



**LEGAL STUDIES RESEARCH PAPER SERIES**

PAPER NO. 11-01-01

*January 18, 2011*

**Congress's Right to Counsel  
In Intelligence Oversight**

by

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## CONGRESS'S RIGHT TO COUNSEL IN INTELLIGENCE OVERSIGHT

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*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 in connection 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 a comprehensive history of congressional disclosures of national security-related information. 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.*

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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.<sup>1</sup> The information must be distributed to those within the executive branch who can use the information to help ensure our security,<sup>2</sup> and to those in the legislative branch

1. See MARKLE FOUND, TASK FORCE ON NAT'L SEC. IN THE INFO. AGE, MEETING THE THREAT OF TERRORISM: AUTHORIZED USE; AN AUTHORIZED USE STANDARD FOR INFORMATION SHARING STRENGTHENS NATIONAL SECURITY AND RESPECTS CIVIL LIBERTIES (2009).

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. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT 417-18 (2004).

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 particularly closely.<sup>3</sup> 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<sup>4</sup> and the Republican and Democratic leaders of the House and Senate.<sup>5</sup> The administration instructed these congressional intelligence leaders that they must not share any information about the program with their staff members, including their staff lawyers. One of the leaders, then-Senate Intelligence Committee Vice Chair Jay Rockefeller, thought that the program “raise[d] profound oversight issues” and lamented the fact that “given the security restrictions associated with this information, and [his] inability to consult staff or counsel on [his] own, [he] fe[lt] unable to fully evaluate . . . these activities.”<sup>6</sup> 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.<sup>7</sup> There is no indication that Senator Rockefeller complained to the other congressional intelligence leaders about the surveillance program or about these restrictions on consulting staff.<sup>8</sup> It is unclear whether any other congressional intelligence leaders contested

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3. The Bush administration took a similar—although not identical—approach in disclosing its torture policy to a limited number of members of Congress. See OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, MEMBER BRIEFINGS ON ENHANCED INTERROGATION TECHNIQUES (EITs) (2009), [http://www.fas.org/irp/congress/2009\\_cr/eit-briefings.pdf](http://www.fas.org/irp/congress/2009_cr/eit-briefings.pdf) (listing forty Central Intelligence Agency (CIA) briefings about the torture program from September 2002 to March 2009 for intelligence committee members and staffers).

4. 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.

5. 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, 94th Cong. § 2(b) (1976) (as amended).

This group of eight members of Congress is colloquially known as “the gang of eight.” But as this Article will show, this common moniker overstates the coordination among these eight members of Congress. The term “gang” implies a collective identity, but the historical record shows that these eight members of Congress do not necessarily consult or coordinate with each other. Each of these eight members might be better thought of as an individual picket (as in a picket fence). To the degree that the pickets connect with each other, they can form a strong barrier. Without such coordination, they are easily knocked over. To avoid reinforcing this inaccurate implication, this Article refers to these eight members as “congressional intelligence leaders” rather than “the gang of eight.”

6. Letter from Senator John D. Rockefeller IV, Vice Chairman, U.S. Senate Select Comm. on Intelligence, to Vice President Dick Cheney, Vice President of the United States (July 17, 2003), <http://www.globalsecurity.org/intell/library/news/2005/intell-051219-rockefeller01.pdf> (noting that Senator Rockefeller is “neither a technician nor an attorney”).

7. *Id.*

8. After Senator Rockefeller released his letter, Senator Roberts asserted that Senator Rockefeller “could have discussed his concerns with me or other Members of Congress who had been briefed on the program. He never asked me or the Committee to take any action consistent with the ‘concerns’ raised in his letter.” News Release, Senator Pat Roberts, U.S. Senator, Kansas, Senator Roberts’ Response to Media Reports About Senator Rockefeller’s 2003 Letter (Dec. 20, 2005), [http://msnbcmedia.msn.com/i/msnbc/sections/news/051220\\_roberts\\_rockefeller\\_statement.pdf](http://msnbcmedia.msn.com/i/msnbc/sections/news/051220_roberts_rockefeller_statement.pdf).

these restrictions on their ability to consult lawyers and other staff before the *New York Times* exposed the program in 2005.<sup>9</sup>

While no statute or congressional rule addresses whether the congressional intelligence leaders can share this information with their counsel or other staff, the executive branch has insisted for nearly thirty years that the leaders not do so, and they have acquiesced in this insistence.<sup>10</sup> 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 can be checked by setting up a system in which “[a]mbition must be made to counteract ambition.”<sup>11</sup> Within this structure, each branch is given “the necessary constitutional means . . . to resist encroachments of the others.”<sup>12</sup> In practice, eight members of Congress, by themselves and without any staff support, have proven to be incapable of opposing or even closely scrutinizing an executive branch activity, warrantless surveillance, that may well have violated the law.<sup>13</sup>

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9. Representative 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 made this complaint prior to the disclosure of the warrantless surveillance program. Shane Harris, *The Survivor*, NAT'L J., June 6, 2009, at 36, 42. Jane Harman, ranking member of the same committee from 2005 to 2006, did not consult a lawyer about the legality of the program until after the *New York Times* revealed the program in December 2005. Jane Harman, *Jane Harman Comments on the Release of Bush's Law by Eric Lichtblau*, TALKING POINTS MEMO (Mar. 31, 2008, 6:01 PM), [http://tpmcafe.talkingpointsmemo.com/2008/03/31/jane\\_harman\\_comments\\_on\\_the\\_re/](http://tpmcafe.talkingpointsmemo.com/2008/03/31/jane_harman_comments_on_the_re/). After the program was made public, she complained about this restriction. Letter from Representative Jane Harman, Ranking Member on the House Permanent Select Comm. on Intelligence, to President George W. Bush, President of the United States (Jan. 4, 2006), available at [http://www.house.gov/list/press/ca36\\_harman/pr\\_060104\\_nsa.shtml](http://www.house.gov/list/press/ca36_harman/pr_060104_nsa.shtml).

Another congressional intelligence leader, then-ranking member Representative Nancy Pelosi, noted that the executive branch refused to respond to her staff member's attempt to get more information about the legality of a surveillance program, and she personally followed up with a letter to National Security Agency (NSA) Director Michael Hayden seeking more information about legal authority for the surveillance. Letter from Representative Nancy Pelosi, Ranking Member, House Permanent Select Comm. on Intelligence, to Lieutenant Gen. Michael V. Hayden, Dir., Nat'l Sec. Agency (Oct. 11, 2001), available at <http://pelosi.house.gov/news/press-releases/2006/01/releases-Jan06-declassified.shtml> (declassified version). While Pelosi's letter is partially redacted, it appears to focus on concerns about the legality of the surveillance rather than concerns about the restriction on her staff.

10. ALFRED CUMMING, CONG. RESEARCH SERV., R40698, “GANG OF FOUR” CONGRESSIONAL INTELLIGENCE NOTIFICATIONS 6–7 (2010) (citing Letter from Representative Jane Harman to President George W. Bush, *supra* note 9).

11. THE FEDERALIST NO. 51 (James Madison).

12. *Id.*

13. While the Bush administration was engaging in warrantless surveillance, it avoided outside legal scrutiny of the program by instructing the congressional intelligence leaders 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 Federal Intelligence Surveillance Act (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, at A1. Within the executive branch, attorneys from the Department of Justice eventually concluded that “aspects of the program lacked legal support.” OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF., DEP'T OF JUSTICE, CENT. INTELLIGENCE AGENCY, NAT'L SEC. AGENCY

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 when 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.<sup>14</sup> If Congress is going to act as a coequal branch with its own responsibilities in the national security sphere,<sup>15</sup> it must resist executive branch attempts to dictate the terms on which it 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 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, in some circumstances, further limited oversight to congressional intelligence leaders. 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 information, then it must also have the right to

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& OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, REPORT NO. 2009-0013-AS, UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM 22 (2009).

After the *New York Times* disclosed the existence of this program in December 2005, scores of individuals filed lawsuits, claiming that the government had illegally monitored their communications. In almost all of these cases, the executive branch persuaded courts to dismiss the lawsuits without reaching the merits because the state secrets privilege prevented plaintiffs from establishing that they had been subjected to the surveillance. In the first case to reach a federal appellate court, *ACLU v. NSA*, the U.S. Court of Appeals for the Sixth Circuit reversed a district court's grant of summary judgment for the plaintiffs, dismissing plaintiffs' claims because the state secrets privilege prevented plaintiffs from establishing that they had been subjected to surveillance. 493 F.3d 644, 653 (6th Cir. 2007). But in a lawsuit involving the Al-Haramain Islamic Foundation, Chief Judge Vaughn Walker of the U.S. District Court for the Northern District of California ruled that FISA preempts the state secrets privilege; *Al-Haramain Islamic Found. v. Bush (In re NSA Telecomms. Records Litig.)*, 564 F. Supp. 2d 1109, 1111 (N.D. Cal. 2008); that plaintiffs had provided sufficient circumstantial evidence to make out a prima facie case that they had been subjected to surveillance; *In re NSA Telecomms. Records Litig.*, 595 F. Supp. 2d 1077, 1085 (N.D. Cal. 2009); that the government had failed to come forward with any evidence that the surveillance was legal, granting summary judgment for the plaintiffs; *In re NSA Telecomms. Records Litig.*, 700 F. Supp. 2d 1182 (N.D. Cal. 2010); and awarding the individual plaintiffs liquidated damages and over \$2.5 million in attorney fees; *In re NSA Telecomms. Records Litig.*, No. 06-1791 VRW, 2010 U.S. Dist. LEXIS 136156 (N.D. Cal. Dec. 21, 2010).

14. This Article does not address situations where the executive branch asserts that the executive privilege exempts it from disclosing particular information to Congress. See, e.g., James G. Hudec, Commentary, *Unlucky SHAMROCK—The View from the Other Side*, STUD. INTELLIGENCE, Winter-Spring 2001, at 85, 91 (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, *Getting an Earful*, GOV'T EXECUTIVE, Mar. 15, 2006, at 52, 53–58.

15. 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).

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 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. It recommends that the congressional intelligence committees amend their internal rules to clarify that the congressional intelligence leaders can share information with their 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 regarding executive branch activities. The Supreme Court recognizes that Congress's authority "to conduct investigations is inherent in the legislative process,"<sup>16</sup> and that gathering information is "an essential and appropriate auxiliary to the legislative function."<sup>17</sup> In particular, the Court recognizes that Congress's power of investigation reaches "probes into departments of the Federal Government to expose corruption, inefficiency or waste."<sup>18</sup> The executive branch has acknowledged that in light of Congress's oversight and legislative responsibilities, Congress has a legitimate need for information from the executive branch.<sup>19</sup>

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

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16. *Watkins v. United States*, 354 U.S. 178, 187 (1957).

17. *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927); *see also* *Tenney v. Brandhove*, 341 U.S. 367, 377 n.6 (1951) ("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." (quoting WOODROW WILSON, CONGRESSIONAL GOVERNMENT 303 (1885) (internal quotation marks omitted))).

18. *Watkins*, 354 U.S. at 187.

19. Memorandum from Charles J. Cooper, Assistant Attorney Gen., Office of Legal Counsel, Dep't of Justice, to the Attorney Gen., The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act (Dec. 17, 1986).

branch.<sup>20</sup> On a more systematic basis, Congress statutorily requires the executive branch to provide reports on its activities.<sup>21</sup> Congress has enacted numerous statutes that require the executive branch to disclose information to Congress (as well as to the public).<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup> 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 significantly reducing its information demand or its secrecy claim, depending on the political salience of the information at issue. Thus, the 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.<sup>25</sup> Lower courts have ruled on these congressional-executive information disputes only five times,<sup>26</sup> and the Supreme Court

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20. DENIS McDONOUGH ET AL., CTR. FOR AM. PROGRESS, NO MERE OVERSIGHT: CONGRESSIONAL OVERSIGHT OF INTELLIGENCE IS BROKEN 24–25 (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.” *Id.* at 25.

21. See generally 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 *infra* Part I.B.

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 when 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.

24. See Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197, 202–13, 223–26 (1992).

25. *Id.* at 228–29.

26. *United States v. AT&T*, 567 F.2d 121, 128–31 (D.C. Cir. 1977) (setting out tentative procedures under which congressional staff would gain access to some, but not all of the requested information in a case where the executive branch sought to enjoin a company from complying with a congressional subpoena); *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 733 (D.C. Cir. 1974) (dismissing committee's suit seeking a declaratory judgment that the President



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 Environmental Protection Agency Administrator Anne Gorsuch in contempt for her failure to provide requested documents.<sup>27</sup> 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.”<sup>28</sup> That is exactly what the parties did, and the House ultimately gained access to all the requested documents, subject to an agreement to keep the contents of certain documents confidential.<sup>29</sup>

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. Whereas the Constitution vests in the President the executive power and the role of Commander in Chief of the armed forces,<sup>30</sup> 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.<sup>31</sup> Through statutes, Congress has required the executive branch to share with it vast amounts of information.<sup>32</sup> 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.<sup>33</sup> The next Section discusses the evolving statutory require-

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must comply with its information demand because another congressional committee already obtained most of that information and was pursuing impeachment proceedings, making this committee’s request merely cumulative); *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 53 (D.D.C. 2008) (granting the committee’s motion for partial summary judgment that White House advisors are not immune from the congressional process in a case where the committee sought a declaratory judgment that current and former advisors must appear and provide internal documents); *Walker v. Cheney*, 230 F. Supp. 2d 51, 52–53, 74 (D.D.C. 2002) (dismissing for lack of standing Comptroller General’s suit seeking a court order that the Vice President produce documents related to the energy task force); *United States v. House of Representatives*, 556 F. Supp. 150, 153 (D.D.C. 1983) (dismissing executive branch’s suit seeking declaratory judgment that the Environmental Protection Agency need not comply with a congressional subpoena); see MORTON ROSENBERG, CONG. RESEARCH SERV., RL 30319, PRESIDENTIAL CLAIMS OF EXECUTIVE PRIVILEGE: HISTORY, LAW, PRACTICE AND RECENT DEVELOPMENTS 1 (2008) (identifying *Senate Select Committee on Presidential Campaign Activities v. Nixon*, *United States v. AT&T*, and *United States v. House of Representatives* as congressional-executive information disputes in which the executive branch asserted executive privilege).

27. *House of Representatives*, 556 F. Supp. at 151.

28. *Id.* at 153.

29. Shane, *supra* note 24, at 210–11.

30. U.S. CONST. art. II, §§ 1–2.

31. U.S. CONST. art. I, § 8.

32. See, e.g., *infra* text accompanying note 62.

33. See, e.g., *infra* text accompanying note 63.

ment 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 the political process, and have only rarely reached the courts. One of those rare instances occurred in the 1970s following an investigation of warrantless surveillance by the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce.<sup>34</sup> The subcommittee subpoenaed AT&T to produce documents related to the government's warrantless surveillance.<sup>35</sup> The Department of Justice (DOJ) responded with a suit to enjoin AT&T from complying with the subpoena.<sup>36</sup> In that suit, the subcommittee chair intervened on behalf of the House of Representatives.<sup>37</sup> While the D.C. Circuit initially refrained from deciding the case on the merits and directed the political branches to attempt to settle the matter,<sup>38</sup> in 1977 it required the executive branch to provide subcommittee staff limited access to some of the information, directing the district court to consider contested documents.<sup>39</sup> The following year, the parties settled the dispute, with the subcommittee obtaining access to some of the disputed information.<sup>40</sup>

### B. *Congress's Access to Intelligence Information*

Congress performs most of its work through its committees, so responsibility for the DOJ can be found in the House and Senate Judiciary Committees and the Subcommittees on Commerce, Justice, Science, and Related Agencies of the Appropriations Committees.<sup>41</sup> Until the mid-1970s, congressional oversight of intelligence was handled by intelligence subcommittees of the House and Senate Armed Services and Appropria-

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34. *United States v. AT&T*, 567 F.2d 121, 123–24 (D.C. Cir. 1977). *But see* L. BRITT SNIDER, CENT. INTELLIGENCE AGENCY, CSI 97-10001, SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE 17 (1997), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/sharing-secrets-with-lawmakers-congress-as-a-user-of-intelligence/toc.htm> (“No case has reached US courts that involved a refusal by the executive to turn over intelligence information requested by Congress . . .”).

35. *AT&T*, 567 F.2d at 123.

36. *Id.* at 124.

37. *Id.*

38. *United States v. AT&T*, 551 F.2d 384, 395 (D.C. Cir. 1976).

39. See Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 652–54 (1997).

40. MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY 95–96 (1994); Joel D. Bush, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719, 731 (1993).

41. See WILSON, *supra* note 17, at 79 (“Congress in its committee-rooms is Congress at work.”).

tions Committees.<sup>42</sup> Their oversight was quite lax.<sup>43</sup> The subcommittees had only minimal staff, and the intelligence agencies provided oral (rather than written) briefings.<sup>44</sup> In the Senate, only one staff member was allowed to attend the briefings.<sup>45</sup> The subcommittees did not have secure facilities to store classified documents, so they did not keep written records of the executive branch's briefings or of subcommittee meetings. Staff members who wanted to examine documents had to travel to Central Intelligence Agency (CIA) headquarters in Langley, Virginia, and were prohibited from removing any documents or even their own notes about the documents.<sup>46</sup> 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.<sup>47</sup>

42. SNIDER, *supra* note 34, at 1 (noting that the armed services and appropriations committees had subcommittees "responsible for the CIA"). In 1974, the House Foreign Affairs Committee gained some oversight authority "for intelligence activities relating to foreign policy." Frederick M. Kaiser, *Congress and the Intelligence Community: Taking the Road Less Traveled*, in *THE POSTREFORM CONGRESS* 279, 281 (Roger H. Davidson ed., 1992); *see also* CECIL V. CRABB, JR. & PAT M. HOLT, *INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY* 140 (1980). *But see* STEPHEN F. KNOTT, *SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY* 163 (1996) ("[B]y 1967, seventeen committees received detailed information on the [CIA]'s activities."). For a discussion of the failed attempts of Senators Mike Mansfield and Eugene McCarthy to create a committee dedicated to intelligence oversight, *see* CRABB & HOLT, *supra*, at 141–42, 144.

43. CRABB & HOLT, *supra* note 42, at 137 ("For more than 25 years following passage of the National Security Act . . . in 1947, Congress largely ignored the intelligence community."); FRANK J. SMIST, JR., *CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 1947–1994*, at 4 (2d ed. 1994). Smist refers to this lax oversight approach as "institutional oversight." *Id.* at 19–24. Other analysts refer to it as "undersight." William E. Conner, *Congressional Reform of Covert Action Oversight Following the Iran-Contra Affair*, 2 *DEF. INTELLIGENCE J.* 35, 40 (1993); *see also* L. BRITT SNIDER, *THE AGENCY AND THE HILL: CIA'S RELATIONSHIP WITH CONGRESS, 1946–2004*, at 55 (2008) (describing congressional oversight before the mid-1970s as "ad hoc and informal"). Some refer to it as "overlook instead of oversight." Loch K. Johnson, *Playing Hardball with the CIA*, in *THE PRESIDENT, THE CONGRESS, AND THE MAKING OF FOREIGN POLICY* 49, 53 (Paul E. Peterson ed., 1994). Still others refer to it as "minimal." Kaiser, *supra* note 42, at 280 (quoting Senator Leverett Saltonstall, a member of two intelligence subcommittees, referring to congressional "reluctance . . . to seek information and knowledge on subjects which [he] 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 they reached the newspapers, such as the Soviets' shooting down the U-2 plane and the failed invasion of Cuba at the Bay of Pigs. CRABB & HOLT, *supra* note 42, at 137–38, 142–43; Loch K. Johnson, *Accountability and America's Secret Foreign Policy: Keeping a Legislative Eye on the Central Intelligence Agency*, 1 *FOREIGN POL'Y ANALYSIS* 99, 103 (2005) [hereinafter Johnson, *Accountability*] (contrasting Congress's energetic responses to scandals affecting the intelligence community with its more lax routine oversight).

44. SNIDER, *supra* note 43, at 306 ("[T]he lack of a professional staff capable of independently probing and assessing what the Agency was being directed to do . . . hampered the CIA subcommittees.").

45. CRABB & HOLT, *supra* note 42, at 141 ("Only one staff member—the much overworked staff director of the Senate Armed Services Committee—was permitted to attend the meetings, and he was forbidden to brief any other senators on what transpired.").

46. SMIST, *supra* note 43, at 4–5, 7–8.

47. Senator Richard Russell, who chaired the CIA subcommittees of *both* the Armed Services and Appropriations Committees, wrote:

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.”<sup>48</sup> 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.”<sup>49</sup> 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.<sup>50</sup>

That same month, Seymour Hersh started publishing a series of newspaper articles detailing extensive illegal activity by intelligence agencies.<sup>51</sup> Hersh’s articles led to the creation of ad hoc investigative committees in the Senate (colloquially known as the “Church Committee” for its chair, Senator Frank Church) and the House (known as the “Pike Committee” for its chair, Representative Otis Pike).<sup>52</sup> These committees hired large staffs, including lawyers and investigators; held hearings; and wrote lengthy reports revealing widespread illegal activities

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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.

*Id.* at 6 (quoting Letter from Senator Richard Russell, Chairman, CIA Subcomm. of Armed Servs., to Senator Theodore Green, Chairman, Comm. Rules & Admin. (Jan. 16, 1956) (on file with the Dr. Frank J. Smist, Jr. Collection of the University of Oklahoma)).

48. 50 U.S.C. § 413b(e) (2006). Congress enacted this statutory definition of covert action in 1991. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602, § 503(e), 105 Stat. 441, 443. The statutory definition of covert activities specifically excludes “activities the primary purpose of which is to acquire intelligence.” *Id.* The Hughes-Ryan Amendment did not use the phrase, “covert action,” and instead referred to “operations in foreign countries, other than activities intended solely for obtaining necessary intelligence.” Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (codified at 22 U.S.C. § 2422). In the Intelligence Authorization Act for Fiscal Year 1981, Congress used an additional phrase to refer to covert actions: “a significant anticipated intelligence activity.” Pub. L. No. 96-450, § 407(a)(2), 94 Stat. 1975, 1981 (1980) (amending 22 U.S.C. § 2422).

49. Foreign Assistance Act § 32, 88 Stat. at 1804; see Conner, *supra* note 43, at 41.

50. KNOTT, *supra* note 42, at 166.

51. Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at 1; see also Cynthia M. Nolan, *Seymour Hersh’s Impact on the CIA*, 12 INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 18, 20–21 (1999).

52. SMIST, *supra* note 43, at 9–10 (describing the creation of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities and the House Select Intelligence Committee). In February 1975, the House created a committee chaired by Representative Lucien Nedzi, but that committee was beset by internal squabbling. In June of the same year, Representative Nedzi resigned as chair. In July, the House abolished the initial committee and created a new one with the same name but chaired by Representative Pike. CRABB & HOLT, *supra* note 42, at 150.

by the intelligence agencies.<sup>53</sup> Among their recommendations was a call for enhanced congressional oversight of the intelligence community.

In May 1976, less than one month after the Church Committee issued its final report, the Senate created the Senate Select Committee on Intelligence and passed a nonbinding resolution that department heads should keep that committee “fully and currently informed” of the agency’s intelligence activities.<sup>54</sup> The following year, the House created its own Intelligence Committee.<sup>55</sup> 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,<sup>56</sup> 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.”<sup>57</sup> In 1980, Congress codified the requirement that the executive branch keep the intelligence committees “fully and currently informed” of intelligence activities (including covert actions),<sup>58</sup> but it also included limiting language similar to that in Carter’s executive order.<sup>59</sup> This additional language raises the possibility that the executive

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53. The Church Committee issued seventeen volumes of reports and hearings. CRABB & HOLT, *supra* note 42, at 149; *see* S. SELECT COMM. TO STUDY GOVERNMENTAL 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 COMM. ON INTELLIGENCE, 94TH CONG., RECOMMENDATIONS OF THE FINAL REPORT OF THE HOUSE SELECT COMMITTEE ON INTELLIGENCE, H.R. Rep. No. 94-833 (1976). But the report on its findings was not officially published because the House of Representatives voted against its issuance. *See infra* text accompanying notes 212–13.

54. S. Res. 400, 94th Cong. § 11(a) (1976) (as amended); CRABB & HOLT, *supra* note 42, at 152–53.

55. H.R. Res. 658, 95th Cong. (1977) (enacted). The House Resolution did not purport to require intelligence agencies to keep the House Intelligence Committee “fully and currently informed.” Kaiser, *supra* note 42, at 288.

56. Exec. Order No. 12,036, § 3-401, 3 C.F.R. 112, 132 (1979).

57. *Id.* § 3-4, 3 C.F.R. at 132.

58. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, sec. 407(b)(1), § 501(a), 94 Stat. 1975, 1981 (1980) (known as the Intelligence Oversight Act of 1980) (codified as amended at 50 U.S.C. § 413(a)). The Act required intelligence agency heads to keep the intelligence committees fully and currently informed

[t]o the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of 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.

*Id.* In 1991, Congress amended this statute to impose the requirement to keep the intelligence committees “fully and currently informed” on the President as well. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602, § 501(a)(1), 105 Stat. 429, 441 (codified as amended at 50 U.S.C. § 413(a)). For a visual representation of how several of the congressional intelligence oversight statutes have evolved over time, see AS THE CODE CHANGES, <http://asthecodechanges.wustl.edu> (last visited Apr. 6, 2011).

59. The statute imposed 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 of the Government, and to the ex-

branch can withhold information about intelligence activities from the intelligence committees.<sup>60</sup> 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 congressional intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.”<sup>61</sup> When Congress re-codified the duties of the Director of Central Intelligence (DCI) in 1992, it set out in statute a requirement that the DCI “provid[e] national intelligence” to Congress.<sup>62</sup> 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.<sup>63</sup> When Congress reorganized the intelligence community in 2003, creating the office of Director of National Intelligence (DNI), it required the DNI to “ensur[e] that national intelligence is provided” to Congress, and omitted the “where appropriate” language.<sup>64</sup> 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. On the other hand, Congress passed legislation in 2010 requiring the executive branch to provide the intelligence committees with “the legal basis under which . . . intelligence activit[ies are] being . . . conducted,”<sup>65</sup> and specifically re-

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tent 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) (1988) (amended 1991). 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. NO. 96-730, at 6 (1980).

60. 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. Conner, *supra* note 43, at 43–44. In 2006, the Bush administration argued that this same provision justified its limited disclosures to Congress. Letter from William E. Moschella, Assistant Attorney Gen., to Senator Arlen Specter, Chairman, Comm. on the Judiciary 8 (Feb. 3, 2006), <http://www.usdoj.gov/ag/readingroom/surveillance17.pdf> (arguing that this provision “gives the [e]xecutive [b]ranch flexibility to brief only certain members of the intelligence committees where more widespread briefings would pose an unacceptable risk to the national security”).

61. 50 U.S.C. § 413(e) (2006) (emphasis added).

62. Intelligence Authorization Act for Fiscal Year 1993, Pub. L. No. 102-496, sec. 705, § 103(a), 106 Stat. 3180, 3190–91 (1992).

63. *Id.*; see also SNIDER, *supra* note 34, at 14.

64. National Security Intelligence Reform Act of 2004, Pub. L. No. 108-458, sec. 1011, § 102A(a), 118 Stat. 3643, 3644 (codified at 50 U.S.C. § 403-1).

65. Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, § 331(b), 124 Stat. 2654, 2685 (amending 50 U.S.C. § 413a(a)(2)).

quires disclosure of the legal basis for intelligence interrogations<sup>66</sup> and cybersecurity programs.<sup>67</sup>

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)<sup>68</sup> so that such notice need be given only to the intelligence committees.<sup>69</sup> This modification significantly decreased 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,<sup>70</sup> but explicitly permitted prior notice to be limited to eight congressional intelligence leaders (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."<sup>71</sup> If the President had not 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 the reasons for not giving prior notice."<sup>72</sup>

In January 1986, President Reagan issued presidential findings in connection with the sale of arms to Iran, but notified neither congressional intelligence leaders nor the full intelligence committees for more than ten months, until those operations were revealed in a Lebanese newspaper.<sup>73</sup> Eventually, the DOJ's Office of Legal Counsel (OLC) is-

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66. *Id.* § 333(a)(3), 124 Stat. at 2687.

67. *Id.* § 336(a)(2)(A), 124 Stat. at 2689. This legislation also requires the executive branch to report the legal basis for covert actions. *See infra* text accompanying notes 83–86.

68. The eight committees previously subject to Hughes-Ryan notification were the House and Senate Committees on Intelligence, Armed Services, Foreign Affairs, and Appropriations. *See* James S. Van Wagenan, *A Review of Congressional Oversight: Critics and Defenders*, STUD. INTELLIGENCE, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/97-unclass/wagenen.html> (last updated June 27, 2008).

69. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, sec. 407, § 501(b), 94 Stat. 1975, 1982 (1980) (codified at 50 U.S.C. § 413 (1988)); SNIDER, *supra* note 43, at 280–81.

70. 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 activit[ies]." *Id.* § 407(a)(2), 94 Stat. at 1981 (emphasis added). 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) (1988) (amended 1991); *see also* S. REP. NO. 96-730, at 4 (1980) (repealing the Hughes-Ryan Amendment's requirement that the executive branch report covert actions to Congress "in a timely fashion," and replacing it with a requirement that the intelligence committees be given prior notice of covert actions); SNIDER, *supra* note 43, at 59–60 (noting the statute "contemplated [the intelligence committees] would be advised in advance" of covert actions).

71. 50 U.S.C. § 413(a)(1). The Senate Report accompanying this legislation asserted that withholding of prior notice to the full committees would occur "in rare extraordinary circumstances." S. REP. NO. 96-730, at 12.

72. Intelligence Authorization Act for Fiscal Year 1981, sec 407(b)(1), § 501(b), 94 Stat. at 1982 (codified at 50 U.S.C. § 413(b)) (emphasis added).

73. *See* Marshall Silverberg, *The Separation of Powers and Control of the CIA's Covert Operations*, 68 TEX. L. REV. 575, 603 (1990); *see also* EXECUTIVE SUMMARY, in REPORT OF THE

sued an opinion reviewing these events and asserting that this delay in notification was legal despite the statutory requirement that notice be given “in a timely fashion.”<sup>74</sup> The opinion reasoned that in light of the President’s constitutional authority as Commander in Chief, the vague “‘timely fashion’ language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification.”<sup>75</sup> In 1989 and 1990, congressional intelligence committees asked the first President Bush to repudiate the OLC opinion. President Bush responded by avoiding a direct confrontation with the intelligence committees, while at the same time not conceding any executive power. President Bush indicated that “in almost all instances,” he would provide prior notice; “in those rare instances” when he did not provide prior notice, he “anticipate[d] that notice will be provided within a few days”; and if he withheld notice for longer than that, he would be doing so “based upon [his] assertion of authorities granted [his] office by the Constitution.”<sup>76</sup> In effect, Bush asserted that the Constitution granted him authority to act contrary to the statutory requirement of “timely” notice.<sup>77</sup>

In 1991, following recommendations of the joint committee that investigated the Iran-Contra scandal,<sup>78</sup> Congress enacted legislation stating 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.<sup>79</sup> In that legislation, Congress left intact the nonspecific “timely fashion” requirement, rather than replacing it with a more specific requirement.<sup>80</sup> 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.”<sup>81</sup> The conference report, however, disclaimed any congressional ability to authoritatively interpret this law. It asserted that “[n]either the legislative [n]or executive branch authoritatively interpret the Constitu-

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CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1987).

74. Memorandum from Charles J. Cooper, to the Attorney Gen., *supra* note 19, at 2, 24.

75. *Id.* at 24.

76. Letter from President George Bush, President of the United States, to the Chairman of the House Intelligence Comm., *reprinted in* H.R. REP. NO. 102-166, at 27 (1991) (Conf. Rep.).

77. 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 Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

78. Conner, *supra* note 43, at 35.

79. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602, § 503(a), 105 Stat. 429, 442 (codified at 50 U.S.C. § 413b (2006)); *see* AS THE CODE CHANGES, <http://asthecode.changes.wustl.edu> (last visited Apr. 6, 2011).

80. *Id.*

81. H.R. REP. NO. 102-166, at 28 (“[T]he President’s stated intention . . . to make a notification ‘within a few days’ . . . is consistent with what the conferees believe is its meaning and intent.”).



tion, which is the exclusive province of the judicial branch.”<sup>82</sup> Yet this assertion ignored the fact that the judicial branch never has the opportunity to interpret the Constitution with respect to many issues related to intelligence. Oftentimes in the national security sphere, the responsibility for interpreting the Constitution falls on the political branches, rather than the judicial branch. Faced with a President who asserted constitutional authority to ignore a statutory requirement, Congress blinked when given the opportunity to devise a statutory mandate for “timely notification.”

The Intelligence Authorization Act for Fiscal Year 2010 tweaked covert action notifications in several ways.<sup>83</sup> Covert action notifications must now be in writing and must explain their legal basis.<sup>84</sup> When the notification is limited to congressional intelligence leaders, the executive branch must provide a written statement to those leaders explaining why it was necessary to limit notice in this way.<sup>85</sup> In addition, it must notify the remaining intelligence committee members that it issued a notification to committee leaders and provide “a general description . . . consistent with the reasons for not yet fully informing all members of [the] committee[s].”<sup>86</sup>

While some of Congress’s constraints on the executive branch include the potential for criminal liability,<sup>87</sup> there is no criminal liability for failure to notify Congress of intelligence activities. The executive branch may pay a political price for failing to notify Congress, however, depending on the political salience of the issue. This dynamic was illustrated in the spring of 1984, when news reports revealed that the CIA 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,<sup>88</sup> and the chair wrote a public letter excoriating the DCI for this failure.<sup>89</sup> Congress responded by cutting off fi-

82. *Id.*

83. Pub. L. No. 111-259, 124 Stat. 2654; *see* AS THE CODE CHANGES, <http://asthecodechanges.wustl.edu> (last visited Apr. 6, 2011).

84. *Id.* § 331(c), 124 Stat. at 2685–86 (amending 50 U.S.C. § 413b(b)(2), (c)(1)).

85. *Id.* (to be codified at 50 U.S.C. § 413b(c)(5)(A)). Within 180 days, the President must either reveal the information to the entire committee or provide an explanation of why such access must be denied. *Id.*

86. *Id.* (to be codified at 50 U.S.C. § 413b(g)).

87. *E.g.*, 18 U.S.C. § 2441 (2006) (imposing domestic criminal liability for a grave breach of the Common Article 3 of the Geneva Conventions); 50 U.S.C. § 1809(a)(1) (a provision of the Foreign Intelligence Surveillance Act imposing criminal liability for “engag[ing] in electronic surveillance under color of law except as authorized” by statute); *see* JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007) (criticizing the potential for criminal liability of executive branch officials).

88. 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 C.I.A.*, N.Y. TIMES, Apr. 16, 1984, at A1.

89. *Goldwater Writes CIA Director Scorching Letter*, WASH. POST, Apr. 11, 1984, at A17 (reprinting Letter from Senator Barry Goldwater, Chairman, Senate Intelligence Comm., to William J. Casey, CIA Dir. (Apr. 9, 1984)). At least one member of the committee disputed Goldwater’s assertion, stating “Casey supplied ‘all [the] sufficient details for anybody to draw correct conclusions.’”

nancial support for the military aid to the Nicaraguan Contras.<sup>90</sup> More recently, the second Bush administration's failure to notify the full intelligence committees of its warrantless surveillance programs did not result in any legislative setbacks,<sup>91</sup> and the administration was eventually able to obtain statutory authorization for warrantless surveillance<sup>92</sup> and statutory immunity for telecommunication firms that had assisted the government in warrantless surveillance.<sup>93</sup>

While Congress has imposed statutory requirements that the executive branch share information with Congress, these requirements are fundamentally ambiguous.<sup>94</sup> In effect, they leave the executive branch with the discretion to disclose or not. The consequences of nondisclosure are merely political. Although the executive branch shares a wide range of intelligence information with Congress,<sup>95</sup> it also asserts its authority not to disclose to Congress some intelligence information.<sup>96</sup> 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."<sup>97</sup> Some of these limits—such as notifying only congressional intelligence leaders of covert actions—are statutorily authorized, but other limits—such as restrictions on consulting staff—have no statutory basis.<sup>98</sup>

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George J. Church, *Explosion over Nicaragua*, TIME, Apr. 23, 1984, at 18, 22 (quoting Senator Malcolm Wallop). Another member, Senator Leahy, said he had requested a separate briefing from the CIA and had asked specific questions about the mining operation. Gwertzman, *supra* note 88; see Loch K. Johnson, *Ostriches, Cheerleaders, Skeptics, and Guardians: Role Selection by Congressional Intelligence Overseers*, 28 SAIS REV. INT'L AFF. 93, 102–03 (2008) (arguing Casey misled the Senate Intelligence Committee).

90. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1987).

91. Cynthia McKinney, a member of the House of Representatives who had lost her bid for reelection, introduced Articles of Impeachment against George W. Bush on December 8, 2006, but her bill did not attract any cosponsors. H.R. Res. 1106, 109th Cong. (2006).

92. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552.

93. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, sec. 201, §§ 801–804, 122 Stat. 2436, 2467–70.

94. For an example of this ambiguity, see THE SELECT COMM. ON INTELLIGENCE, U.S. SENATE, LEGISLATIVE OVERSIGHT OF INTELLIGENCE ACTIVITIES: THE U.S. EXPERIENCE, S. REP. NO. 103-88, at 10 (1994) (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 from Charles J. Cooper to the Attorney Gen., *supra* note 19, at 2 (describing ambiguities in statutory requirement for timely notification).

95. In 2004, the CIA provided Congress with 1000 briefings and 4000 documents. ALFRED CUMMING, CONG. RESEARCH SERV., R40136, CONGRESS AS A CONSUMER OF INTELLIGENCE INFORMATION 7–8 n.40 (2009).

96. The executive branch does not generally share intelligence sources or methods, raw intelligence, or the President's Daily Brief with Congress. *Id.* at 4.

97. S. REP. NO. 103-88, at 10.

98. Intelligence committee leaders have also acquiesced in the executive branch's desire to limit some information to the committee chairs and ranking members. There is no statute, committee rule, or chamber rule support for these limited notifications. CUMMING, *supra* note 10, at 6–7.

C. *Congress's Ability to Consult Staff in Connection with Intelligence*

The Church and Pike Committees had large staffs,<sup>99</sup> comprised of staff members who underwent security background checks so that they could gain access to intelligence information.<sup>100</sup> These security-cleared staff members' work enabled the Church and Pike Committees to conduct extensive hearings and produce lengthy reports about intelligence abuses. The National Security Agency (NSA) initially took the position that its information was so sensitive that it would be provided only to the chair and ranking member, rather than to staffers, but it eventually abandoned this position and provided information to committee staffers.<sup>101</sup> The staffers were instrumental in uncovering the NSA's program of warrantless surveillance of telegram traffic in and out of the country.<sup>102</sup>

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, their staff carry out essential functions in investigating the executive branch's activities and 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 over 3000 staff members at its disposal who work indirectly for Congress through its Government Accountability Office (GAO).<sup>103</sup> The GAO audits and analyzes the operation of the executive branch, responding to specific requests for analysis from members of Congress.<sup>104</sup> 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.<sup>105</sup>

Congressional staff—including the GAO—has 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

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99. The Church Committee had 135 staff members, LOCH K. JOHNSON, *A SEASON OF INQUIRY: THE SENATE INTELLIGENCE INVESTIGATION* 25 (1985), and the Pike Committee had 32 staff members. SMIST, *supra* note 43, at 136.

100. *See infra* Part II.A.

101. L. Britt Snider, *Recollections from the Church Committee's Investigation of NSA: Unlucky SHAMROCK*, *STUD. INTELLIGENCE*, Winter 1999–2000, available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter99-00/art4.html>. The NSA initially indicated that the answers to the committee's written interrogatories were so sensitive that they would be provided only to the chair and ranking member. After a news leak regarding the NSA's surveillance of international communications, however, the NSA wanted to get out "its side of the story," and it briefed Church Committee staff on this surveillance. *Id.*

102. *Id.*

103. U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO-09-2SP, CITIZENS' REPORT: FISCAL YEAR 2008 SUMMARY OF GAO'S PERFORMANCE AND FINANCIAL RESULTS 1* (2009), <http://www.gao.gov/new.items/d092sp.pdf>.

104. *Id.*

105. In Fiscal Year 2008, the GAO had approximately 3100 employees and provided Congress with over 1200 reports (including written testimony) analyzing executive branch programs. *Id.* at 1, 3.

certain intelligence information. The executive branch asserts that the GAO does not have the authority to analyze intelligence activities.<sup>106</sup> During the Reagan administration, the DOJ's OLC asserted that while the 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 statute.<sup>107</sup> In light of the statutory authorization for and regulation of intelligence operations, this OLC opinion is not particularly persuasive. Until recently, Congress has acquiesced in the executive branch's insistence that intelligence oversight be conducted only by the intelligence committees and not by the GAO. But legislative developments in 2010 suggest that this may be changing, at least to a limited degree. The Intelligence Authorization Act for Fiscal Year 2010 requires the DNI to "issue a written directive governing the access of the Comptroller General," who is the leader of the GAO, to intelligence information,<sup>108</sup> and requires the Comptroller General to ensure the confidentiality of that information.<sup>109</sup>

Since enactment of the congressional intelligence leader notification procedures in 1980, the executive branch has asserted that those leaders may not consult their staff members—even those with high-level security clearances—regarding the covert action information that the executive branch provides them.<sup>110</sup> Congressional intelligence leaders have also 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. This hobbles Congress's 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.<sup>111</sup> In addition, the executive branch asserts

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106. Investigative Authority of the General Accounting Office, 12 Op. O.L.C. 171 (1988).

107. *Id.* at 172 (“[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.”).

108. Pub. L. No. 111-259, § 348(a)(1), 124 Stat. 2654, 2700 (to be codified at 50 U.S.C. § 403-9).

109. *Id.* § 348(b)(1), 124 Stat. at 2700. The legislation also indicates that GAO employees will be subject to “the same statutory penalties for unauthorized disclosure or use of such information as” executive branch employees. § 348(b)(2), 124 Stat. at 2700.

110. Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1059 (2008).

111. *See, e.g.*, Letter from William E. Moschella, Assistant Attorney Gen., to Senator Patrick J. Leahy, Ranking Member, Comm. on the Judiciary (Apr. 4, 2005) (on file with author) (“[T]he Executive Branch has substantial confidentiality interests in OLC opinions, and our longstanding practice is not to disclose non-public OLC opinions outside the Executive Branch.”).

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.<sup>112</sup> 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."

While Congress may trust, it must verify<sup>113</sup>—a lesson learned during the Bush administration. Congress seems to have taken this lesson to heart, and in 2010 amended the intelligence oversight statutes, requiring the executive branch to inform the congressional intelligence committees of "the legal basis" for covert actions<sup>114</sup> and other intelligence activities.<sup>115</sup>

Executive branch insistence that Congress not consult its staff has 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 ninety-two page document assessing Iraq's weapons of mass destruction.<sup>116</sup> 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.<sup>117</sup> Prior to voting to authorize the U.S. inva-

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112. See Kitrosser, *supra* note 110, at 1059.

113. See Remarks on Signing the Treaty Eliminating Intermediate-Range and Short-Range Nuclear Missiles, 49 WEEKLY COMP. PRES. DOC. 1457, 1458 (Dec. 8, 1987) ("We have listened to the wisdom in an old Russian maxim. . . . The maxim is: *Dovorey no provorey*—trust, but verify.").

114. Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, § 331(c)(1), 124 Stat. 2654, 2685 (amending 50 U.S.C. § 413b(b)(2)).

115. *Id.* § 331(b) (amending 50 U.S.C. § 413a(a)(2)); see also *id.* § 333(a)(3), 124 Stat. at 2687 (requiring the Director of National Intelligence to report "the legal basis for" the intelligence community's detention and interrogation activities); *id.* § 336(a)(2), 124 Stat. at 2689 (requiring the executive branch to notify Congress of "the legal basis" for its cybersecurity programs). An earlier version of the bill would have required even more robust disclosure of the executive branch's legal assessments, requiring the executive branch 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.

SILVESTRE REYES, PERMANENT SELECT COMM. ON INTELLIGENCE, INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010, H.R. Rep. No. 111-186 (2009). The Obama administration threatened to veto this earlier version, objecting to its requirement to disclose "internal [e]xecutive branch legal advice and deliberations." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2701—INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010 (July 8, 2009), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=86389>; see Kathleen Clark, "A New Era of Openness?": *Disclosing Intelligence to Congress Under Obama*, 26 CONST. COMMENT. 313, 323 (2010).

116. Dana Priest, *Congressional Oversight of Intelligence Criticized: Committee Members, Others Cite Lack of Attention to Reports on Iraqi Arms, Al Qaeda Threat*, WASH. POST, Apr. 27, 2004, at A1.

117. *Id.*

sion of Iraq, only a few members of Congress took the time to read past the five-page executive summary.<sup>118</sup>

*D. Critique of the 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<sup>119</sup>—may be worse than no notification at all. Under this system, which I call “limited notification as inoculation,” the executive branch is able to inoculate itself against congressional backlash if an intelligence program later exposed results in public controversy. The executive branch can point to its earlier notifications to Congress and Congress’s lack of action or response as endorsement of the executive action.<sup>120</sup> This kind of notification provides the executive branch with political cover, but does not enable Congress to effectively participate as a coequal branch of government.<sup>121</sup>

When the warrantless surveillance program was eventually exposed and controversy about it erupted, the Bush administration was able to point to the silence of congressional intelligence leaders. Their silence came to be seen as endorsement. Or, at the very least, congressional silence inoculated the administration against charges of overreaching. Representative Peter Hoekstra, then chair of the House Intelligence Committee, alluded to this inoculation effect when some democratic

118. *Id.*; see also Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force*, 26 CONST. COMMENT. 433, 450–51 (2010).

119. Former House Intelligence Committee Ranking Member Jane Harman described the limits of taking notes on these oral briefings and of consulting staff. Interview by Renee Montagne, host, Morning Edition, with Jane Harman, U.S. Representative, on National Public Radio (Jan. 16, 2008), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=18137722> (“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.”).

120. 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.

SNIDER, *supra* note 43, at 71 (citation omitted). “If [a covert action] is disclosed or ends in disaster, the administration will want to have had Congress on board.” *Id.* at 311.

121. 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.

Johnson, *Accountability*, *supra* note 43, at 114.

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 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.<sup>122</sup>

As a matter of practical politics, Representative Hoekstra is correct. Members of Congress share some political responsibility for the intelligence programs about which they have received information.<sup>123</sup> 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 a legitimate concern for the confidentiality of this information. The next Part of this Article explains the mechanisms the intelligence committees use to maintain the secrecy of the information received from the executive branch.

## II. CONGRESS'S ABILITY TO KEEP SECRETS

This Part examines the degree to which Congress can keep national security-related information secret. It examines the specific mechanisms Congress has put into place to protect this information, and then provides a history of national security-related leaks by Congress over the last forty years.<sup>124</sup>

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122. Peter Hoekstra, U.S. Representative, Congressman Hoekstra Holds a News Conference on the NSA Authorizations (Dec. 21, 2005), in CQ TRANSCRIPTIONS, available at 2005 WL 3486002; see also Shane Harris, *The Survivor*, NAT'L J., June 6, 2009, at 36, 37-39; Memorandum from Alfred Cumming, Specialist in Intelligence & Nat'l Sec., Foreign Affairs, Def. & Trade Div., Cong. Research Serv., Statutory Procedures Under Which Congress Is to Be Informed of Intelligence Activities, Including Covert Actions 6-7 (Jan. 18, 2006). President 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. See Memorandum from Alfred Cumming, *supra*, at 6-7.

123. A. John Radsan, *An Overt Turn on Covert Action*, 53 ST. LOUIS U. L.J. 485, 542 (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.").

124. 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 News Leaks in Governance and the Law of Journalists' Confidentiality, 1795-2005*, 43 SAN DIEGO L. REV. 425, 433-46 (2006).

A. *Congressional Mechanisms for Protecting the Confidentiality of Intelligence Information*

From the beginning of congressional oversight of intelligence, there has been concern for the 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.<sup>125</sup> The subcommittees did not have offices with the physical security required for the protection of intelligence-related information.<sup>126</sup> Leaks of this information were rare.<sup>127</sup>

Congressional access to classified documents changed in the mid-1970s with the ad hoc Church and Pike Committees, which were able to review thousands of intelligence agency documents in their own offices. The confidentiality of those documents and the other information provided was a key concern, and the committees implemented 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,<sup>128</sup> members of Congress do not undergo this type of security clearance process.<sup>129</sup> 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.<sup>130</sup> Although the mem-

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125. SMIST, *supra* note 43, at 4–5, 8 (“Nothing was put in writing and no records were kept . . . Appropriations staff had to go to CIA headquarters to see files and documents, and no material or notes could be taken from the CIA.”).

126. Cf. S. SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE *rr.* 9.1, 9.2 (Comm. Print 2009) (mandating a U.S. 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)); H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE *r.* 14(a)(2) (Comm. Print 2009) (requiring at least one U.S. Capitol Police Officer to be on duty outside the entrance of the House Intelligence Committee at all times).

127. SMIST, *supra* note 43, at 9 (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”).

128. Elected officers in the executive branch, the President and the Vice President, do not undergo security clearance procedures.

129. CUMMING, *supra* note 95, at 1 n.4.

130. One would not want to overestimate 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—



bership 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.<sup>131</sup> Each intelligence committee member has access to all documents held by the committee,<sup>132</sup> but not to the information provided in oral briefings to congressional intelligence leaders.

Senators who are not members of the Senate Intelligence Committee can gain access to intelligence-related documents held by the committee.<sup>133</sup> But before gaining access to such materials, the Senator is given verbal or written notice that he must protect the confidentiality of the information.<sup>134</sup> 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.<sup>135</sup> They only have access to information that the executive branch designates as available to noncommittee members.<sup>136</sup> Even with respect to that information, noncommittee members must notify the committee in writing, and explain “with specificity the justification for the request and the need for access.”<sup>137</sup> The committee may consult the DNI 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.<sup>138</sup> If the committee grants access, the noncommittee member must sign both a confidentiality agreement and a secrecy oath.<sup>139</sup> The Senate and House

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both characteristics that could result in the denial of a security clearance to executive branch employees. 135 CONG. REC. 3439 (1989) (statement of Sen. Timothy Wirth) (“[Tower’s] record suggests that [he] had some very significant drinking problems in the 1970’s.”); see also STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 700 (Richard A. Epstein et al. eds., 2d ed. 1997); Molly Moore, *Tower Presses Case for Confirmation: Senate Disapproval Would Be “Damning the President’s Judgment,”* WASH. POST, Mar. 5, 1989, at A12.

131. The Church, Pike, and Nedzi Committees were also “Select” Committees, chosen by party leaders.

132. S. SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE r. 9.4 (Comm. Print 2009); H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE r. 14(b) (Comm. Print 2009).

133. S. Res. 400, 94th Cong. § 8(c)(2) (1976) (as amended) (authorizing the Senate Intelligence Committee to set up rules making information available to other committees and members and requiring a written record of the members and committees who have accessed such information).

134. S. SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE r. 9.5 (Comm. Print 2009).

135. Kaiser, *supra* note 42, at 288 (“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.”) (quoting Rules Committee Chair Richard Bolling).

136. H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE r. 13 (Comm. Print 2009). 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.” Priest, *supra* note 116; *Congressional Report Cites “Missed Opportunities” Prior to 9/11*, CNN.COM (July 25, 2003, 9:34 AM), <http://edition.cnn.com/2003/ALLPOLITICS/07/24/9.11.report/>. Few members actually took the time to read the report, and their staff members were not given access to it. Priest, *supra* note 116.

137. H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE r. 14(f)(1) (Comm. Print 2009).

138. *Id.* at r. 14(f), (p)(2).

139. *Id.* at r. 14(f)(4).

require their respective ethics committees to investigate unauthorized leaks of intelligence information and recommend appropriate sanctions against the offending member or staffer.<sup>140</sup> In the House, members and staff must swear to a secrecy oath prior to gaining access to classified information.<sup>141</sup>

The intelligence committees require their staff members to obtain security clearances and sign confidentiality agreements.<sup>142</sup> The committees consult with the DNI to determine the appropriate security clearance level for staffers.<sup>143</sup> The Federal Bureau of Investigation (FBI) performs a background check on the potential employee and the committee then obtains a “security opinion” on that person from the intelligence agency.<sup>144</sup> This clearance process does not include polygraph examinations, even though such examinations are routine in some intelligence agencies.<sup>145</sup> In theory, the committees reserve the right to make their own hiring decisions. In practice, committees rarely hire employees over the objection of the executive branch.<sup>146</sup>

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.<sup>147</sup> If a member of the committee wants to disclose the information, the member may ask the committee to vote for such disclosure.<sup>148</sup> If the committee votes for disclosure, it must notify the President.<sup>149</sup> If the President personally certifies in writing that disclosure would threaten the national interest and that such threat out-

140. S. Res. 400, 94th Cong. § 8(d), (e) (1976) (as amended); RULES OF THE HOUSE OF REPRESENTATIVES, H. Res. 5, r. X, cl. 11(g)(4), (5) (2011).

141. H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE r. 14(d) (Comm. Print 2009); *see also* RULES OF THE HOUSE OF REPRESENTATIVES, H. Res. 5, r. XXIII, cl. 13 (2011).

142. S. Res. 400, 94th Cong. § 6 (1976) (as amended); S. SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE rr. 10.1, 10.6 (Comm. Print 2009); H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE rr. 11, 12 (Comm. Print 2009). In addition to a confidentiality agreement, House Intelligence Committee members and staff are required to sign a secrecy oath. H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE r. 14(d) (Comm. Print 2009); RULES OF THE HOUSE OF REPRESENTATIVES, H. Res. 5, r. X, cl. 11(e) (2011); *see also* SMIST, *supra* note 43, at 48–49.

143. S. Res. 400, 94th Cong. § 6 (1976) (as amended).

144. S. SELECT COMM. ON INTELLIGENCE, LEGISLATIVE OVERSIGHT OF INTELLIGENCE ACTIVITIES: THE U.S. EXPERIENCE, S. REP. NO. 103-88, at 9 (1994).

145. *Id.*; SMIST, *supra* note 43, at 48–49 (“We took the FBI and its background check as our agent. There were a few staffers ousted as a result of the FBI check.” (quoting the Church Committee Staff Director)).

146. S. REP. NO. 103-88, 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, at A1.

147. S. Res. 400, 94th Cong. § 8 (1976) (as amended); RULES OF THE HOUSE OF REPRESENTATIVES, H. Res. 5, r. X, cl. 11(g) (2011).

148. S. Res. 400, 94th Cong. § 8(a) (1976) (as amended); RULES OF THE HOUSE OF REPRESENTATIVES, H. Res. 5, r. X, cl. 11(g)(1)(A) (2011).

149. S. Res. 400, 94th Cong. § 8(b)(1) (1976) (as amended); RULES OF THE HOUSE OF REPRESENTATIVES, H. Res. 5, r. X, cl. 11(g)(2)(A) (2011).

weighs the public interest in disclosure, the committee may refer the matter to the full chamber for consideration in closed session.<sup>150</sup> These elaborate procedures have never been invoked, and so have never resulted in congressional disclosure over the objection of the executive branch.<sup>151</sup>

The House Intelligence Committee rules also permit a committee member to request a committee roll-call vote to disclose particular information to another committee or to the entire House.<sup>152</sup> If the disclosure is to another committee, the committee makes the information available to the chair and the ranking member of that committee.<sup>153</sup>

*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,<sup>154</sup> while others characterize it as very strong.<sup>155</sup> 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."<sup>156</sup> Rather than simp-

150. S. Res. 400, 94th Cong. § 8(b) (1976) (as amended); RULES OF THE HOUSE OF REPRESENTATIVES, H. Res. 5, r. X, cl. 11(g)(2)(C) (2011).

151. CRABB & HOLT, *supra* note 42, at 155; McDONOUGH ET AL., *supra* note 20, at 27; *see also What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration: Hearing Before the Subcomm. on Admin. Oversight and the Courts*, 111th Cong. (2009) (statement of Sen. Sheldon Whitehouse, Chairman, Subcomm. on Admin. Oversight and the Courts), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3842&wit\\_id=6151](http://judiciary.senate.gov/hearings/testimony.cfm?id=3842&wit_id=6151) (stating that Senate disclosure procedures have never been used).

152. H.R. PERMANENT SELECT COMM. ON INTELLIGENCE, 111TH CONG., RULES OF PROCEDURE r. 14(g) (Comm. Print 2009).

153. *Id.* at r. 14(l).

154. KNOTT, *supra* note 42, at 177 ("[T]he House and Senate Intelligence Committees are colanders of leaks . . .") (quoting journalist Jim Lehrer) (citing Gary J. Schmitt & Abram N. Shulsky, *The Theory and Practice of Separation of Powers: The Case of Covert Action, in THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH* 59 (L. Gordon Crovitz & Jeremy A. Rabkin, eds. 1989)); Bruce E. Fein, *Access to Classified Information: Constitutional and Statutory Dimensions*, 26 WM. & MARY L. REV. 805, 817 (1985) ("[E]xperience teaches that initial disclosures to Congress, despite procedural safeguards, frequently result in public dissemination of classified materials through knowing or unwitting 'leaks.'"); Bruce E. Fein, *The Constitution and Covert Action*, 11 HOUS. J. INT'L L. 53, 59 (1988) [hereinafter Fein, *The Constitution and Covert Action*] ("Leaks from the House and Senate Intelligence Committees are endemic."); *see also* Henry J. Hyde, *Can Congress Keep a Secret?*, NAT'L REV., Aug. 24, 1984, at 46, 46 ("The calculated, politically motivated leaking of highly sensitive information has become a Washington art form.")

155. CRABB & HOLT, *supra* note 42, at 159 ("[T]hus far there has been no serious leak of classified information [from the intelligence committees]."); Johnson, *Accountability*, *supra* note 43, at 114 ("Every study and every DCI has been laudatory of [the intelligence committees'] record on keeping secrets."). *See also* similar positive assessments of Congress's record in keeping national security secrets by former DCI Allen Dulles, Ambassador Arthur Goldberg, and Senators Stuart Symington and Howard Baker in July 29, 1988. Memorandum from Frederick M. Kaiser, Specialist, Am. Nat'l Gov't Exec. Org. & Operation, to Senator Charles E. Grassley, Protection of Classified Information by Congress 8-10 (July 29, 1988), reprinted in *Congress and the Administration's Secrecy Pledges: Hearing Before a Subcomm. of the H. Comm. on Gov't Operations*, 100th Cong. 50, 57-59 (1988) (on file with author).

156. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 579 (1987).

ly labeling Congress's ability to keep secrets as good or bad, this Section describes with some specificity 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 congressional intelligence leaders, 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.<sup>157</sup> 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 when the member was exposing an executive branch policy that the member 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 Department of Defense employee, provided Senator J. William Fulbright with a copy of the forty-seven volume official history of U.S. involvement in Vietnam, revealing the government's record of deception.<sup>158</sup> When Senator Fulbright refused to respond, Ellsberg gave a copy of the Pentagon Papers to the *New York Times*, which started publishing excerpts from the history.<sup>159</sup> 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.<sup>160</sup> Late on the night of June 29, 1971, after the Supreme Court heard oral arguments in the case but before it issued its decision, Senator Mike Gravel convened a hearing of his Subcommittee on Buildings and Grounds of the Senate Public Works Committee, and started reading from a copy of the Pentagon Papers.<sup>161</sup> He then placed the entire forty-seven volume

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157. 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 Fein, *The Constitution and Covert Action*, *supra* note 154, at 57 (alluding to numerous alleged congressional leaks); David Everett Colton, Comment, *Speaking Truth to Power: Intelligence Oversight in an Imperfect World*, 137 U. PA. L. REV. 571, 608 n.163 (1988) (describing several congressional leaks); Robert J. Caldwell, Op-Ed., *Button the Loose Lips in Congress*, SAN DIEGO UNION-TRIB., July 26, 1987, at C1; Daniel Schorr, Op-Ed., *CIA's Misadventures: To Blow the Whistle or Keep the Secret*, CHRISTIAN SCI. MONITOR, Nov. 29, 1996, at 19.

158. PETER SCHRAG, TEST OF LOYALTY: DANIEL ELLSBERG AND THE RITUALS OF SECRET GOVERNMENT 37, 48 (1974).

159. *Id.* at 48, 53–54, 80.

160. *Id.* at 87–100.

161. *Gravel v. United States*, 408 U.S. 606, 609 (1972).

history in the public record.<sup>162</sup> News reports indicated that Senator Gravel and members of his staff had also spoken with a private publishing firm about publishing the Pentagon Papers.<sup>163</sup>

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.<sup>164</sup> Another senator objected, and the Senate met in closed session to consider Senator Gravel's request.<sup>165</sup> Before the Senate made its decision, Senator Gravel read excerpts from the memorandum on the floor of the Senate.<sup>166</sup> The excerpts that Gravel read dealt with a plan to mine North Vietnamese ports, a plan that President Nixon had publicly announced the previous day.<sup>167</sup> Two days later, Representative Ron Dellums obtained the memorandum from Senator Gravel and placed a copy of it in the congressional record.<sup>168</sup>

In 1974, Representative 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.<sup>169</sup> At the request of the subcommittee staff director, Representative Harrington signed a document acknowledging that the information was classified, that a House rule prohibited its disclosure, and he pledged not to disclose it.<sup>170</sup> Representative 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, Representative Harrington leaked his letter to the press.<sup>171</sup> He apparently believed that "he had a greater duty to release the information."<sup>172</sup> The House Armed Services Committee reprimanded Representative Harrington, and decided not to grant him further access to confidential information (despite the then-existing House rule granting all members access to information in the hands of any committee).<sup>173</sup> A House member filed a complaint against Representative Harrington with the House Ethics Committee, which did not sanc-

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162. *Id.*

163. *Id.* at 610 n.6. The executive branch opened a criminal investigation of Gravel's actions. See *infra* text accompanying notes 243–45.

164. MINORITY REPORT, *in* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 576–77 (1987) (citing ARTHUR MAASS, CONGRESS AND THE COMMON GOOD 241 (1983)).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. CRABB & HOLT, *supra* note 42, at 146; SMIST, *supra* note 43, at 134.

170. SMIST, *supra* note 43, at 134 (citation omitted).

171. CRABB & HOLT, *supra* note 42, at 146.

172. SMIST, *supra* note 43, at 134.

173. CRABB & HOLT, *supra* note 42, at 150.

tion the representative, finding that the information had not been properly classified.<sup>174</sup>

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.<sup>175</sup> The Ford administration refused to turn over any additional classified documents until the Committee agreed to respect their confidentiality.<sup>176</sup>

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 copies of messages sent in or out of the United States from telegraph companies between 1947 and May of 1975.<sup>177</sup> In its interim report on assassinations, at the request of the Ford administration, the Church Committee deleted most of—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.<sup>178</sup> Over the objections of committee member Senator John 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.<sup>179</sup> At that four-hour closed session, some senators spoke against publication of the report, but no vote was taken.<sup>180</sup> 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.<sup>181</sup> Senator Church had

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174. H.R. COMM. 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>; see also CRABB & HOLT, *supra* note 42, at 150 (the ethics committee found that the leaked transcript "had not been taken at a legal meeting" because of the lack of notice, lack of vote to go into executive session, and lack of quorum).

175. CRABB & HOLT, *supra* note 42, at 151; JOHNSON, *supra* note 99, at 78.

176. CRABB & HOLT, *supra* note 42, at 151.

177. JOHNSON, *supra* note 99, at 112; SMIST, *supra* note 43, at 74; Snider, *supra* note 101 (describing the Ford administration's pleas for secrecy and the committee's internal debate about whether to disclose).

178. JOHNSON, *supra* note 99, at 130; Nicholas M. Horrock, *Bid to Cut Name in Report on C.I.A. Fails*, N.Y. TIMES, Nov. 18, 1975, at 12.

179. JOHNSON, *supra* note 99, at 131–33.

180. *Id.* at 131–35.

181. *Id.* at 131–36. Senator Walter Mondale asserted that the report was "not here to be adopted or approved. It [was] 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." See *id.* at 133–36.

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; the staff promptly disclosed the report at the end of the session.<sup>182</sup>

In 1987, Senator 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.<sup>183</sup> Senate colleagues asked the Ethics Committee to investigate, and Senator Durenberger contended that these remarks were based on newspaper articles rather than confidential intelligence briefings.<sup>184</sup> The Ethics Committee issued a letter criticizing Senator Durenberger for giving “the appearance that [he was] disclosing sensitive national security information,” without confirming or denying whether he had actually disclosed classified information.<sup>185</sup> The Committee did not recommend a formal sanction “because of the particular facts of [the] case,” concluding that the senator’s “actions were not intentional, deliberate, nor attended with gross negligence.”<sup>186</sup>

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.”<sup>187</sup> Minority Leader Robert Michel and Representative Dick Cheney asked the House Ethics Committee to investigate whether Wright improperly disclosed classified information.<sup>188</sup> While the Intelligence Committee voted to grant the Ethics Committee limited access to classified information so that it could investigate the alleged security breach,<sup>189</sup> the Ethics Committee issued no findings regarding these allegations.<sup>190</sup> But the allegation that Wright had revealed classified information helped defeat a legislative proposal that would have

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182. *Id.* at 136.

183. Stephen Engelberg, *Senator Is Quoted As Saying U.S. Recruited Israeli Officer As a Spy*, N.Y. TIMES, Mar. 21, 1987, at 3; Philip Shenon, *Senator Durenberger Stirs New Concern with Outspokenness*, N.Y. TIMES, Apr. 8, 1987, at B6.

184. Irvin Molotsky, *Senate Ethics Panel Criticizes Durenberger on Talk*, N.Y. TIMES, Apr. 30, 1988, at 32.

185. *Id.*

186. *Id.*

187. Roy Gutman, *Behind Wright vs. Reagan: Appointee Reportedly Provoked Furor over Nicaragua*, NEWSDAY, Sept. 23, 1988, at 5; Susan F. Rasky, *C.I.A. Tied to Nicaragua Provocations*, N.Y. TIMES, Sept. 21, 1988, at A6. But the House Intelligence Committee refused to turn over classified information to the House Ethics Committee.

188. Don Phillips & Joe Pichirallo, *Wright Denies Secrecy Breach: CIA Briefed Panel on Propaganda Drive*, WASH. POST, Sept. 23, 1988, at A1.

189. *Wright Tells Ethics Panel He Broke No Rules*, CHRISTIAN SCI. MONITOR, Oct. 6, 1988, at 4.

190. The House Ethics Committee eventually issued a report documenting unrelated ethics violations by Wright, who resigned his position as Speaker of the House. H.R. COMM. ON STANDARDS OF OFFICIAL CONDUCT, HISTORICAL SUMMARY OF CONDUCT CASES IN THE HOUSE OF REPRESENTATIVES 23 (2004), available at <http://ethics.house.gov/Pubs/Default.aspx?Section=15>.

required the executive branch to notify the full intelligence committees of covert actions within forty-eight hours.<sup>191</sup>

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.<sup>192</sup> Banking Committee Chair Henry Gonzalez made a series of disclosures on the floor of the House of Representatives, reading excerpts from those classified documents and placing some of them in the congressional record.<sup>193</sup> 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.<sup>194</sup> The executive branch 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.<sup>195</sup> Minority leader Robert Michel introduced a resolution urging the House Ethics Committee to investigate Representative Gonzalez's unauthorized disclosures, but the House rejected that resolution on a party-line vote.<sup>196</sup>

In 1995, Richard Nuccio, a Department of State employee, told Representative 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 these deaths a secret.<sup>197</sup> Representative Torricelli wrote President Clinton a letter about this and gave a copy of the letter to the *New York Times*,

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191. Michael Oreskes, *Wright, in Gesture to Bush, Shelves Bill on Covert Acts*, N.Y. TIMES, Feb. 1, 1989, at A12; see also John Felton, *Wright at Center of Nicaragua Policy Storm*, CQ WKLY. REP., Sept. 24, 1988, at 2631, 2631.

192. See George Lardner, Jr., *Gonzalez's Iraq Exposé: Hill Chairman Details U.S. Prewar Courtship*, WASH. POST, Mar. 22, 1992, at A1.

193. A list of Gonzalez's floor statements can be found at David T. Radcliffe, *Broadening Our Perspectives of 11 September 2001*, RATVILLE TIMES 78 n.126 (Sept. 2002), <http://www.ratical.com/ratville/CAH/AOPof911.pdf>.

194. Resolution Calling for an Ethics Probe of Chairman Gonzalez, 102d Cong., 138 CONG. REC. 21,443 (1992). Gonzalez inserted the full text of at least fourteen classified documents into the congressional record.

195. Introduction of Resolution Requesting Immediate Investigation by House Ethics Committee, 102d Cong., 138 CONG. REC. 25,449 (1992).

196. Resolution Calling for an Ethics Probe of Chairman Gonzalez, 102d Cong., 138 CONG. REC. 21,443 (1992); *Congressman Avoids Inquiry into U.S.-Iraq Disclosures*, N.Y. TIMES, Sept. 20, 1992, at 11.

197. Michael J. Glennon, *Congressional Access to Classified Information*, 16 BERKELEY J. INT'L L. 126, 126-29 (1998). Two years earlier, Nuccio had advised members of Congress that the CIA had no connection to these deaths. Schorr, *supra* note 157.



which revealed these allegations.<sup>198</sup> 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.<sup>199</sup> He also argued that even if he violated the secrecy oath taken by all House members, this oath was overridden by his oath of office to uphold the Constitution, which he asserted required him to report crimes involving the federal government.<sup>200</sup> Although some Republican members of Congress wanted to expel Torricelli from the committee, House leaders deferred any such move until after the House Ethics Committee had an opportunity to investigate.<sup>201</sup> The House Ethics Committee found that he violated House rules but did not recommend any sanction.<sup>202</sup> The CIA Director withdrew Nuccio's security clearance, and he resigned from the Department of State, never to work in the executive branch again, although he did work from March 1997 to January 1998 for Representative Torricelli.<sup>203</sup>

On September 11, 2001, Senator Orrin Hatch told *Associated Press* reporters that intelligence agencies had "an intercept of . . . people associated with [Osama] bin Laden [that] acknowledged a couple of targets were hit."<sup>204</sup> While executive branch officials expressed anger about this leak of communications intelligence,<sup>205</sup> 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,<sup>206</sup> this Subsection brings together reports of specific documented examples of congressional leaks of national security-related information.<sup>207</sup> In late 1975, executive branch officials briefed

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198. Jim Geraghty, *A Brief History of Classified Leaks*, NAT'L REV. ONLINE (Oct. 1, 2003, 8:43 AM), <http://www.nationalreview.com/geraghty/geraghty200310010843.asp>.

199. Timothy J. Burger, *Torricelli Wants Public Hearings in Ethics Probe of Alleged Breach of Secrecy Oath*, ROLL CALL, June 1, 1995.

200. Timothy J. Burger, *Ethics Is Asked to Probe Torricelli*, ROLL CALL, Apr. 13, 1995; David Gramm, *Ethics Committee Action on Gingrich May Be Delayed by Torricelli Case*, HILL, May 3, 1995, at 14.

201. Michael Hedges, *Torricelli Keeps Seat, Pending Ethics Probe; Case Centers on Break of Secrecy Oath*, WASH. TIMES, Apr. 8, 1995, at A1.

202. See Geraghty, *supra* note 198.

203. *Id.*

204. Karen Gullo & John Solomon, *Experts, U.S. Suspect Osama bin Laden, Accused Architect of World's Worst Terrorist Attacks*, SFGATE.COM (Sept. 11, 2001), <http://www.sfgate.com/today/suspect.shtml> (internal quotation marks omitted).

205. See Geraghty, *supra* note 198.

206. See Henry J. Hyde, "Leaks" and Congressional Oversight, 11 GEO. MASON L. REV. 145, 147 (1988) ("An officially 'proven' source of leaks on the Hill or elsewhere . . . is extremely rare. Only a handful of leaks have ever been traced through investigation to the culpable individual . . .").

207. For additional nonspecific allegations of congressional leaks, see, for example, Fein, *The Constitution and Covert Action*, *supra* note 154, at 56–61; Hyde, *supra* note 206, at 146–48.

the Senate Foreign Relations Committee and its Subcommittee on Foreign Assistance about the U.S. 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.”<sup>208</sup>

During the Church Committee investigation, there were only two confirmed unauthorized leaks of confidential information.<sup>209</sup> In 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 President Allende of Chile in the early 1970s.<sup>210</sup> In the second incident, committee members leaked to the press President Kennedy’s relationship with a woman linked to the mafia, prior to the Committee’s official disclosure of this information.<sup>211</sup>

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.<sup>212</sup> But the question of whether to publish the report with this classified information went to the entire House of Representatives, which voted on January 29th not to release the report unless the classified passages were first deleted.<sup>213</sup> Chairman Pike was inclined not to publish the report at all rather than 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 16th.<sup>214</sup> The House authorized the Ethics Committee to

208. CRABB & HOLT, *supra* note 42, at 148 (internal quotation marks omitted); *see also* KNOTT, *supra* note 42, at 178 (“[C]overt assistance to the UNITA rebels in Angola reached the press thirty-six hours after it was revealed to the committees.” (citing Donald F.B. Jameson, *The “Iran Affair,” Presidential Authority and Covert Operations*, STRATEGIC REV., Winter 1987, at 24, 29)).

209. SMIST, *supra* note 43, at 38. An August 1975 leak regarding NSA monitoring of international communications “apparently” came from a member or staffer of the Church Committee. Snider, *supra* note 101, at n.5. “The leak had the salutary effect,” prompting the NSA “to explain its side of the story.” *Id.* According to a “legislative aide who has done extended research on international communications and eavesdropping,” international satellite connections enable transmission of computer files internationally. Nicholas M. Horrock, *National Security Agency Reported Eavesdropping on Most Private Cables*, N.Y. TIMES, Aug. 31, 1975, at 1; Hudec, *supra* note 14, at 90 (“[A] couple of Senate staff committee members probably leaked information about SHAMROCK to Bella Abzug’s House subcommittee staff . . .”).

210. SMIST, *supra* note 43, at 49.

211. *Id.* at 38; *see also* JOHNSON, *supra* note 99, at 123–24.

212. CRABB & HOLT, *supra* note 42, at 152; JOHNSON, *supra* note 99, at 180–81.

213. CRABB & HOLT, *supra* note 42, at 152 (explaining that 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”); JOHNSON, *supra* note 99, at 182.

214. Aaron Latham, *The CIA Report the President Doesn’t Want You to Read*, VILLAGE VOICE, Feb. 16, 1976, at 69; *see also* *How Kissinger, the White House, and the CIA Obstructed the Investigation*, VILLAGE VOICE, Feb. 23, 1976, at 59. It was also published as a book in the United Kingdom. CIA: THE PIKE REPORT (1977); MICHAEL WARNER & J. KENNETH McDONALD, STRATEGIC MGMT. ISSUES

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.<sup>215</sup>

In 1981, Representative 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 President Reagan expressing concern about a planned covert action to undermine the government of Libyan Colonel Muammar al Qaddafi.<sup>216</sup> Committee Chair Representative Edward Boland took no action against Zablocki, apparently because "leaks were epidemic."<sup>217</sup> In 1983, the *New York Times* cited the House and Senate Intelligence Committees (as well as administration officials) as sources indicating that the CIA had abandoned a planned covert action to overthrow the government of Suriname after both committees expressed objections to the plan.<sup>218</sup> In 1985, Senator Jesse Helms leaked information about the CIA's program of covertly assisting Salvadoran President Jose Napoleon Duarte's election campaign, allegedly because Senator Helms supported a different candidate.<sup>219</sup> In January 1987, Senator Leahy, vice chair of the Senate Intelligence Committee, unintentionally disclosed an unclassified draft committee report on Iran-Contra to NBC, which broadcast a story about the draft report.<sup>220</sup> After the broadcast, Senator Leahy notified committee Chairman Senator Boren that he had "carelessly" allowed a NBC reporter to look at the draft report and resigned from the committee.<sup>221</sup> Boren instituted new security procedures, requiring that members and staff review documents only within the committee's offices.<sup>222</sup> 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.<sup>223</sup> In 1998, executive branch officials alleged that the Senate Gov-

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OFFICE, U.S. INTELLIGENCE COMMUNITY REFORM STUDIES SINCE 1947, at 30 (2005); see CRABB & HOLT, *supra* note 42, at 152; SMIST, *supra* note 43, at 136.

215. JOHNSON, *supra* note 99, at 190; SMIST, *supra* note 43, at 136.

216. KNOTT, *supra* note 42, at 176-78 (citing BOB WOODWARD, VEIL: THE SECRET WARS OF THE CIA, 1981-1987 (1987)).

217. *Id.* at 177 (citing WOODWARD, *supra* note 216).

218. Philip Taubman, *C.I.A. Reported Blocked in Plot on Surinamese*, N.Y. TIMES, June 1, 1983, at A1; see KNOTT, *supra* note 42, at 176 (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").

219. KNOTT, *supra* note 42, at 176 (citing Daniel Schorr, *Cloak-and-Dagger Relics*, WASH. POST, Nov. 14, 1985, at A23).

220. *Sen. Leahy Admits 'Careless' Leak of Iran-Contra Report*, SAN DIEGO UNION-TRIB., July 29, 1987, at A11.

221. *Id.*

222. *Id.*

223. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 577-78 (1987).

ernment 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.<sup>224</sup>

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 the message had not been translated until September 12th.<sup>225</sup> During a break in the briefing, then Vice Chair Senator Richard Shelby, conveyed this information to two reporters.<sup>226</sup> One of them broadcast it half an hour later, citing “congressional sources.”<sup>227</sup> When the classified briefing reconvened later that day, executive branch officials were outraged that this information had been leaked and chastised committee members.<sup>228</sup> 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 Senator Shelby, who had repeatedly called for the resignation of then CIA Director George Tenet, leaked the information in order to highlight problems in the intelligence community.<sup>229</sup> The DOJ referred the matter to the Senate Ethics Committee, which investigated but declined to take any action against Shelby.<sup>230</sup>

### 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 to further specific policy objectives, such as to oppose particular executive branch policies.<sup>231</sup> 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

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224. Douglas Stanglin et al., *Plugging a Leaky Congress: Why America's Spies Worry About Thompson's Committee*, U.S. NEWS & WORLD REP., Feb. 23, 1998, at 15.

225. 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.COM (July 26, 2004, 12:37 PM), <http://www.msnbc.msn.com/id/5504846/>.

226. *Id.*

227. Allan Lengel & Dana Priest, *Investigators Concluded Shelby Leaked Message: Justice Dept. Declined to Prosecute Case*, WASH. POST, Aug. 5, 2004, at A17.

228. *Id.*

229. *Id.*

230. Martin Kady II, *Senate Ethics Clears Shelby in Classified Information Leak Probe*, 63 CQ WKLY. 3142, 3142 (2005); Murray Waas, *Senate Ethics Committee Clears Shelby*, NAT'L J., Nov. 13, 2005 (on file with author).

231. For a catalog of the various types (and purposes) of leaks of government information, see STEPHEN HESS, *Leaks and Other Informal Communications*, in NEWS & NEWSMAKING 68, 70–72 (1996).

of them.<sup>232</sup> 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.<sup>233</sup> Former Secretary of State Dean Rusk has asserted that the disastrous Bay of Pigs covert action might have been averted if it had been vetted more thoroughly with Congress.<sup>234</sup>

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 misleading congressional intelligence committees by claiming that it was necessary in order to prevent committee members from leaking the accurate information.<sup>235</sup>

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.<sup>236</sup> 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.<sup>237</sup> Nonpoliticians who have

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232. KNOTT, *supra* note 42, at 178 (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”); Hyde, *supra* note 154, at 61 (“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 . . .”); see also Schorr, *supra* note 219, at A23 (stating that former Representative Leo Ryan condoned the disclosure of covert actions “if it was the only way to block an ill-conceived operation”).

233. Fein, *The Constitution and Covert Action*, *supra* note 154, at 57 (“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 ‘hair-brained.’”); Silverberg, *supra* note 73, at 617 (arguing that threatened and actual congressional leaks of covert actions indicate that “Congress is attempting to gain a sort of veto power over” covert actions).

234. DEAN RUSK, AS I SAW IT 208–10 (Daniel S. Papp ed., 1990). Historian Arthur Schlesinger takes a different view of these events. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 175 (1973). According to Schlesinger, when President Kennedy informed congressional leaders of his decision to move forward with the Bay of Pig invasion,

[t]he object was not to consult them but to inform them. . . . Should Kennedy have included members of the Congress . . . [earlier]? This might have made a marginal political difference if the policy had not worked . . . . The serious argument for informal congressional participation would have been if members of Congress might have urged views that the executive branch had not adequately considered. In many cases, especially in the later cases of the Dominican Republic and Vietnam, this might well have been so. But in this particular case Kennedy had already made provision for the forceful representation of a diversity of views.

*Id.*

235. MINORITY REPORT, *in* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 578 (1987) (“Past leaks contributed to decisions that in turn led to these investigations.”); Hyde, *supra* note 206, at 145 (“[T]he Iran/Contra affair . . . highlight[ed] policymakers’ fear of leaks and distrust of congressional discretion . . .”).

236. For an unscientific survey suggesting that politicians are twice as likely to leak than congressional staff, see Robert Garcia, *Leak City: Washington Insiders Are Giving the Nation’s Capital a New Name*, *AM. POL.*, Aug. 1987, at 23, 24.

237. *Cf.* Hyde, *supra* note 206, at 146 (“Congressmen by nature have strong political views, cater to and depend on the press, and are not imbued with the security habits of intelligence professionals.”).

made unauthorized disclosures of classified information will need to find a different career.<sup>238</sup> 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

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 it obtains.<sup>239</sup>

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.<sup>240</sup> 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.<sup>241</sup> 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.<sup>242</sup>

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238. See discussion of Richard Nuccio *supra* text accompanying notes 197–203.

239. See CUMMING, *supra* note 10, at 9 (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” (quoting Testimony of CIA Director Leon Panetta)).

240. See Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1296 (1987). Miller argued that executive branch lawyers should defend executive branch prerogatives and do not represent “the government as a whole.” “In 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.* 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.

241. U.S. CONST. art. I, § 6, cl. 1.

242. In *Kilbourn v. Thompson*, 103 U.S. 168, 196 (1880), 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 the witness, but granted immunity to the members of the House of Representa-

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 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.<sup>243</sup> 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 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 *Gravel* Court rejected the member/staffer distinction, ruling that "for the purpose of construing the privilege a Member and his aide are to be 'treated as one.'"<sup>244</sup> 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 . . ."<sup>245</sup> After *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."<sup>246</sup>

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]."<sup>247</sup> In *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.<sup>248</sup> "Since the Members are immune because the issuance of the subpoena is 'essential to legislating,' their aides share that immunity."<sup>249</sup> In *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

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tives who voted for the resolution. Similarly, in *Dombrowski v. Eastland*, 387 U.S. 82, 84–85 (1967), the Court permitted a suit against the subcommittee's chief counsel for a claim regarding the subcommittee's seizure of records, but ruled that the senator who chaired the subcommittee was immune from suit. In *Powell v. McCormack*, 395 U.S. 486, 505–06 (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. For a very readable analysis and critique of the Court's speech or debate decisions, see JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 93–105 (2007).

243. *Gravel v. United States*, 408 U.S. 606, 608–10 (1972).

244. *Id.* at 616 (*United States v. Doe*, 455 F.2d 753, 761 (1st Cir. 1972)).

245. *Id.*

246. *Id.* at 622.

247. *Doe v. McMillan*, 412 U.S. 306, 320 (1973).

248. 421 U.S. 491, 507 (1975).

249. *Id.* (quoting *Gravel*, 408 U.S. at 621).

introducing material at Committee hearings that identified particular individuals, for referring the [r]eport that included the material to the Speaker of the House, and for voting for publication of the report.”<sup>250</sup> 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 integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings.”<sup>251</sup>

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.*”<sup>252</sup> Thus, 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,<sup>253</sup> issuing press releases,<sup>254</sup> and making requests on behalf of constituents to the executive branch.<sup>255</sup>

Congressional staffers contribute to nearly all legislative functions, and their participation has been particularly critical to the conduct of oversight investigations.<sup>256</sup> Staff members serve as a force multiplier, both in terms of their numbers and in terms of their substantive expertise.<sup>257</sup> Congressional employees outnumber members by a factor of

250. *McMillan*, 412 U.S. at 312.

251. *Id.* at 314 (quoting *Gravel*, 408 U.S. at 625).

252. *Hutchinson v. Proxmire*, 443 U.S. 111, 126 (1979) (quoting *Gravel*, 408 U.S. at 625).

253. *McMillan*, 412 U.S. at 315–17.

254. *Hutchinson*, 443 U.S. at 130–32.

255. *United States v. Helstoski*, 442 U.S. 477, 489–90 (1979).

256. JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT 128, 132 (1990) (citing virtually universal agreement among members and staffers in Congress that “staffers play a significant role in oversight decisions”); Christine DeGregorio, *Staff Utilization in the U.S. Congress: Committee Chairs and Senior Aides*, 28 POLITY 261, 274–75 (1995); Johnson, *Accountability*, *supra* note 43, at 101. For a critique of members’ dependence on staff, see MICHAEL J. MALBIN, UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENT 3–8 (1980).

257. Christine DeGregorio, *Professionals in the U.S. Congress: An Analysis of Working Styles*, 13 LEGIS. STUD. Q. 459, 473 (1988); (finding that staff directors “characteristically work as human extensions of their bosses”); Barbara S. Romzek & Jennifer A. Utter, *Career Dynamics of Congressional Legislative Staff: Preliminary Profile and Research Questions*, 6 J. PUB. ADMIN. RES. & THEORY 415, 418 (1996) (“Staffers provide political, analytical, and logistical support to members of Congress as the members pursue their partisan, legislative, and constituent service agendas.”); Nils Ringe et al., *Keeping Your Friends Close and Your Enemies Closer: Information Networks in Legislative Politics* 11 (2009) (unpublished manuscript), available at [http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1011&context=pn\\_wp](http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1011&context=pn_wp) (“Legislative staffs . . . can be viewed as extensions of the legislators themselves . . .”). As Robert Salisbury and Kenneth Shepsle noted nearly thirty years ago, “each member of Congress . . . operate[s] as the head of an enterprise—an organization consisting of anywhere from eight or ten to well over one hundred subordinates.” Robert H. Salisbury & Kenneth A. Shepsle, *U.S. Congressman as Enterprise*, 6 LEGIS. STUD. Q. 559, 559 (1981). And “staffers . . . enormously expand the scope and range of each member’s policy-relevant activity.” *Id.* at 565.



more than forty to one,<sup>258</sup> and they bring to oversight tasks substantive expertise that members lack.<sup>259</sup> 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.<sup>260</sup>

Staff lawyers, in particular, have played key roles in conducting investigations, including the 1912 House Banking Committee investigation of the Money Trust, led by its counsel, Samuel Untermyer;<sup>261</sup> the 1933–34 Senate Banking Committee investigation of the 1929 Wall Street crash, led by chief counsel Ferdinand Pecora;<sup>262</sup> the 1973 Senate Watergate committee hearings, led by lawyers Sam Dash and Fred Thompson,<sup>263</sup> and the 1987 Iran-Contra committee, led by lawyers Arthur Liman and John Nields.<sup>264</sup> Members cannot be expected to digest and analyze by

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258. 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 ET AL., VITAL STATISTICS ON CONGRESS 2008, at 110, 115 (2008).

259. Barbara S. Romzek & Jennifer A. Utter, *Congressional Legislative Staff: Political Professionals or Clerks?*, 41 AM. J. POL. SCI. 1251, 1252 (1997) (“The 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.”).

260. For a discussion of congressional delegation to staff members in general, see Christine DeGregorio, *Professional Committee Staff as Policymaking Partners in the U.S. Congress*, 21 CONGRESS & PRESIDENCY 49, 49–50 (1994); DeGregorio, *supra* note 257, at 459 (“[Staffers] furnish legislators with information on . . . the substantive implications and the technical and political feasibility of alternative programs.”); Susan Webb Hammond, *Legislative Staffs*, 9 LEGIS. STUD. Q. 271, 281 (1984) (“[P]roviding information is probably the central characteristic of the role definition of the professional staff members.” (quoting Samuel C. Patterson, *The Professional Staffs of Congressional Committees*, 15 ADMIN. SCI. Q. 22, 26 (1970))); Susan Webb Hammond, *Recent Research on Legislative Staffs*, 21 LEGIS. STUD. Q. 543, 550 (1996) (discussing the role of staff in analyzing information and monitoring issues for members); Cindy Simon Rosenthal & Lauren Cohen Bell, *From Passive to Active Representation: The Case of Women Congressional Staff*, 13 J. PUB. ADMIN. RES. & THEORY 65, 65–66 (2003). For a discussion of the specific intelligence oversight tasks conducted by staffers, see JOHNSON, *supra* note 99, at 23–26; SMIST, *supra* note 43, at 4; Loch K. Johnson et al., *The Study of Congressional Investigations: Research Strategies*, 19 CONGRESS & PRESIDENCY 137, 147–52 (1992); Edward I. Sidlow & Beth Henschen, *The Performance of House Committee Staff Functions: A Comparative Exploration*, 38 W. POL. Q. 485, 486–88 (1985) (describing staffers’ role in collecting information); Snider, *supra* note 101.

261. See ARSÈNE PUJÓ, REPORT OF THE COMMITTEE APPOINTED PURSUANT TO H.R. RES. 429 AND 504 TO INVESTIGATE THE CONCENTRATION OF CONTROL OF MONEY AND CREDIT, H.R. REP. NO. 62-1593, at 14 (1913).

262. DUNCAN FLETCHER, REPORT OF THE COMMITTEE ON BANKING AND CURRENCY PURSUANT TO S. RES. 84, S. REP. NO. 1455, at 2 (1934).

263. Jo Becker, *Walking Washington’s Fine Line: As Legal Counsel, Thompson Was Pursuer and Loyalist*, N.Y. TIMES, Aug. 27, 2007, at A1; Warren E. Leary, *Samuel Dash, Chief Counsel for Senate Watergate Committee, Dies at 79*, N.Y. TIMES, May 30, 2004, at N33.

264. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at viii–ix, xv (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. DeGregorio, *supra* note 256, at 266. But in both the high- and low-profile congressional investigations, the participation of staff is critical.

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 *Gravel*, “[t]he 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.”<sup>265</sup>

A second relevant line of cases addresses the presidential communications privilege. In *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.<sup>266</sup> In finding that this privilege has “constitutional underpinnings,”<sup>267</sup> the Court noted that the need to communicate with trusted advisors exists not just in the executive branch, but in every branch of government,<sup>268</sup> and “the privilege can be said to derive from the supremacy of *each* branch within its own assigned area of constitutional duties.”<sup>269</sup> Courts have recognized “the President’s *dependence* on presidential advisers,”<sup>270</sup> acknowledging that he “must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisers.”<sup>271</sup> 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 communications between those advisors and government officials who provide information to help them formulate advice for the President.<sup>272</sup> One can easily see an 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 *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

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265. *Gravel v. United States*, 408 U.S. 606, 617 (1972).

266. 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.”).

267. *Id.* at 705–06.

268. *Id.* at 705 (“[T]he 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.”).

269. *Id.* (emphasis added). In addressing the presidential communications privilege, the Court’s analysis encompassed government officials more generally, not just the President. *Id.* (referring to “the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties”).

270. *In re Sealed Case*, 121 F.3d 729, 751 (D.C. Cir. 1997) (emphasis added).

271. *Id.* at 750.

272. *Id.* at 751–52; *Judicial Watch, Inc. v. Dep’t of Justice*, 365 F.3d 1108, 1123 (D.C. Cir. 2004) (“[T]he presidential communications privilege applies to . . . documents ‘solicited and received’ by the President or his immediate advisers in the Office of the President . . .”).

such material for *in camera* inspection” by a court.<sup>273</sup> 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 *Legal Services Corporation v. Velazquez*, the 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.<sup>274</sup> The Court found that this restriction “threatens severe impairment of the judicial function.”<sup>275</sup> While the plaintiff lawyers argued that this restriction violated their individual First Amendment rights,<sup>276</sup> 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.<sup>277</sup> 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.”<sup>278</sup> 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.<sup>279</sup> 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 nonlawyer experts. The Article uses the rubric of “right to *counsel*,” but

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273. *Nixon*, 418 U.S. at 706.

274. 531 U.S. 533, 546 (2001) (finding the prohibition to be “inconsistent with accepted separation-of-powers principles”).

275. *Id.*

276. *Id.* at 539.

277. *Id.* 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.”); see also *id.* at 544 (stating that federal and state courts “depend [on an independent bar] for the proper performance of their duties and responsibilities”).

278. *Id.* at 545.

279. *Id.* (“[The statute] prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power.”).

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 nonlegal 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.<sup>280</sup> Just as the President has a need for and right to advice from nonlegal advisors,<sup>281</sup> so do members of Congress.<sup>282</sup> In fulfilling its constitutional responsibilities, Congress has a right to consult both its lawyers and nonlawyer expert staff.

#### IV. CHARTING A PATH TOWARD CONGRESSIONAL ACCESS TO COUNSEL

The statutory provision for notifying congressional intelligence leaders is silent on whether those leaders can share information about covert actions with their staff. In the nearly thirty years since its enactment, the executive branch has insisted that they not share this information with staff, and they have acquiesced in this restriction.<sup>283</sup>

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 of plans to consult counsel. If the leader explains this 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 the leader's 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.<sup>284</sup> If the committee leader explains the

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280. *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 advice lawyers render is more crucial to the functioning of the Presidency than the advice coming from all other quarters.

*Id.*; see also *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997).

281. *United States v. Nixon*, 418 U.S. 683, 706–08 (1974).

282. *Gravel v. United States*, 408 U.S. 606, 615–18 (1972).

283. Telephone Interview with L. Britt Snider (Oct. 16, 2009).

284. The intelligence authorization bills for fiscal years (FYs) 2007 and 2008 contained analogous provisions. The FY 2008 bill would have withheld seventy percent 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. Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, 110th Cong. § 328. President Bush vetoed the bill.

plan *after* receiving the information, executive branch officials could try to dissuade the leader 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.<sup>285</sup>

A committee leader who confronted the executive using the ad hoc approach would be taking an enormous political risk. While congressional intelligence leaders sometimes take the risk of opposing the substance of executive branch intelligence policies,<sup>286</sup> they have been unwilling to disregard the prevailing procedural norm of secrecy and consult a lawyer. In addition, such a leader would be exiting from the existing framework for cooperation—such as it is—between the legislative and executive branches. The leader would risk not just popularity, but also continued involvement in intelligence oversight. The historical record suggests that such an ad hoc confrontation is unlikely to occur.

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.<sup>287</sup> 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.<sup>288</sup> Instead, the intelligence committees have developed

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154 CONG. REC. H1419 (daily ed. Mar. 10, 2008). The FY 2007 bill would have withheld all funding for intelligence activities unless they had been disclosed to the full intelligence committees. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 372—INTELLIGENCE AUTHORIZATION ACT OF FY 2007 (Apr. 12, 2007) (criticizing section 307 of the bill).

285. The disciplinary route could be problematic because it would require disclosure of some additional information to the ethics committee. See Burger, *supra* note 199 (noting that two House Ethics Committee staffers received security clearances so they could investigate the charge that Representative Robert Torricelli violated his secrecy oath when he disclosed information about the CIA informant's involvement in extrajudicial killings in Guatemala).

286. For instance, Senator Jay Rockefeller did so when leading the conference on the FY 2008 Intelligence Authorization that voted to mandate use of the Army Field Manual in CIA interrogations. 154 CONG. REC. S. 928–29 (daily ed. Feb. 13, 2008) (statement of Sen. Jay Rockefeller). Senator Rockefeller did not consult an attorney, however. If a legislator of Senator Rockefeller's stature and personal financial resources would not disregard the decades-long practice of secrecy and lawyer consult, it seems unlikely that any committee leader will ever do so.

287. The Intelligence Authorization Act for Fiscal Year 2010 requires the intelligence committees to put in writing their procedures for carrying out intelligence oversight. Pub. L. No. 111-259, § 331(a), 124 Stat. 2654, 2685 (amending 50 U.S.C. § 413(c)). This new requirement that the procedures be in writing provides the committees with the opportunity to clarify the role of their staff.

288. 50 U.S.C. §§ 413–413b (2006). 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 proscribe regulations so that other “[m]embers of Congress and appro-

specific rules regarding staff access to information.<sup>289</sup> Within this framework, the committees themselves can make clear that committee leaders may consult their cleared staff, including their lawyers.

The intelligence committees need to confront the 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.”<sup>290</sup> Congress needs to step up to the plate and assert itself as a coequal 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.<sup>291</sup> When congressional intelligence leaders acquiesced to 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 public 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 current intelligence notification process, which is itself deeply

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priately cleared staff” could access information provided by intelligence agencies about U.S. “military personnel listed as prisoner, missing, or unaccounted for in military actions.” Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, § 405, 105 Stat. 429, 434.

289. The committees developed these rules in consultation with the executive branch in order to protect sensitive information.

290. *United States v. Nixon*, 418 U.S. 683, 703 (1974).

291. *See, e.g.*, THE FEDERALIST NO. 51 (James Madison).

flawed. Notification of congressional intelligence leaders has become a process of inoculation rather 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 intelligence leaders—individually or collectively—cannot by themselves pass legislation to check the executive branch.<sup>292</sup>

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.

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292. Vicki Divoll, Op-Ed., *Congress's Torture Bubble*, N.Y. TIMES, May 13, 2009, at A31.