Confrontation or Collaboration?

Congress and the Intelligence Community

Informing Congress of Intelligence Activities

Eric Rosenbach and Aki J. Peritz

HARVARD Kennedy School
JOHN F. KENNEDY SCHOOL OF GOVERNMENT

Belfer Center
for Science and International Affairs

Informing Congress of Intelligence Activities

Members of Congress cannot monitor the Intelligence Community (IC) without access to information about important and ongoing intelligence activities. In most cases, Congress will have no knowledge of intelligence operations without some level of cooperation with the executive branch. Over the past several decades, the executive and legislative branches have struggled to find the appropriate level of information that should be available to Congress.

This memo provides an overview of the President's obligation to inform Congress of significant intelligence activities—a duty that has taken on renewed importance in light of significant post-9/11 intelligence programs.

Historical Overview

Since the founding of the United States, Congress has long provided oversight of national security and intelligence issues. Examples of this type of oversight include:

- Investigations following the surprise attack on Pearl Harbor during WWII.
- Hearings on Vietnam-era domestic surveillance programs.
- Investigations of pre-war intelligence reports on Iraq's weapons programs.

When Congress passed the National Security Act of 1947—the law that serves as the cornerstone of the modern-day national security apparatus—systematic oversight of the newly reorganized IC was not a priority. After World War II, however, Congress gradually replaced sporadic and ad-hoc investigations with a more regular, organized, and active system of oversight.

Congress eventually formed modern oversight committees, expanded them in the 1970s, and gradually increased their resources. Modernization of oversight mechanisms also resulted in more formal reporting requirements for the executive branch:

- Spurred in large part by the Watergate scandal, Congress in 1974 passed the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961, requiring the President to describe covert activity to the relevant committees in a timely fashion prior to authorization of funds.
- In 1980, Congress passed the Intelligence Oversight Act of 1980 which amended the Hughes-Ryan Amendment. This Act streamlined IC reporting responsibilities to two committees, the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI).

Current Reporting Requirements

The ability of Congress to oversee the intelligence activities of the executive branch is limited by the access that members of the oversight committees have to information about ongoing operations and current intelligence assessments. In an effort to compel the executive branch to provide Congress with information about intelligence activities, Congress adopted in the 1991 Intelligence Authorization bill the modern statutory language that exists today:

> "The President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity…"

When crafting the phrase "fully and currently informed," Congress looked to language used in the Atomic Energy Act of 1946. Congress now interprets this phrase to mean that the IC should affirmatively and proactively report complete, timely, and detailed accounts of intelligence activities.

Covert Action Reporting Requirements

When the President determines that covert action represents the best option for advancing U.S. foreign policy objectives, the law requires him to authorize the covert action through a document called a *presidential finding*. A written finding must be issued within 48 hours after the official policy decision.

- Congress expects that the IC to brief all covert action findings to the full membership of the intelligence oversight committees because they represent *significant intelligence activities*. Furthermore, the National Security Act of 1947 requires the President to report a finding to the intelligence committees "as soon as possible after…approval and before initiation" of the activities.

Extraordinary Circumstances and the Gang of Eight

According to the National Security Act of 1947, the President can limit reporting on significant intelligence activities to a small, select group of members of Congress in "extraordinary circumstances affecting vital interests" of the United States. This select group of legislators is nicknamed the "Gang of Eight," and typically includes:

- The House and Senate leaders from both parties.
- The Chair and ranking members of both House and Senate Intelligence Committees.

The law does not explicitly define "extraordinary circumstances." Nevertheless, Congress intended

that the Gang of Eight exception would apply only to specific time-sensitive covert actions, and *not* all intelligence activities. When passing the 1991 legislation, lawmakers noted that "this provision [should] be utilized when the President is faced with a covert action of such extraordinary sensitivity or risk to life that knowledge of the covert action should be restricted to as few individuals as possible."

If the President finds there are "extraordinary circumstances" and does not immediately inform the committee or the Gang of Eight about the covert action, then the President must still eventually report the activity to the Congress in a "timely fashion" and explain the delay.

- Congress and the White House have disagreed on the meaning of the requirement for reporting in a "timely fashion." Congress generally interprets the requirement as two days, but past Presidents have withheld information for a longer period. This has led to friction between the two branches in the past.

Case Study: The NSA Warrantless Surveillance Controversy

Conflict over presidential reporting obligations, congressional oversight and interpretation of statute surfaced during the recent debate about electronic surveillance. In December 2005, President Bush publicly announced he had authorized the National Security Agency (NSA) to secretly monitor electronic communications without court-issued warrants. The NSA reportedly intercepted the communications of individuals the NSA believed had links to terrorist groups, even if the communication originated, passed through or terminated within the U.S. In the past, collection of these types of communications required a warrant obtained through the Foreign Intelligence Surveillance Court.

The Bush Administration maintained that it fulfilled congressional reporting obligations on the program because:

- The White House briefed the Gang of Eight more than twelve times, affording these members the opportunity to voice opinions or concerns about the program.
- According to Attorney General Alberto Gonzales, the Director of National Intelligence (DNI) only has to inform Congress "[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters."
- It was "common practice" for the White House to inform only the committee chair and ranking member or the "Gang of Eight" for activities similar to the surveillance program.

Members of Congress who wanted full briefings on the NSA program argued that the warrantless surveillance program was not a covert action. Hence, the program did not qualify for limited briefings to the Gang of Eight under the "extraordinary circumstances" exception.

From some lawmakers' perspectives, the administration offered few legitimate reasons for limiting briefings on the program to the Gang of Eight. Furthermore:

- Some members of the Gang of Eight disagreed with the Administration's assertion that they had been given an opportunity to voice their opinion or to disapprove the program.
- Some Bush Administration critics argued that the limited briefings were a deliberate attempt to impede active and effective oversight since the Gang of Eight could not discuss the complex program with legal and technical experts on their staffs.
- The lack of congressional oversight may have harmed the perceived legitimacy of the program.

Sources

Informing Congress of Intelligence Activities

1991 Intelligence Authorization Act (P.L. 102-88).

Bazan, Elizabeth B. and Jennifer K. Elsea, "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information." Congressional Research Service. 5 January 2006.

"Covert Action: Legislative Background and Possible Policy Questions." Congressional Research Service, 28 January 2008.

Lowenthal, Mark. Intelligence: From Secrets to Policy, 2nd Edition. CQ Press: Washington DC, 2003.

President George W. Bush Radio Address, Dec. 17 2005.

Rindskopf, Elizabeth R. Intelligence Oversight in a Democracy, 11 Hous. J. Int'l L. 30 (1988-1989).

Reid, Edwina Clare. Congressional Intelligence Oversight: Evolution in Progress, 1947 – 2005, Thesis for the Naval Postgraduate School, September 2005.

"Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions." Congressional Research Service, 18 January 2006.

Vandenberg, Lt. Gen. Hoyt. S. "Hearing before the Committee on Expenditures in the Executive Departments, First Session" on H.R. 2319, 27 June 1947.