee rules.

While intelligence committee members are able to consult their staff regarding many intelligence activities, they have not been able to utilize the expert staff of the GAO, nor have they been able to consult their own committee staff with respect to some of the most sensitive intelligence programs. The result has been that members of Congress have been hobbled in their ability to understand and analyze key executive branch programs. Executive branch officials have asserted that these programs – such as warrantless surveillance – are legal, but they have not permitted Congress to review the executive branch’s own legal analysis. In addition, the executive branch asserts that these members may not consult their own security-cleared lawyers and other expert staff, which would enable these members to draw their own independent conclusions about the legality of these programs. The executive branch’s position has been: “Trust our conclusion that this program is legal. We won’t show you our own legal analysis. We won’t let you conduct your own legal analysis. Just trust us.”

One of the lessons of the Bush administration is that while Congress may trust, it must verify.92 The House intelligence committee seems to have taken this lesson to heart, and has reported out of

91 But see § 335 of H.R. 2701, the Intelligence Authorization Act for FY 2010, which would direct the Director of National Intelligence to provide GAO personnel with access to intelligence information they need in order to conduct investigations requested by an intelligence committee. The Obama administration has expressed concern about this provision, which it notes “would fundamentally shift the long-standing relationship and information between the [intelligence community] and intelligence committee members and staff,” but has not explicitly indicated that it opposes this provision. Statement of Administration Policy, H.R. 2701 – Intelligence Authorization Act for Fiscal Year 2010 (July 8, 2009).

committee an intelligence authorization bill that would require the President to provide the intelligence committees with “all information necessary to assess the lawfulness . . . of an intelligence activity, including . . . the legal authority under which the intelligence activity is being or was conducted [and] . . . any legal issues upon which guidance was sought in carrying out or planning the intelligence activity, including dissenting views.”\textsuperscript{93} The Obama administration has threatened to veto the final bill if it contains this provision, objecting to its requirement to disclose “internal Executive branch legal advice and deliberations.”\textsuperscript{94}

This executive branch insistence that Congress not consult its staff has also occurred not just in connection with congressional oversight of intelligence activities, but also with respect to congressional authorization for war. In the fall of 2002, the Bush Administration was seeking congressional authorization for its planned invasion of Iraq. The executive branch made available to all members of Congress – but not their staffs – a 92-page document assessing Iraq’s weapons of mass destruction. All members of Congress were free to go to a secure room and read the document, but they could not take notes and could not consult staff about its contents. Prior to voting to authorize the U.S. invasion of Iraq, only a few members of Congress took the time to read past the 5-page executive summary.\textsuperscript{95}

D. CRITIQUE OF CURRENT SYSTEM: LIMITED NOTIFICATION AS INOCULATION

The current system permits the executive branch to notify Congress in a way that provides the appearance but not the reality of an actual checking function. This type of ineffectual notification -- where members of Congress are given information about intelligence activities but lack the means to rigorously scrutinize the information\textsuperscript{96} -- may be...

\textsuperscript{93} See § 321 of H.R. 2701, the Intelligence Authorization Act for FY 2010.
\textsuperscript{95} Dana Priest, Congressional Oversight of Intelligence Criticized, WASH. POST, April 27, 2004, p.A1; see also Leslie Jacobs, Consent to War, 26 CONST. COMMENTARY (forthcoming 2010).
\textsuperscript{96} Former House Intelligence Committee Ranking Member Jane Harmon described the limits on taking notes on these oral briefings and on consulting staff. See interview with Representative Jane Harman, “House Committee to Probe Ruin of CIA Tapes,” Morning Edition, National Public Radio, January 16, 2008 (transcript available at http://www.npr.org/templates/transcript/transcript.php?storyId=18137722)
worse than no notification at all. Under this system, which I would call “limited notification as inoculation,” the executive branch is able to inoculate itself against later congressional backlash if an intelligence program is later exposed results in public controversy. The executive branch can point to its earlier notifications of Congress and Congress’s lack of action or response as endorsement of the executive action. This kind of notification provides the executive branch with political cover, but does not enable Congress to effectively participate as a co-equal branch of government.

When the warrantless surveillance program was eventually exposed and controversy about it erupted, the Bush Administration was able to point to the silence of the congressional gang of eight. Their silence came to be seen as endorsement. Or at the very least, congressional silence inoculated the administration against charges of overreaching. Rep. Peter Hoekstra, then chair of the House intelligence committee, alluded to this invoked this inoculation effect when some Democratic congressional leaders expressed concern about the warrantless surveillance program after it was exposed:

This is a shared accountability. The president shared this sensitive information with congressional leaders. These same leaders should now accept the responsibility for this program. If they now have second thoughts because

I suppose one could take some notes but they would have to be carried around in a classified bag, which I don’t personally own. You can’t talk to anybody about what you’ve learned, so there’s no ability to use committee staff, for example, to do research on some of the issues that are raised in these briefings.

With regard to the practice of notifying Congress of issues that could be potentially problematic, a former CIA official stated:

They couldn’t come back to us any more when something went wrong and claim they’d never been told about it. If they had a problem with something, then it was up to them to let us know about it. If they didn’t... well... it makes it hard for them to criticize us for failing to do something about it.


Loch Johnson, a political scientist who has written extensively about intelligence oversight, observed that DCI George Tenet tended to ignore the rank-and-file membership on [the intelligence committees], preferring to discuss issues one-on-one with the committee chairs and ranking minority members. Sometimes in the past this approach has been used as a ploy by DCIs to honor ‘oversight’ more in the breach than in the observance, whispering into the ear of the chair, then counting on him to support the intelligence community if an operation crash landed and junior members demanded to know why they were never informed before the take-off. Loch K. Johnson, Accountability and America’s Secret Foreign Policy: Keeping a Legislative Eye on the Central Intelligence Agency, 1 FOR. POL. ANAL. 99, 114 (2005).
it's made it into the press, so be it. But they should be held accountable for their participation in the process and they shouldn't run from their responsibility and accountability right now because it may just be a little bit uncomfortable for them.99

As a matter of practical politics, Rep. Hoekstra is correct. Members of Congress share some political responsibility for the intelligence programs about which they have received information.100 In order for the members of Congress to actually take responsibility, however, they must be armed with the legal and technical knowledge that will enable them to assess the legality of these intelligence programs.

The prospect of members sharing this information with their lawyers raises legitimate concern for the confidentiality of this information. The next section of this article explains the mechanisms that the intelligence committees use to maintain the secrecy of the information they receive from the executive branch.

II. CONGRESS’S ABILITY TO KEEP SECRETS

From the beginning of congressional oversight of intelligence, there has been concern for adequate protection of the confidentiality of the information that the executive branch shares with Congress. In the decades of lax congressional oversight, information was orally shared with chairmen of the intelligence subcommittees. When the executive branch provided written documents to these subcommittees and their staff, it brought the documents to Capitol Hill for them to read under the watch of executive branch personnel or arranged for congressional staffers to review the documents in intelligence agency offices, but it would not allow the members or staffers to retain written documentation of this information.101 The subcommittees did not have offices with the

99 News Conference of Rep. Peter Hoekstra, CQ Transcriptions, Dec. 12, 2005; see also Shane Harris, The CIA Briefing Game, NATL. J. (June 5, 2009); Alfred Cumming, Congressional Research Service, Statutory Procedures Under Which Congress Is to Be Informed of Intelligence Activities, Including Covert Actions 7 (Jan. 18, 2006) (Pres. Bush indicated that members of Congress had been briefed more than a dozen times about the surveillance program and were given an opportunity to express approval or disapproval).

100 A. John Radsan, An Overt Turn on Covert Action, 53 ST. LOUIS L.J. 485 (2009) (“Through notification, Congress takes on an implicit role of approving presidential proposals for covert action. . . . [T]he collective decision by the oversight committees not to leak a particular plan and not to cut off funding brings Congress into the circle of responsibility.”)

101 FRANK J. SMITH, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 1947-1994, 5, 8 (2nd ed. 1994) (In connection with subcommittee meetings, “[n]othing was put in
physical security required for the protection of intelligence-related information.\footnote{Cf. Rules of Procedure of the Senate Select Committee on Intelligence (111th Cong. 1st Sess. 2009), Rules 9.1, 9.2 (mandating a United States Capitol Police Officer to be on duty at the entrance to the committee office at all times and requiring that classified information be stored in the committee’s Sensitive Compartmented Information Facility (SCIF)); Rules of Procedure for the Permanent Select Committee on Intelligence, U.S. House of Representatives (11th Cong.), Rule 14(a)(2) (requiring at least one U.S. Capitol Police officer to be on duty outside the entrance of the House Intelligence Committee at all times).} Leaks of this information were rare.\footnote{Frank J. Smist, Jr., Congress Oversees the United States Intelligence Community 1947-1994, 9 (2nd ed. 1994) (asserting that “secrets did not leak,” and that one member who revealed information from a classified briefing to a job candidate “was disciplined by his colleagues and was never allowed to again sit on a classified intelligence appropriations hearing”).}

This section examines the degree to which Congress can keep national security-related information secret. It provides a history of national security-related leaks by Congress over the last forty years,\footnote{For an examination of leaks by Congress and the executive branch from the nation’s founding until World War II see Richard B. Kielbowicz, The Role of Leaks in Governance and the Law of Journalists’ Confidentiality, 1795-2005, 43 San Diego L. Rev. 425, 433-46 (2006).} and then examines the specific mechanisms that Congress has put into place to protect this information.

A. CONGRESSIONAL MECHANISMS FOR PROTECTING THE CONFIDENTIALITY OF INTELLIGENCE INFORMATION

Congressional access to classified documents changed in the mid-1970s with the ad hoc Church and Pike committees, which were able to review in their own offices thousands of intelligence agency documents. The confidentiality of those documents and the other information provided was a key concern, and the committees put in place several mechanisms for maintaining their confidentiality.

While employees in the executive branch who need access to secret national security information for their work must undergo a security clearance process before being given access to that information,\footnote{Elected officers in the executive branch, the President and Vice-President, do not undergo security clearance procedures.} members of Congress do not undergo this type of security clearance process.\footnote{Alfred Cumming, Congressional Research Service, Congress as a Consumer of Intelligence Information 1 (Jan. 15, 2009).} Intelligence committee members do not undergo the same rigorous – if bureaucratic – screening process used for hundreds...
of thousands of executive branch employees, but they do undergo a political screening process controlled by the leaders of the legislative branch.\footnote{One would not want to over-estimate the rigor or efficacy of the ad hoc screening process for members of Congress. For example, Senator John Tower served on the Church Committee. Fourteen years later, when President Bush nominated him to be Secretary of Defense, his Senate confirmation hearings revealed that he had a record of public drunkenness and inappropriate sexual behavior – both characteristics that could result in the denial of a security clearance to executive branch employees. Molly Moore, \textit{Tower Presses Case for Confirmation; Senate Disapproval Would be “Dannning the President’s Judgment,”} WASH. POST, March 5, 1989, A12; STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 700 (2nd ed. 1997).\footnote{The Church, Pike and Nedzi committees were also “Select” Committees, chosen by party leaders.}} Although the membership of most congressional committees is determined by party caucuses, the membership of the intelligence committees is chosen by party leaders, hence the term “Select” in their titles.\footnote{The Church, Pike and Nedzi committees were also “Select” Committees, chosen by party leaders.} All intelligence committee members have access to all documents held by the committee,\footnote{Rules of Procedure of the Senate Select Committee on Intelligence (111th Cong. 1st Sess. 2009), Rule 9.4; Rules of Procedure for the Permanent Select Committee on Intelligence, U.S. House of Representatives (11th Cong.), Rule 14(b).} but not to the information provided in oral briefings to the gang of eight.

Senators who are not members of the Senate intelligence committee can gain access to intelligence-related documents held by the committee.\footnote{S. Res. 400 § 8(c)(2), 94th Cong., 2nd Sess. (1976) (authorizing the Senate Intelligence Committee to set up rules making information available to other committees and members requiring a written record of the members and committees who have accessed such information).} But before gaining access to such materials, the Senator is given a verbal or written notice that he must protect the confidentiality of the information.\footnote{Rules of Procedure of the Senate Select Committee on Intelligence (111th Cong. 1st Sess. 2009), Rule 9.5.} Members of the House of Representatives who are not members of the intelligence committee are not granted access to all documents held by the committee.\footnote{Frederick M. Kaiser, \textit{Congress and the Intelligence Community: Taking the Road Less Traveled}, in \textit{THE POSTREFORM CONGRESS} (Roger H. Davidson, ed.) 288 (1992) (quoting one member of Congress as saying, “It is not, in my judgment, sensible for the House of Representatives to say that election to Congress automatically gives any member the right to see the most secret matters in the security establishment”).} They have access to only that information which the executive branch designates as available to non-committee members.\footnote{Rules of Procedure for the Permanent Select Committee on Intelligence, U.S. House of Representatives (11th Cong.), Rule 13. In 2003, the committee temporarily changed its rules so that all members could read the entire 800-page report of the Congressional “Joint Inquiry into the Terrorist Attacks of September 11, 2001.” Dana Priest, \textit{Congressional Oversight of Intelligence Criticized}, WASH. POST, April 27, 2004, p.A1. Congressional Report Cites ‘Missed Opportunities’ Prior to 9/11, CNN.com (July 25, 2003) (available at http://edition.cnn.com/2003/ALLPOLITICS/07/24/9.11.report/ (checked on Dec. 22, 2009)). Few
committee members must notify the committee in writing, and explain “with specificity the justification for the request and the need for access.”\footnote{114} The committee may consult the Director of National Intelligence in considering this request, and must take a roll call vote in deciding whether to grant access to that specific member or to all members, and may notify the relevant executive branch agency.\footnote{115} If the committee grants access, then the non-committee member must sign both a confidentiality agreement and a secrecy oath.\footnote{116} The Senate and House require their respective ethics committees to investigate unauthorized leaks of intelligence information and recommend appropriate sanctions against the member or staffer.\footnote{117} In the House, members and staff must swear to a secrecy oath prior to gaining access to classified information.\footnote{118}

The intelligence committees require their staff members to obtain security clearances and sign confidentiality agreements.\footnote{119} The committees consult with the Director of National Intelligence to determine the appropriate security clearance level for staffers.\footnote{120} The FBI performs a background check on the potential employee, and then the committee obtains a “security opinion” on that person from the intelligence agency.\footnote{121} This clearance process does not include polygraph examinations, even though such examinations are routine in

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\footnote{114}{\textit{Rules of Procedure for the Permanent Select Committee on Intelligence, U.S. House of Representatives (11\textsuperscript{th} Cong.), Rule 14(f)(1).}} \footnote{115}{\textit{Rules of Procedure for the Permanent Select Committee on Intelligence, U.S. House of Representatives (11\textsuperscript{th} Cong.), Rule 14(f)(p)(2).}} \footnote{116}{\textit{Rules of Procedure for the Permanent Select Committee on Intelligence, U.S. House of Representatives (11\textsuperscript{th} Cong.), Rule 14(f)(4).}} \footnote{117}{\textit{S. Res. 400 § 8(d), (e), 94\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. (1976); House Rule X, clause 11(g)(4), (5).}} \footnote{118}{\textit{House Rule XXIII, cl. 13, 110\textsuperscript{th} Cong.; Rules of Procedure for the Permanent Select Committee on Intelligence, U.S. House of Representatives (11\textsuperscript{th} Cong.), Rule 14(d).}} \footnote{119}{\textit{Rules of Procedure of the Senate Select Committee on Intelligence (111\textsuperscript{th} Cong. 1\textsuperscript{st} Sess. 2009), Rules 10.1, 10.6; S. Res. 400 § 6, 94\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. (1976) (as amended); Rules of Procedure for the Permanent Select Committee on Intelligence, U.S. House of Representatives (11\textsuperscript{th} Cong.), Rules 11, 12. In addition to a confidentiality agreement, House intelligence committee members and staff are required to sign a secrecy oath. Rules of Procedure for the Permanent Select Committee on Intelligence, U.S. House of Representatives (11\textsuperscript{th} Cong.), Rule 14(d). House Rule X, class 11(e). See also FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 1947-1994, 49 (2\textsuperscript{nd} ed. 1994).}} \footnote{120}{\textit{S. Res. 400 § 6, 94\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess. (1976) (as amended).}} \footnote{121}{\textit{SENATE SELECT COMMITTEE ON INTELLIGENCE, LEGISLATIVE OVERSIGHT OF INTELLIGENCE ACTIVITIES: THE U.S. EXPERIENCE, S. Rpt. 103-88 (2004) at 9.}}
some intelligence agencies. In theory, the committees reserve the right to make its own hiring decisions. In practice, committees rarely hire employees over the objection of the executive branch.

The Senate and House have created elaborate procedures that, in theory, permit the disclosure of classified information that the executive branch wishes to keep secret. If a member of the committee wants to disclose the information, she may ask the committee to vote for such disclosure. If the committee votes for disclosure, it must notify the President. If the President personally certifies in writing that disclosure would threaten the national interest and that such threat outweighs the public interest in disclosure, the committee may refer the matter to the full chamber for consideration in closed session. These elaborate procedures have never been invoked, yet alone resulting in congressional disclosure over the objection of the executive branch.

The House intelligence committee rules also permit a committee member to request that the committee take a roll call vote to disclose particular information to another committee or to the entire House. If the disclosure is to another committee, the committee makes the

122 Senate Select Committee on Intelligence, Legislative Oversight of Intelligence Activities: The U.S. Experience, S. Rpt. 103-88 (2004) at 9; Frank J. Smist, Jr., Congress Oversees the United States Intelligence Community 1947-1994, 48-49 (2d ed. 1994) (quoting the Church Committee Staff Director as saying, “We took the FBI and its background check as our agent. There were a few staffers ousted as a result of the FBI check.”).
123 Senate Select Committee on Intelligence, Legislative Oversight of Intelligence Activities: The U.S. Experience, S. Rpt. 103-88 (2004) at 9. The Staff Director of the ad hoc joint congressional committee to investigate 9/11 was forced to resign after it emerged that he had hired a former CIA officer who was under investigation for failing a polygraph test at the agency. Greg Miller, Why U.S. Intelligence Stumbled: Hearings Portray Overwhelmed Agencies and Suggest 9/11 Could Have Been Prevented, L.A. TIMES, Oct. 19, 2002.
124 S. Res. 400 § 8, 94th Cong., 2d Sess. (1976) (as amended); House Rule X, clause 11(g).
129 Rules of Procedure for the Permanent Select Committee on Intelligence, U.S. House of Representatives (111th Cong.), Rule 14(g).
information available to the chair and ranking member of that committee.  

B. CONGRESSIONAL DISCLOSURES OF NATIONAL SECURITY INFORMATION OVER THE OBJECTION OF THE EXECUTIVE BRANCH FROM 1970 TO THE PRESENT

Some observers have characterized Congress’s record for keeping secrets as abysmal, while others characterize it as very strong. The minority report of the congressional Iran-Contra investigation asserted (without elaboration) that leaks from the Church and Pike committee investigations “seriously debilitated our overall intelligence capabilities and it took us over a decade to repair the damage.” Rather than simply labeling Congress’s ability to keep secrets as good or bad, this section describes with some specificity

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132 Loch K. Johnson, *Accountability and America’s Secret Foreign Policy: Keeping a Legislative Eye on the Central Intelligence Agency*, 1 FOR. POL. ANAL. 99, 114 (2005) (asserting that “[e]very study and every DCI has been laudatory of [the intelligence committees’] record on keeping secrets”); Cecil V. Crabb and Pat M. Holt, *Invitation to Struggle: Congress, the President & Foreign Policy* 159 (1980) (“thus far there has been no serious leak of classified information” from the intelligence committees). See also similar positive assessments of Congress’s record in keeping national security secrets by former Director of Central Intelligence Allen Dulles, Ambassador Arthur Goldberg, and Senators Stuart Symington and Howard Baker in July 29, 1988 Memorandum from Frederick Kaiser to Senator Charles Grassley re: Protection of Classified Information by Congress at 8-10, reprinted in Congress and the Administration’s Secrecy Pledges, Hearing of Legislation and National Security Subcommittee of the House Committee on Government Operations, 100th Cong., 2nd Sess., Aug. 10, 1988. (on file with author).
documented examples of Congress’s disclosure of national security-related information that the executive branch wanted to remain secret. In evaluating the executive branch’s insistence on limiting certain intelligence disclosure to just eight members of Congress, it is important to consider the history of congressional disclosures. This section brings together the most comprehensive compilation of documented congressional leaks from 1970 to the present.\(^{134}\) In some cases, members of Congress or committees made these disclosures in open defiance of executive branch wishes. In other cases, members or staff surreptitiously disclosed this information to the press.

1. OPEN DISCLOSURE OF NATIONAL SECURITY INFORMATION

Most of the instances in which members of Congress or congressional committees have openly disclosed national security-related information over the objection of the executive branch have occurred where the member was exposing an executive branch policy that he opposed. One of the most notorious examples of open congressional defiance of executive branch secrecy occurred in the summer of 1971 in connection with the Pentagon Papers. Daniel Ellsberg, a former defense department employee, had provided Senator Fulbright with a copy of the 47-volume official history of U.S. involvement in Vietnam, revealing the government’s record of deception. When Fulbright refused to respond, Ellsberg gave a copy of the Pentagon Papers to the New York Times, which started publishing excerpts from the history. The executive branch obtained a temporary restraining order preventing the New York Times from publishing any additional excerpts, and the New York Times sought appellate review of the injunction, quickly reaching the Supreme Court on expedited review. Late on the night of June 29, 1971 -- after the Supreme Court had heard oral arguments in the case but before it had issued its decision -- Senator Mike Gravel convened a hearing of his Subcommittee on Buildings and Grounds of the Senate Public Works

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\(^{134}\) While there is no comprehensive compilation of congressional leaks of intelligence-related information, several sources describe in more or less detail examples of such leaks. See David Everett Colton, Comment, Speaking Truth To Power: Intelligence Oversight In An Imperfect World, 137 U. PA. L. REV. 571, n163 (1988) (describing several Congressional leaks); Daniel Schorr, CIA’s Misadventures: To Blow the Whistle Or Keep the Secret, CHRI. SCI. MON., NOV. 29, 1996, p.19; Robert J. Caldwell, Button the loose lips in Congress, SAN DIEGO UNION-TRIB., July 26, 1987, p. C1; Bruce E. Fein, The Constitution and Covert Action, 11 Hous. J. INT’L L. 53, 57 (1988) (alluding to numerous alleged congressional leaks).
Committee, and started reading from a copy of the Pentagon Papers. He then placed the entire 47 volumes of the history in the public record. News reports indicated that Senator Gravel and members of his staff had also spoken with a private publishing firm about publishing the Pentagon Papers.\footnote{Gravel v. United States, 408 U.S. 606, n.6 (1972). The executive branch opened a criminal investigation of Gravel actions. See discussion, infra.}

The following year, Senator Gravel was involved in another incident of open disclosure. In 1972, he sought unanimous consent to include excerpts from a classified 1969 memorandum from Henry Kissinger to President Nixon. Another Senator objected, and the Senate met in closed session to consider Gravel’s request. Before the Senate decided on Gravel’s request, Gravel read excerpt from the memorandum on the floor of the Senate. The excerpts Gravel read dealt with a plan to mine North Vietnamese ports, a plan that President Nixon had publicly announced the previous day. Two days later, Rep. Ron Dellums obtained the memorandum from Gravel and placed a copy of it in the Congressional Record.\footnote{House Select Committee to Investigate Covert Arms Transactions with Iran and Senate Select Committee on Secret Military Assistance to Iran and Nicaraguan Opposition, Report of the Congressional Committees Investigating the Iran-Contra Affair, H. R Rep. No. 433, S. Rep. No. 216, 100th Cong., 1st Sess. 576-77 (1987) (Minority Report) (quoting ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 241 (1983)).}

In 1974, Rep. Michael Harrington asked to review transcripts of a House Armed Services Intelligence Subcommittee hearing about the U.S. efforts to overthrow Chilean President Salvador Allende. At the request of the subcommittee staff director, Harrington signed a document acknowledging that the information was classified, that a House rule prohibited its disclosure, and pledged not to disclose it.\footnote{FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 1947-1994, 134 (2nd ed. 1994).} Harrington wrote the chairs of the House and Senate foreign relations committees, describing the information in the transcript and requesting that they investigate, but neither took any action. In response, Harrington leaked his letter to the press.\footnote{CECIL V. CRABB AND PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY 146 (1980).} Harrington apparently believed that “he had a greater duty to release the information.”\footnote{FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 1947-1994, 134 (2nd ed. 1994).}
granting all members access to information in the hands of any committee). A member filed a complaint against Harrington with the House ethics committee, which did not sanction Harrington, finding that the information had not been properly classified.

In September of 1975, the Pike committee published, over the objection of the executive branch, intelligence documents that allegedly revealed the government’s ability to monitor Egyptian communications during the 1973 Arab-Israeli war. The Ford administration refused to turn over any additional classified documents until the committee agreed to respect their confidentiality.

The Church committee faced particularly contentious disclosure issues regarding two programs: warrantless surveillance and assassinations. The committee voted to reveal, over the objection of the Ford Administration, Operation SHAMROCK, a warrantless surveillance program under which the NSA obtained from telegraph companies copies of messages sent in or out of the United States from 1945 until it was ended in May of 1975. In its interim report on assassinations, at the request of the Ford Administration, the Church committee had deleted most -- but not all -- the names of the CIA operatives involved. One of those operatives sought an injunction to prevent the committee from disclosing his identity, but federal district court Judge Gerhard Gesell denied the injunction, ruling that the public interest in disclosure outweighed the former operative’s privacy interest and safety concerns.

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140 Cecil V. Crabb and Pat M. Holt, Invitation to Struggle: Congress, the President & Foreign Policy 150 (1980).

141 House Committee on Standards of Official Conduct, Historical Summary of Conduct Cases in the House of Representatives 12 (2004) (available at http://ethics.house.gov/Pubs/Default.aspx?Section=15). But see Cecil V. Crabb and Pat M. Holt, Invitation to Struggle: Congress, the President & Foreign Policy 150 (1980) (the ethics committee found that the leaked transcript “had not been taken at a legal meeting” because of the lack of notice, vote to go into executive session or quorum).

142 Loch Johnson, A Season of Inquiry: The Senate Intelligence Investigation 78 (1985); Cecil V. Crabb and Pat M. Holt, Invitation to Struggle: Congress, the President & Foreign Policy 151 (1980).

143 Cecil V. Crabb and Pat M. Holt, Invitation to Struggle: Congress, the President & Foreign Policy 151 (1980).

144 L. Britt Snider, Unlucky SHAMROCK: Recollections from the Church Committee’s Investigation of NSA, STUD. IN INTEL. (Winter 1999-2000) (describing the Ford administration’s pleas for secrecy and the committee’s internal debate about whether to disclose); Loch Johnson, A Season of Inquiry: The Senate Intelligence Investigation 112 (1985); Frank J. Smist, Jr., Congress Oversees the United States Intelligence Community 1947-1994, 74 (2nd ed. 1994).

Tower, the committee voted to recommend public release of the report, but also decided to put the report before the entire Senate in a closed session prior to its public release. At that four-hour closed session, some Senators spoke against publication of the report, but no vote was taken. It was unclear to some Senators whether the Church committee was seeking specific Senate approval of the report’s publication or whether the committee was simply informing the Senate of the report’s contents prior to disclosure. Senator Church had instructed committee staff to distribute the report to the press at the end of the closed session unless the Senate had voted to block its release, and they did so promptly at the end of the session.

In 1987, Sen. David Durenberger, who had been Chair of the Senate intelligence committee, told two Jewish groups in Florida that the U.S. government had used an Israeli military officer to spy on Israel in the early 1980s. Senate colleagues asked the ethics committee to investigate, and Durenberger contended that these remarks were based on newspaper articles rather than confidential intelligence briefings. The ethics committee issued a letter criticizing Durenberger for giving “the appearance that you were disclosing sensitive national security information,” without confirming or denying whether he had actually disclosed classified information. The committee did not recommend a formal sanction, concluding that Durenberger’s “actions were not intentional, deliberate, nor attended with gross negligence, and because of the particular facts of this case.”


148 LOCH JOHNSON, A SEASON OF INQUIRY: THE SENATE INTELLIGENCE INVESTIGATION 133-36 (1985). (Senator Walter Mondale asserted that the report was “not here to be adopted or approved. It is here to be heard.” Senator Pastore responded, “If you are not seeking the approbation of the Senate in what you are doing, why did we come here in secrecy to begin with?” Senator Huddleston explained that “[t]he whole purpose of coming before the Senate by the committee was simply to inform senators so they would not read about the report in the press before they had any knowledge of what it is all about.”).  


At a press briefing in September of 1988, Speaker of the House Jim Wright said, “We have received clear testimony from CIA people that they have deliberately done things to provoke an overreaction on the part of the government in Nicaragua.”

Minority Leader Robert Michel and Rep. Dick Cheney asked the House ethics committee to investigate whether Wright improperly disclosed classified information. While the intelligence committee voted to grant the ethics committee limited access to classified information so that it could investigate the alleged security breach, the ethics committee issued no findings regarding these allegations. But the allegation that Wright had revealed classified information helped defeat a legislative proposal that would have required the executive branch to notify the full intelligence committees of covert actions within 48 hours.

In 1992, the House banking committee investigated the first Bush administration’s support for Iraq prior to the 1991 invasion of that country, and obtained from the executive branch numerous classified documents about the U.S.-Iraq relationship, including the CIA’s knowledge of an Atlanta-based bank’s loans to Iraq. Banking committee chair Henry Gonzalez made a series of disclosures on the floor of the House of Representatives, reading excerpts those documents and placing some of them in the Congressional Record. Executive branch officials protested these disclosures and refused to provide any additional classified documents to the banking committee until Gonzalez would provide assurances of confidentiality. The executive branch

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159 A list of Gonzalez’s floor statements can be found at http://www.ratical.com/ratville/CAH/AOPof911p14.html.

160 Resolution Calling for an Ethics Probe of Chairman Gonzalez, *Cong Rec. H7366* (Aug. 4, 1992) (Gonzalez inserted the full text of at least 14 classified documents into the Congressional Record).
initially indicated that it would make classified documents available to the House intelligence committee, but when the Speaker of the House rejected that approach, it indicated that it would make classified documents available for inspection by members and cleared staff, but would not relinquish control of the documents.\footnote{161} Minority leader Robert Michel introduced a resolution urging the House ethics committee to investigate Gonzalez’s unauthorized disclosures, but the House rejected that resolution on a party-line vote.\footnote{162}

In 1995, Richard Nuccio, a State Department employee, told Rep. Robert Torricelli, a member of the House intelligence committee, that a Guatemalan military colonel who was a paid CIA informant had been involved in killing Michael DeVine, an American citizen, and Efrain Bamaca, the husband of American citizen Jennifer Harbury, and that the CIA was keeping the colonel’s involvement in this death a secret.\footnote{163} Torricelli wrote President Clinton a letter about this and gave a copy of the letter to the New York Times, which revealed these allegations. The intelligence committee chair asked the ethics committee to investigate whether Torricelli had violated House confidentiality rules. Torricelli contended that he had not violated his intelligence committee secrecy oath because the information had not come to him through administration briefings to the intelligence committee.\footnote{164} He also argued that even if he violated the secrecy oath taken by all House members, that oath was overridden by his oath of office to uphold the Constitution, which he claimed required him to report crimes involving the federal government.\footnote{165} Nonetheless, Torricelli resigned from the intelligence committee. The House ethics committee investigated his disclosure, finding that he violated House rules but not recommending any sanction. The CIA Director withdrew Nuccio’s security clearance, and he resigned from the State Department, never to work in the executive branch again,

\footnote{161} Introduction of Resolution Requesting Immediate Investigation by House Ethics Committee, Cong. Rec. H8727 (Sept. 17, 1992).
\footnote{162} Resolution Calling for an Ethics Probe of Chairman Gonzalez, Cong Rec. H7366 (Aug. 4, 1992); Congressman Avoids Inquiry into U.S.-Iraq Disclosures, N.Y. TIMES, Sept. 20, 1992.
\footnote{163} Michael J. Glennon, Congressional Access to Classified Information, 16 BERKELEY J. INTL. L. 126 (1998). Two years earlier, Nuccio had advised members of Congress that the CIA had no connection to these deaths. Daniel Schorr, CIA’s Misadventures: To Blow the Whistle Or Keep the Secret, CHR. SCI. MON., Nov. 29, 1996, p.19.
\footnote{164} Timothy J. Burger, Torricelli Wants Public Hearings In Ethics Probe Of Alleged Breach of Secrecy Oath, ROLL CALL, June 1, 1995.
\footnote{165} David Grann, Ethics Committee action on Gingrich may be delayed by Torricelli case, THE HILL, May 3, 1995; Timothy J. Burger, Ethics Is Asked To Probe Torricelli, ROLL CALL, April 13, 1995.

On Sept. 11, 2001, Sen. Orrin Hatch told reporters that intelligence agencies had an intercept indicating that associates of Osama bin Laden acknowledged that “a couple of targets were hit.” While executive branch officials expressed anger about this leak of communications intelligence, there is no indication that the ethics committee initiated an investigation.

2. **SURREPTITIOUS DISCLOSURE OF NATIONAL SECURITY INFORMATION**

While it is inherently impossible to create a comprehensive compilation of surreptitious leaks, this section brings together reports of specific documented examples of congressional leaks of national security related information. In late 1975, executive branch officials briefed the Senate Foreign Relations Committee and its Subcommittee on Foreign Assistance about the US covert action in Angola. Substantial portions of both meetings leaked to the press, and CIA Director Colby wrote that “publicity of this sort obviously casts serious doubts on my ability to provide sensitive information to the Foreign Relations Committee, its subcommittees, and its staff.”

In the course of the Church committee investigation, there were only two confirmed unauthorized leaks of confidential information. In 1975, executive branch officials briefed the Senate Foreign Relations Committee and its Subcommittee on Foreign Assistance about the US covert action in Angola. Substantial portions of both meetings leaked to the press, and CIA Director Colby wrote that “publicity of this sort obviously casts serious doubts on my ability to provide sensitive information to the Foreign Relations Committee, its subcommittees, and its staff.”


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171 CECIL V. CRABB AND PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY 152 (1980); STEPHEN F. KNOTT, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY 178 (1996) (citing Donald F.B.Jameson, The Iran Affair, Presidential Authority & Covert Operations, 15 STRAT. REV. 29 (Winter 1987)) (information about “covert assistance to the UNITA rebels in Angola reached the press thirty-six hours after it was revealed to the committees.”). 
the first incident, a staffer was fired after he was overheard at a restaurant discussing information from a CIA document indicating that Senator Henry Jackson had supported CIA efforts to overthrow Pres. Allende of Chile in the early 1970s. In the second incident, prior to the committee’s official disclosure of President Kennedy’s relationship with a woman linked to the mafia, committee members leaked that information to the press.

On January 23, 1976, the Pike committee voted to issue its final report, which contained information that the executive branch maintained was classified and should not be disclosed. But the question of whether to publish the report with this classified information went to the entire House of Representatives, which voted on January 29 not to release the report unless it the classified passages were first deleted. Chairman Pike was inclined not to publish the report at all rather than to publish the expurgated version, but this issue was taken out of his hands when someone leaked the report to CBS News reporter Daniel Schorr, who then turned it over to the Village Voice, which published excerpts from the report on February 11. The House authorized the ethics

the Church Committee’s Investigation of NSA. STUD. IN INTEL., r.5 (Winter 1999-2000) (asserting that a August 1975 leak regarding NSA monitoring of international communications “apparently” came from a member of staffer of the Church Committee, and citing a New York Times article, Nicholas M. Horrock, National Security Agency Reported Eavesdropping on Most Private Cables, N.Y. TIMES, Aug. 31 1975, p. 1, that quoted a “legislative aide who has done extended research on international communications and eavesdropping. Snider also notes that “[t]he leak had the salutary effect,” prompting the NSA “to explain its side of the story.”); James G. Hudec, Unlucky SHAMROCK – The View From the Other Side, STUD. IN INTEL., 85, 90(Winter/Spring 2001) (asserting that “a couple of Senate staff committee members probably leaked information about SHAMROCK to Bella Abzug’s House subcommittee staff”).


176 LOCH JOHNSON, A SEASON OF INQUIRY: THE SENATE INTELLIGENCE INVESTIGATION 182 (1985); CECIL V. CRABB AND PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY 152 (1980) (the House voted to prohibit the committee from publishing the report “until it had been “certified by the President as not containing information which would adversely affect the intelligence activities of the Central Intelligence Agency” or other agencies”).

committee to investigate who leaked the report. The ethics committee questioned all of the committee’s thirteen members and thirty-two staff, and subpoenaed Daniel Schorr, who acknowledged transmitting the report to the Village Voice, but refused to testify. The ethics committee was unable to identify the source of the leak.\footnote{Loch Johnson, A Season of Inquiry: The Senate Intelligence Investigation 190 (1985)

Frank J. Smist, Jr., Congress Oversees the United States Intelligence Community 1947-1994, 136 (2nd ed. 1994).}

In 1981, Rep. Clement Zablocki, a member of the House intelligence committee, acknowledged to House staffers that he leaked to Newsweek a letter from House intelligence committee members to Pres. Reagan expressing concern about a planned covert action to undermine the government of Libyan Col. Muammar al Qaddafi.\footnote{Stephen F. Knott, Secret and Sanctioned: Covert Operations and the American Presidency 176 (1996) (asserting that the executive branch decided not to go forward with this covert action because “the informal legislative veto power of the two committees [through leaking] guaranteed its demise”).}
The committee Chair, Rep. Edward Boland, took no action against Zablocki, apparently because “leaks were epidemic.”\footnote{Sen. Leahy admits ‘careless’ leak of Iran-Contra report, San Diego Union-Trib., July 29, 1987, p.A11.}


In 1985, Sen. Jesse Helms leaked information about the CIA’s program of covertly assisting Salvadoran president Jose Napoleon Duarte’s election campaign, allegedly because Helms supported a different candidate.\footnote{House Select Committee to Investigate Covert Arms Transactions with Iran and Senate Select Committee on Secret Military Assistance to Iran and Nicaraguan Opposition, Report of the Congressional Committees Investigating the Iran-Contra Affair, H. R Rep. No. 433, S. Rep. No. 216, 100th Cong., 1st Sess. 579 (1987).}

the broadcast, Leahy notified the committee chairman, Sen. Boren, that he had “carelessly” allowed a NBC reporter to look at the draft report and resigned from the committee.\textsuperscript{184} Boren instituted new security procedures, requiring that members and staff review documents only with the committee’s offices.\textsuperscript{185} During the joint congressional committee investigation of Iran-Contra in the spring of 1987, committee sources apparently leaked the substance of one witness’s closed session testimony prior to release of the declassified transcript.\textsuperscript{186} In 1998, executive branch officials charged that the Senate Government Affairs committee, which had received classified briefings in connection with its campaign finance investigation, leaked information about intercepts and wiretaps of Chinese officials, causing the Chinese to shift their communication methods and resulting in a loss of U.S. intelligence.\textsuperscript{187}

At a June, 2002 classified briefing, the executive branch officials informed the Senate intelligence committee that the NSA had intercepted an Arabic language message from Afghanistan to Saudi Arabia on September 10, 2001 indicating that an attack would occur the next day, but that the message was not translated until September 12\textsuperscript{th}. During a break in the briefing, then vice chair of the committee, Sen. Richard Shelby, conveyed this information to two reporters.\textsuperscript{188} One of them broadcast it a half-hour later, citing “congressional sources.” When the classified briefing re-convened later that day, executive branch officials were outraged that this information had been leaked and chastised committee members.\textsuperscript{189} Vice President Cheney complained to the intelligence committee chairs about the leak, who responded by asking the FBI to investigate it. During that investigation, a committee staff member asserted that Shelby, who had repeatedly called for the

\begin{itemize}
  \item \textsuperscript{186}House Select Committee to Investigate Covert Arms Transactions with Iran and Senate Select Committee on Secret Military Assistance to Iran and Nicaraguan Opposition, Report of the Congressional Committees Investigating the Iran-Contra Affair, H. R Rep. No. 433, S. Rep. No. 216, 100\textsuperscript{th} Cong., 1st Sess. 577-78 (1987)
  \item \textsuperscript{187}Douglas Stanglin et al., Plugging a Leaky Congress, US NEWS & WORLD RPT., Feb. 23, 1998, p. 15
  \item \textsuperscript{188}Pete Williams & Robert Windrem, Sen. Shelby the subject of probe on 9/11 intelligence leak: Investigation linked to 2001 Al-Qaida Communications, sources say, MSNBC (July 26, 2004) (available at http://www.msnbc.msn.com/id/5504846/ (last checked Dec. 6, 2009)).
  \item \textsuperscript{189}Allan Lengel & Dana Priest, Investigators Concluded Shelby Leaked Message: Justice Dept. Declined to Prosecute Case, WASH. POST (Aug. 5, 2004), A17.
\end{itemize}
resignation of then CIA Director George Tenet, leaked the information in order to highlight problems in the intelligence community. The Justice Department referred the matter to the Senate ethics committee, which investigated but declined to take any action against Shelby.

3. Lessons from Open and Surreptitious Congressional Disclosures

As the preceding historical record demonstrates, in some of these cases members of Congress deliberately disclosed national security related information in order to further specific policy objectives, such as to oppose particular executive branch policies. In a few instances, members of Congress who had been privy to planned covert actions were able to effectively exercise a veto over those actions through strategic disclosure of them. At other times, members of the intelligence committees have threatened to disclose proposed covert actions in an effort to persuade the executive branch to abandon them. Such a threat of disclosure may actually be in the public interest if it leads the executive branch to abandon ill-thought-out policies. President Kennedy acknowledged that the disastrous Bay of Pigs covert action might have been averted if it had been vetted with Congress.

192 For a catalog of the various types (and purposes) of leaks of government information, see STEPHEN HESS, NEWS AND NEWSMAKING 71-72 (1996).
193 Can Congress Keep a Secret?: 36 NATL. REV. 46 (Aug. 24, 1984) (“It appears the only way to mount a successful covert operation these days is for such an activity to have the unanimous support of both intelligence committees . . .”); STEPHEN F. KNOTT, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY 178 (1996) (describing legislative branch leaks that are “intended to veto or cripple a policy that a determined minority could not defeat through the formal processes of government”). See also Daniel Schorr, Cloak-and-Dagger Relics, WASH. POST, Nov. 14, 1985 (former Rep. Leo Ryan condoned the disclosure of covert actions “if it was the only way to block an ill-conceived operation”).
194 Bruce Fein, The Constitution and Covert Action, 11 Hous. J. Int’l L. 53 (1988) (“In a 1986 Brit Hume article carried in The New Republic, Senate Intelligence Committee member Joseph Biden boasted that he had twice threatened to disclose covert action plans by the Reagan administration that were ‘hairbrained.’”); Marshall Silverberg, The Separation of Powers and Control of the CIA’s Covert Operations, 68 TEx. L. REV. 575, 617 (1990) (arguing that Congressional threatened and actual leaks of covert actions indicate that “Congress is attempting to gain a sort of veto power over” covert actions).
The executive branch opposes these actual and threatened leaks as inappropriate interference with its ability to carry out its prerogatives. During the Iran-Contra investigation, some Reagan administration officials attempted to justify their misleading congressional intelligence committees by claiming that it necessary in order to prevent committee members from leaking the accurate information.\textsuperscript{195}

One of the most striking features about the record of surreptitious congressional leaks is that most of them stem from members of Congress rather than staff.\textsuperscript{196} Staff members who have access to classified national security information are usually career professionals in the national security field, and their continued employment in this field is dependent on their ability to retain their security clearance.\textsuperscript{197} Non-politicians who have made unauthorized disclosures of classified information will need to find a different career.\textsuperscript{198} Members of Congress, on the other hand, have a wider portfolio, and are not dependent on a security clearance for their livelihood.

III. CONGRESS’S RIGHT TO SHARE INFORMATION WITH ITS LAWYERS

The thesis of this article is that where Congress has a right to particular information, it must be able to process that information in a meaningful way. To effectively carry out its constitutional duties, Congress must be able to consult its expert staff, including lawyers, about the information that it obtains.\textsuperscript{199}

\textsuperscript{196} For an unscientific survey suggesting that politicians are twice as likely to leak than congressional staff, see Robert Garcia, Leak City, AM. POLITICS, Aug. 1987, 23.
\textsuperscript{197} Cf. Henry J. Hyde, “Leaks” and Congressional Oversight, 11 GEO. MASON U.L.REV. 145, 146 (1988) (“Congressmen [sic] by nature have strong political views, cater to and depend on the press, and are not imbued with the security habits of intelligence professionals.”)
\textsuperscript{198} See discussion of Richard Nuccio, supra.
\textsuperscript{199} See Testimony of CIA Director Leon Panetta, quoted in Alfred Cumming, Congressional Research Service, “Gang of Four” Congressional Intelligence Notifications” (July 14, 2009) (noting that such limitations are problematic because such members are “denied the ability to seek professional advice from their staffs or consult with knowledgeable members.”).
Support for this congressional right to counsel can be found in three distinct lines of judicial decisions, all of which recognize the crucial role of confidential advisors and lawyers in our system of separated powers. In each branch of government, government officials can carry out their constitutional role only with the assistance of trusted advisors, including lawyers. The first line of cases, arising in the legislative branch, recognizes that members of Congress cannot carry out all of their legislative duties without the assistance of their staffers. The second line of cases, arising in the executive branch, recognizes that the President cannot carry out his constitutional duties without the assistance of confidential advisors. The third line of cases, arising in the judicial branch, recognizes that judges cannot carry out their adjudicative function without the assistance of litigants’ lawyers.

The first line of cases interprets the Constitution’s speech or debate clause and addresses whether the immunity provided by that clause applies to legislative staffers as well as Members. The Supreme Court has addressed speech or debate immunity in a dozen cases, about half of which have involved legislative staffers. In its early cases addressing speech or debate immunity, the Court found that while immunity applied to members of Congress, it did not extend to congressional staff who implemented legislative actions that the Court found unauthorized or unconstitutional.

The court moved away from that position in 1972 with its decision in *Gravel v. United States*, which arose out of a grand jury investigation of Senator Gravel’s decision to convene a hearing of his

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200 See Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHIC. L. REV. 1293 (1987). Miller argued that executive branch lawyers should defend executive branch prerogatives and do not represent “the government as a whole,” noting that “[i]n a system of checks and balances it is not the responsibility of an [executive branch] attorney to represent the interests of Congress or the [Supreme] Court. Those departments have their own ‘constitutional means and personal motives’ to protect their prerogatives.” Id. at 1296. While Miller focuses only on executive branch lawyers, one corollary of his argument is that Congress must be able to rely on its own attorneys to represent Congress’s interest.

201 U.S. CONST. Art. I, § 6, cl.1

202 In *Kilbourn v. Thompson*, 103 U.S. 168 (1881), the Court found that a House resolution authorizing the arrest of a recalcitrant witness was unauthorized. It denied immunity to the Sergeant at Arms, who arrested that witness, but granted immunity to the members of the House of Representatives who voted for the resolution. Similarly, in *Dombrowski v. Eastland*, 387 U.S. 82 (1967) the Court permitted a suit claiming that a subcommittee’s seizure of records to go forward against the subcommittee’s chief counsel, but ruled that the Senator who chaired the Subcommittee was immune from suit. In *Powell v. McCormack*, 395 U.S. 486 (1969), the Court found unconstitutional a House resolution excluding duly elected Adam Clayton Powell and denied immunity to House employees who implemented the resolution, but granted immunity to the Speaker of the House and other members who voted for the resolution.
Subcommittee on Buildings and Grounds in order to read from the Pentagon Papers while the government’s injunction against the New York Times publication of them was pending in the Supreme Court.\textsuperscript{203} A grand jury summoned one of his aides, Leonard S. Rodberg, to testify. Rodberg, an employee of a Washington, D.C. think tank, had been added to the Senator’s staff earlier on the day of the hearing. The executive branch argued that Speech or Debate immunity applies only to members of Congress, relying on the Court’s earlier precedents. But the \textit{Gravel} Court rejected that Member/staffer distinction, ruling that “for the purpose of construing the privilege a Member and his aide are to be ‘treated as one.’”\textsuperscript{204} The Court recognized that, “it is literally impossible, in view of the complexities of the modern legislative process, . . . for Members of Congress to perform their legislative tasks without the help of aides and assistants.” After \textit{Gravel}, speech or debate immunity extends to legislative staffers who are performing functions “that would be immune legislative conduct if performed by the Senator himself.”

The Court has since continued this approach, finding speech or debate immunity for legislative staffers “to the extent that they serve legislative functions, the performance of which would be immune conduct if done by” members. In \textit{Eastland v. United States Servicemen’s Fund}, where the plaintiff wanted to enjoin implementation of a subcommittee subpoena, the Court “dr[e]w no distinction between the Members and the Chief Counsel” of a Senate Subcommittee regarding speech or debate immunity.\textsuperscript{205} “Since the Members are immune because the issuance of the subpoena is "essential to legislating," their aides share that immunity.” In \textit{Doe v. McMillan}, a defamation suit against House Committee members, Committee staffers, the Superintendent of Documents and the Public Printer for including inappropriate information in a committee report and then directing that report to be published, the Court ruled that speech or debate immunity applied to “committee members and staff for introducing the material at committee hearings, for referring to the House Speaker the report including the material, and for voting for publication of the report.”\textsuperscript{206} But the Court allowed the suit to go forward against the Superintendent of Documents and the Public Printer because the publication of the report was not "an

\begin{itemize}
\item \textsuperscript{203} 408 U.S. 606 (1972).
\item \textsuperscript{204} \textit{Gravel} v. United States (quoting the appellate court below, United States v. Doe, 455 F.2d at 761).
\item \textsuperscript{205} 421 U.S. 491 (1975).
\item \textsuperscript{206} 412 U.S. 306 (1973).
\end{itemize}
integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings.\textsuperscript{207}

In cabining speech or debate immunity, the Court has focused not on the identity of the actor (member or staffer), but instead on the character of the act. An act is immune if it is "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings."\textsuperscript{208} So the Court has found certain activities to be outside the protection of speech or debate immunity regardless of the identity of the actor. These include publishing committee reports beyond the House of Congress,\textsuperscript{209} issuing press releases,\textsuperscript{210} and making requests on behalf of constituents to the executive branch.\textsuperscript{211}

Congressional staffers contribute to nearly all legislative functions, and their participation has been particularly critical to the conduct of oversight investigations.\textsuperscript{212} Staff members serve as a force multiplier, both in terms of their numbers and in terms of their substantive expertise.\textsuperscript{213} Congressional employees outnumber members

\textsuperscript{207} Id. at 314.
\textsuperscript{208} Hutchinson v. Proxmire, 443 U.S. 111, 126 (1979) (quoting Gravel v. United States) (emphasis supplied in Hutchinson).
\textsuperscript{210} Hutchinson v. Proxmire, 443 U.S. 111 (1979).
by a factor of more than 40 to 1, and they bring to oversight tasks substantive expertise that members lack. Members delegate to their staffers the specific tasks involved with investigating the executive branch: interviewing executive branch officials and others outside of formal hearing rooms, identifying key documents to request and then combing through them, and conducting direct and cross examination of witnesses during hearings.

Staff lawyers in particular have played key roles in conducting investigations, from the 1912 House Banking Committee investigation of the Money Trust, led by its counsel, Samuel Untermyer; the 1933-34 Senate Banking Committee investigation of the 1929 Wall Street crash,

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214 In 2005, there were 22,447 full-time Congressional staffers, including the Congressional Research Service but not including the entire staff of the Library of Congress. NORMAN J. ORNSTEIN, THOMAS E. MANN, AND MICHAEL J. MALBIN, VITAL STATISTICS ON CONGRESS 2008, 110, 115 (2008)).

215 Barbara S. Romzek and Jennifer A. Utter, Congressional Legislative Staff: Political Professionals or Clerks?, 41 AM. J. POL. SCI. 1251, 1252 (1997) (noting “[t]he use of congressional staff [as] an effort to acquire institutional expertise and professionalism in the legislative branch to counterbalance a perceived expertise advantage within executive branch agencies”).


led by chief counsel Ferdinand Pecora;\textsuperscript{218} to the 1973 Senate Watergate committee hearings, led by lawyers Sam Dash and Fred Thompson;\textsuperscript{219} and the 1987 Iran-Contra committee, led by lawyers Arthur Liman and John Nields.\textsuperscript{220} Members cannot be expected to digest and analyze by themselves all of the technical information about the operation of the executive branch, and Congress cannot function without the assistance of congressional aides. As the Court recognized in \textit{Gravel}, “The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions.”\textsuperscript{221}

A second relevant line of cases addresses the Presidential communications privilege. In \textit{United States v. Nixon}, the Court implicitly recognized that the President needs the assistance of trusted advisors in carrying out his constitutional duties, and explicitly recognized a qualified privilege for communications between the President and those advisors.\textsuperscript{222} In finding that this privilege has “constitutional underpinnings,”\textsuperscript{223} the Court noted that the need to communicate with trusted advisors exists not just in the executive branch, but in every branch of government,\textsuperscript{224} and that “the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.”\textsuperscript{225} Courts have recognized “the

\textsuperscript{218} Report of the Committee on Banking and Currency Pursuant to S.Res. 84, S. Rpt. 1455, 73rd Cong., 2d Sess. (1934)

\textsuperscript{219} Warren E. Leary, \textit{Samuel Dash, Chief Counsel for Senate Watergate Committee, Dies at 79}, N.Y. 

\textsuperscript{220} House Select Committee to Investigate Covert Arms Transactions with Iran and Senate Select Committee on Secret Military Assistance to Iran and Nicaraguan Opposition, Report of the Congressional Committees Investigating the Iran-Contra Affair, H. R Rep. No. 433, S. Rep. No. 216, 100th Cong., 1st Sess. (1987). For an example of a staffer who played a key role in Senator Joseph McCarthy’s notorious investigation into alleged Communist infiltration in the executive branch, see ROY COHN, MCCARTHY (1968). These examples of high-profile investigations led by high-profile lawyers stand in contrast to the ordinary congressional investigation, where congressional staff observe a norm of near-anonymity. Christine DeGregorio, \textit{Staff Utilization in the U.S. Congress: Committee Chairs and Senior Aides}, 28 \textit{POL\textsc{ity}} 261 (1995). But in both the high- and low-profile congressional investigations, the participation of staff is critical.

\textsuperscript{221} 408 U.S. at 616

\textsuperscript{222} 418 U.S. 683, 708 (1974) (“A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.”).

\textsuperscript{223} 418 U.S. at 706.

\textsuperscript{224} 418 U.S. at 705 (“the privilege of confidentiality of Presidential communications . . . can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties”).

\textsuperscript{225} 418 U.S. at 705 (emphasis added). In addressing the Presidential communications privilege, the Court’s analysis encompassed government officials more generally, not just the President. Id.
President’s dependence on presidential advisors,”\textsuperscript{226} acknowledging that he “must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisers.”\textsuperscript{227} This presidential dependence on advisors led the Court of Appeals for the District of Columbia Circuit to extend the presidential communications privilege to cover not just those communications between the president and his White House advisors, but also those between those advisors and government officials who provide information to help them formulate advice for the President.\textsuperscript{228} One can easily see the analogy to members of Congress here. Members of Congress must be able to consult trusted advisors in order to carry out their duties.

A second aspect of the Supreme Court’s decision in \textit{Nixon} also supports congressional access to counsel. The court concluded that it was unlikely that “the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for \textit{in camera} inspection” by a court.\textsuperscript{229} Similarly, it is unlikely that the very important interest in the confidentiality of national security information is significantly diminished if a member of Congress who has access to this information can consult with cleared counsel about it.

Another line of cases deals specifically with the right to legal counsel and its role in ensuring a system of separated powers. In both of these cases, courts found that judicial independence requires that private party litigants have unfettered access to counsel. In \textit{Legal Services Corporation v. Velazquez}, the Supreme Court struck down on separation of powers grounds a statutory prohibition on Legal Services Corporation (LSC) lawyers’ advising and arguing on behalf of their clients that federal or state statutes are unconstitutional.\textsuperscript{230} The court found that this restriction “threatens severe impairment of the judicial function.”\textsuperscript{231} While the plaintiff lawyers argued that this restriction violated their

\textsuperscript{226} In \textit{In re Sealed Case}, 121 F.3d 729, 751 (D.C. Cir. 1997) (emphasis added).
\textsuperscript{227} 121 F.3d at 750.
\textsuperscript{228} 121 F.3d at 752; \textit{Judicial Watch v. Dept. of Justice}, 365 F.2d 1108, 1123 (D.C. Cir. 2004) (“the presidential communications privilege applies to ... documents ‘solicited and received’ by the President or his immediate advisers in the Office of the President”).
\textsuperscript{229} 418 U.S. at 706.
\textsuperscript{230} 531 U.S. 533, 546 (2001) (finding the prohibition to be “inconsistent with accepted separation-of-powers principles”).
\textsuperscript{231} 531 U.S. at 546.
individual First Amendment rights, the Court’s decision rested instead on a structural analysis. The Court focused not on the individual rights of lawyers or litigants, but instead on the judicial role, and the degree to which judges depend on litigants’ lawyers in carrying out their judicial function. At oral argument, the government indicated that if “a judge were to ask an LSC attorney whether there was a constitutional concern, the LSC attorney simply could not answer.” The Court noted this exchange in its opinion, and ruled that restricting this type of communication between a judge and an LSC attorney impairs the judicial function, violating separation of powers.

Analogizing to the congressional context, the argument is even stronger, as the connection between a member of Congress and her counsel is much closer than that between a judge and a private litigant’s lawyer. Members of Congress depend on their staff members to an even greater degree than judges depend on litigants’ lawyers. Just as preventing communication between judges and litigants’ lawyers impairs the judicial function, preventing communication between members of Congress and their staff impairs the legislative function.

This article argues that where it is necessary for carrying out oversight responsibilities, Congress has a right to consult both its lawyers and non-lawyer experts. The article uses the rubric of “right to counsel,” but this phrase should be understood to encompass not just legal advice from lawyers, but technical advice on other subjects from expert staff members. In another context, courts have recognized that government officials need advice from non-legal advisors just as much as they need advice from lawyers, and have rejected arguments that would place legal advisors on a higher plane than other advisors. Just as the President

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231 531 U.S. at 539.
232 531 U.S. at 545 ("An informed, independent judiciary presumes an informed, independent bar. . . . [T]he enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power"); id. at 544 (federal and state courts "depend for the proper performance of their duties and responsibilities" on an independent bar).
233 531 U.S. at 545.
234 531 U.S. at 545 (the statute “prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.”).
235 531 U.S. at 545.
236 In re Lindsey, 158 F.3d 1263, 1278 (D.C. Cir. 1998).

Only a certain conceit among those admitted to the bar could explain why legal advice should be on a higher plane than advice about policy, or politics, or why a President's conversation with the most junior lawyer in the White House Counsel's Office is deserving of more protection from disclosure in a grand jury investigation than a President's discussions with his Vice President or a Cabinet Secretary. In short, we do not believe that lawyers are more important to the operations of government than all other officials, or that the
has a need for and right to advice from non-legal advisors,\textsuperscript{237} so do members of Congress.\textsuperscript{238} In fulfilling its constitutional responsibilities, Congress has a right to consult both its lawyers and non-lawyer expert staff.

IV. Charting a Path Toward Congressional Access to Counsel

The statutory gang of eight provision is silent on whether those eight members can share information about covert actions with their congressional staff. In the nearly thirty years since its enactment, the executive branch has insisted that the gang of eight not share this information with its staff, and the gang of eight has acquiesced in this restriction.\textsuperscript{239}

There are at least two possible routes through which Congress can assert its right to access counsel in its intelligence oversight activities. One route would be individual and ad hoc; the other, institutional and systematic.

The first option would be for a committee leader receiving the information to tell the executive branch that she will consult counsel. If she explains her plan before receiving the information, the executive branch may choose not to provide the information at all. In that case, the leader could seek the support of other committee members and the chamber leadership in order to pressure the executive branch to make the disclosure notwithstanding her plan to consult staff. More concretely, the leader could offer legislation that would withhold funding of particular intelligence activities until the executive branch agreed to provide access to committee staff.\textsuperscript{240} If the committee leader explains

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See also In re: Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997).
\textsuperscript{238} Gravel v. United States, 408 U.S. 606 (1972).
\textsuperscript{239} Telephone interview with L. Britt Snider, Oct. 16, 2009.
\textsuperscript{240} The intelligence authorization bills for fiscal years (FY) 2007 and 2008 contained analogous provisions. The FY 2008 bill would have withheld 70\% of the funds for a particular intelligence program “until the full membership of the intelligence committees is briefed about a reported Israeli military action against a facility in Syria which occurred on September 6, 2007.” H.R. 2082, 110th Cong., § 328. (President Bush vetoed the bill. Cong. Rec. H1419-20 (March 10, 2008)). The FY 2007 bill would have withheld all funding for intelligence activities unless they had been disclosed to the full intelligence committees. \textit{See} Statement of Administration Policy, S. 372 – Intelligence Authorization Act of FY 2007 (April 12, 2007) at 2 (criticizing § 307 of the bill).
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her plan after receiving the information, executive branch officials could try to dissuade her from sharing it. Failing that, the executive branch could launch a public relations campaign against that committee leader for unauthorized disclosure of national security information to a staffer, or could urge the relevant ethics committee to take disciplinary action against the committee leader for the disclosure.\footnote{The disciplinary route could be problematic because it would require disclosure of some additional information to the ethics committee. See Timothy J. Burger, Torricelli Wants Public Hearings In Ethics Probe Of Alleged Breach of Secrecy Oath, ROLL CALL, June 1, 1995 (two House ethics committee staffers received security clearances so that they could investigate the charge that Rep. Robert Torricelli violated his secrecy oath when he disclosed information about the CIA’s informant’s involvement in extrajudicial killings in Guatemala).}

The second option would be for the intelligence committees to amend their rules and clarify that the committee leadership can share information with staff where necessary to carry out its oversight responsibilities, including with respect to covert actions. This approach has the benefit of being proactive and allowing the discussion of the merits of this proposed change outside the context of any controversy over a particular intelligence program. Alternatively, Congress could amend the intelligence oversight statutes to clarify this point. But a statutory fix does not appear to be necessary because the statutes setting out the framework for congressional intelligence oversight do not mention staff members at all.\footnote{50 U.S.C. § 413 et seq. On at least one occasion, Congress has referred to “appropriately cleared staff” members in connection with intelligence oversight, but there, it directed the intelligence committees to prescribe regulations so that other “Members of Congress and appropriately cleared staff” could access information provided by intelligence agencies about U.S. “military personnel listed as prisoner, missing, or unaccounted for in military actions.” Act of Aug. 14, 1991, P.L. 102-88, Title IV, § 405, 105 Stat. 434.} Instead, the intelligence committees have developed specific rules regarding staff access to information.\footnote{The committees developed these rules in consultation with the executive branch in order to protect sensitive information.}

Within this framework, the committees themselves can make clear that committee leaders may consult their cleared staff, including their lawyers.

A committee leader who confronted the executive using the ad hoc approach would be taking an enormous political risk. If a legislator with a safe seat and enormous personal wealth (such as Senator Jay Rockefeller) did not have the political courage to disregard the decades-long practice of secrecy and consult a lawyer, it is unlikely that any committee leader will ever do so.
The intelligence committees need to confront this issue of access to counsel in a proactive fashion, outside of the particulars of a specific intelligence program. Only such a systematic approach will ensure that in the future, congressional intelligence committees can carry out their constitutional responsibility to engage in intelligence oversight. Congress has a constitutional responsibility to assert itself and ensure that it can function effectively. The executive branch will likely resist such efforts. But “[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”  

Congress needs to step up to the plate and assert itself as a co-equal branch of government.

CONCLUSION

Our founders envisioned a government of divided powers, recognizing the need for each branch’s ambition to counteract the ambitions of the other branches in order to prevent the inordinate concentration of power within a single branch.  When congressional leaders – the gang of eight – acquiesced in the executive branch demand that they not consult their lawyers regarding the warrantless surveillance program, they allowed themselves to be stripped of the ability to protect the institutional role of Congress in intelligence oversight and to protect the republic from overreaching by the executive branch. These members of Congress lacked the institutional ambition to counteract an ambitious executive branch, and as a result the executive branch was able to pursue policies of dubious legality.

It may be too much to expect any individual member of Congress to confront the executive branch on behalf of Congress as an institution or on behalf of the constitutional order. But the congressional intelligence committees need to assert their right to counsel. Surely the record of the Bush Administration should make clear that Congress cannot rely solely on executive branch lawyers to vet executive branch programs, and must assert its right to consult its own lawyers.

Ensuring access to counsel will not solve all the problems presented by the gang of eight process, which is itself deeply flawed. Gang of eight notification has become a process of inoculation rather

244 United States v. Nixon, 418 U.S. at 703.
245 See, e.g., Federalist Papers, No. 51.
than a process of oversight. Through that process, the executive branch provides limited information to only a few members of Congress, and then purports to prevent them from consulting other members. Congress is a collective body, and eight members – individually or collectively – cannot by themselves pass legislation to check the executive branch.246

While ensuring access to counsel will not address all the structural flaws in the intelligence oversight process, it will help those members involved in oversight to more thoroughly carry out their responsibilities. Congress’s right to counsel is an essential component of intelligence reform.