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LEGAL PERSPECTIVES ON CONGRESSIONAL NOTIFICATION

HEARING

BEFORE THE

SUBCOMMITTEE ON INTELLIGENCE COMMUNITY MANAGEMENT

OF THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

Hearing held in Washington, DC, October 22, 2009

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LEGAL PERSPECTIVES ON CONGRESSIONAL NOTIFICATION

THURSDAY, OCTOBER 22, 2009

HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
SUBCOMMITTEE ON INTELLIGENCE COMMUNITY MANAGEMENT,
Washington, DC.

The subcommittee met, pursuant to call, at 10:06 a.m., in Room HVC–340, Capitol Visitor Center, the Hon. Anna G. Eshoo (chairwoman of the subcommittee) presiding.

Present: Representatives Eshoo, Hastings, Holt, Ruppersberger, Schakowsky, Murphy, Reyes (ex officio), Thornberry, Rogers, Myrick, King, Hoekstra (ex officio).

Chairwoman ESHOO. Good morning, everyone. I call this hearing to order. The Ranking Member has joined us. Members will be coming in. I want to welcome everyone that is here today; most especially, our panel of witnesses who we are very grateful to for sharing their views with us.

Today's hearing very importantly examines the provisions in the National Security Act of 1947 that established how the President keeps Congress informed of intelligence activities. It is part of the full committee's investigation into whether the Intelligence Community has met its obligation to keep Congress "fully and currently"—and that term comes from the National Security Act—informed of intelligence activities.

The obligation is a solemn one. Intelligence activities necessarily take place in secret, the details known only to those who execute and plan them. They are not subject to the scrutiny of public debate, competing interest groups, or taxpayers. The only people outside the executive branch who may examine these activities are members of the congressional Intelligence Committees. We act as the stewards of the public trust, a check on a system that sometimes acts without the benefit of independent perspectives.

Congress cannot fulfill its constitutional role without access to information. Congress has a duty to learn, and the executive branch has a duty to share, the information that is necessary for Congress to authorize, to appropriate funds, and oversee the activities of the Federal Government, including intelligence activities.

The manner in which the branches have shared information has evolved in the decades since World War II. From 1947 until the mid-1970s, the Intelligence Community briefed Congress primarily through informal meetings with a handful of senior committee chairmen. The Church and Pike Commissions helped usher in reforms that led to the creation of the Intelligence Committees and

required that the President report to Congress when initiating a covert action.

The Iran-Contra affair and revelations about other U.S. government activities in Latin America spurred Congress to create the current standard in 1991; that the President must keep Congress "fully and currently informed" of all "significant" and "significant anticipated" intelligence activities.

But even the statutory regime is flawed. Members of this committee have been repeatedly frustrated by the lack of prompt, thorough notification of intelligence activities. Public revelations of intelligence activities after 2001 have also raised serious questions about the commitment of the executive branch to meeting not just the letter of the law, but its intent as well.

Some have argued that there is no obligation to notify Congress if an activity is not "operational," a term not found in the statute. There have been disputes about what "significant" actually means in this context. We need to understand why there are no penalties in the National Security Act itself and what Congress' remedies are if the executive branch does not comply with its obligation to keep Congress informed.

I hope each one of our witnesses today can help us answer these questions and gain a deeper understanding of Congress' oversight role, the history of Congress and the Intelligence agencies, and the meaning of the statute itself.

Before I welcome our panelists and introduce them individually, I would like to recognize what I think is really a wonderful and outstanding Ranking Member of this subcommittee, Ms. Myrick, for any statement she may wish to make.

Mrs. MYRICK. Thank you, Madam Chairwoman. Welcome to our witnesses, all. Today, we are talking about congressional notification. There is one thing that is of great concern to me that I wanted to mention. This is the ninth-month anniversary of President Obama's decision to close the Guantanamo Bay detention facility. And so I can't think of a better time to discuss the lack of notification to Congress about the plans for this facility and the terrorist prisoners there.

The decision was rushed and the President didn't have a plan when he started out on this. And in the time since he has made this choice, the administration has refused to brief this committee on how it will implement the decision or to discuss the threats posed by moving detainees to the United States.

The public hearing is very timely. It gives Congress a rare opportunity to discuss before the American people both the threat posed by the closure of GTMO and the refusal of the administration to keep Congress fully and currently informed on this national security issue, which I happen to believe is a huge one.

I ask all of our witnesses today to comment on why you think it is important that a national security policy that could mean moving terrorist suspects into American communities must be conducted with full transparency, full congressional notification, and with tough congressional oversight.

There were reports that could include moving Guantanamo detainees to California, North Carolina—my State—Kansas, or Michigan. There are other reports that some of these places may or may

not still be under consideration, but the reality is, unfortunately, no one knows which of these reports is true because the administration has not notified Congress of its plans for Guantanamo Bay, and it has not offered that transparency to the American people.

So I welcome this hearing this morning and I believe it is a chance to move beyond discussing just the issue of notification as an academic one and to examine it as an issue that has real-life consequences.

With that, I again welcome witnesses and look forward to your testimony. And, thank you, Madam Chairwoman.

Chairwoman ESHOO. Thank you. I would like to remind my colleagues that the subject of today's hearing is the "Congressional Notification of Intelligence Activities." We have asked our witnesses to testify to the history and relevance of provisions in the National Security Act of 1947 that require congressional notification generally, as well as those that address covert actions and regular collection activities.

I think the members of this committee know very well that the detention facility at Guantanamo Bay is not under the jurisdiction of the Intelligence Committee and is really outside the scope of this hearing. Obviously, members can choose to say whatever they want to say, but I think, with all due respect to not only the construct of this hearing and its very purpose and the witnesses that we have called who are experts in the area of not only the history and the relevance of the provisions in the National Security Act and congressional notification, that that is what this hearing was set up to examine, and that is what we will do.

I now would like to recognize the distinguished Chairman of the full Intelligence Committee of the House, Mr. Reyes of Texas.

Mr. Chairman.

Mr. REYES. Thank you for convening this very important hearing. This is one of several hearings on congressional notification that the Intelligence Committee will conduct, both open and closed. This is an open hearing today. These hearings are part of a full committee investigation into the symptoms that make up the broader issue of the timely and accurate notification to Congress of intelligence activities.

I have asked the subcommittee to look into the state of the law on notifications. I thank you, Madam Chairwoman, for working hard in looking into all these different aspects.

Obviously, this is a serious issue that we want to look at and we want to get as many different perspectives as possible and feasible. In other aspects of the committee's investigation, we will be looking into specific instances in which the community may have fallen short of its obligations.

Today, though, Chairwoman Eshoo has assembled for us two distinguished and expert witnesses, to which I add my welcome and thank you for agreeing to be here this morning. Just looking and reading your bios, I really appreciate the experience that you bring to this hearing today.

I also welcome you, sir. Thank you for agreeing to be here.

I guess you can say that from your perspective and your experience, you had ringside seats to the debates that actually led to the key provisions of the law that we will be discussing both today and

in this process, trying to fix something that hasn't worked, at least to the satisfaction of keeping Congress fully and functionally informed.

As I think all of us know and appreciate, this is a serious subject, one that goes to the heart of what is this committee's obligation to conduct a thorough oversight of intelligence activities of the United States.

I appreciate that we work in a political body and that sometimes more provincial issues can take center stage. There are things we can control and things that we can't. I hope that we remain focused today on the larger question of what the requirements are for notification in the realm of intelligence activities. I know we will have opportunities later to discuss specific instances as they may apply broadly across our country, but today is not the day for that.

I think it is imperative that we get different perspectives and we have as complete an understanding as possible so the committee can move forward and do its very serious work.

So, again, welcome to all of you. Thank you for being here.

Madam Chairwoman, thank you for convening this very important hearing. I regret that I won't be able to stay because I am in another hearing myself, but I look forward to your recommendations.

Chairwoman ESHOO. Thank you, Mr. Chairman. This subcommittee is really devoted to producing a sound report to the full committee, the completion of our work that you charged us with. So thank you for being here this morning.

With that, I would like to recognize the distinguished Ranking Member of the full committee, Mr. Hoekstra.

Mr. HOEKSTRA. Thank you. I appreciate the time. And I appreciate the direction that the Chairwoman has set, that this is about intelligence and it is about the National Security Act. It is exactly for that specific reason that we do want to talk about GTMO and the Guantanamo facility, because we know that where the prisoners and the detainees are housed at GTMO, whether they are housed in GTMO or somewhere in the United States, will affect our ability to gather intelligence from these individuals.

We, I think, all recognize that many of these individuals that are in GTMO have been identified as high-value targets. And this is also the responsibility of the committee because we have received information through the committee and have been notified through the committee of significant information regarding these individuals, their detention, that may or may not impact where these individuals should be located, and information that should be available to the people in the State and the communities where these individuals may be moved to.

We go back to January 22, as the Ranking Member indicated, the Obama administration decided to move these individuals or to close the GTMO facility. Since that time, there has been a total lack of transparency on its efforts to close the detention facility, although it will have a significant impact on intelligence. Despite signing that executive order for the facility to be closed in one year, the President has still failed to provide any plan on how this administration will do so.

The Obama administration is scrambling to find a place to move Guantanamo detainees. It refuses to meet with this committee to discuss known security risks, legal issues associated with moving them to America and elsewhere around the world. The Obama administration is also refusing to provide any information to State and local officials on the security profiles we have built on the detainees or to talk about relevant security precautions that must be taken before relocating prisoners to my home State, Michigan, or anywhere else in the United States.

It is clear that President Obama and Secretary Gates are trying to shut down congressional oversight. They are willing to disregard the requirements of the law to keep the congressional Intelligence Oversight Committees fully and currently informed about national security matters.

The Obama administration officials clearly do not want to answer any tough questions about what so far has been one of the most disastrous policy decisions made by this President. Even though President Obama and his officials know full well there are extremely dangerous terrorist suspects in Guantanamo that cannot be safely transferred, they still plan to move them, including bringing some to the United States.

The consequences of the President's decision and whether it is necessary or wise to close Guantanamo Bay are legitimate and timely topics that should be the subject of robust congressional oversight and debate.

I am glad that Dave Munson is here. He is here as a representative from Standish, Michigan, because the Obama administration is thinking of relocating GTMO detainees to a soon-to-be-closed prison there. Mr. Munson organized a grassroots effort to oppose this move and has been asking tough questions of local, State, and Federal officials. Mr. Munson and I agree that although Michigan and Standish are facing tough economic times, our State does not need an al Qaeda stimulus.

Worried residents of Michigan want to know more about plans to move GTMO detainees to our State. Residents of other States are also asking questions. I have asked questions and sent letters. I have asked the Obama administration for permission to provide information on the detainees to Michigan officials and to allow me to lead a delegation of State lawmakers for an oversight visit to the GTMO facility. All of our requests have been denied. Along with them, the American people, the people of my home State, and even Dave Munson, were denied much-needed transparency on this serious security issue.

So often we talk about the lack of transparency and the requirements of the National Security Act as how they impact us here in Washington and the relationship between the executive branch and Congress. Today, we add another dimension to that discussion and to that debate: what happens when there is a lack of transparency, a lack of accountability, and a lack of following the law of keeping people and Congress and others fully informed on national security issues?

Today we add the local dimension. A small community that is facing tough economic times, and what happens when they are promised things from Washington, DC—at least certain people may

be—but the community, State legislators, and the congressional delegation is refused access to that information that should be fully shared and open as that discussion and those decisions are being made.

I am glad that Dave is here today to provide that additional dimension to that debate. It clearly relates to intelligence and it clearly relates to local issues and it clearly relates to statutory requirements to keep us fully and currently informed.

Thank you, Madam Chairwoman.

Chairwoman ESHOO. The chairman of the full committee is recognized.

Mr. REYES. I just want to make sure that the record is clear that we have jurisdiction in this committee and rules in the House that we have to abide by. The issues that the Ranking Member just raised are the jurisdiction of the Armed Services Committee. There are a number of us that are on the Intelligence Committee—that are also members of both committees. But it is very important that we understand that those jurisdictions have to be respected.

I know that he and I have worked hard to protect the jurisdiction of this committee. I know that Chairman Skelton and Ranking Member McKeon worked very hard to protect the jurisdiction of this committee, and we ought to respect that.

Hearing the comments of the Ranking Member, this is something that individually we have to be responsible in how we approach the jurisdiction and the topics that this committee looks at. I could make the same kind of argument and bring somebody here from the border to address the violence that is currently going on in Mexico and somehow stretch that into the national security issue, but that is not what this is about.

This shouldn't be about a personal issue that you want to look at. This is about the bigger issue of how do we move forward in making a case for and fixing a system that hasn't served us well in the Congress. And that is why you two gentlemen are so critical to this, because, as I said, you have held ringside seats when these issues were being discussed, when these issues were being formulated.

I am anxious to hear your perspective so that we can get back to how we can work as a coequal branch of government with the executive branch so we can get our respective jobs done.

I just wanted to make sure that the record was clear on that issue, and thank you for the time.

Mr. HOEKSTRA. Mr. Chairman.

Chairwoman ESHOO. Thank you. Mr. Hoekstra, do you want to yield?

Go ahead.

Mr. HOEKSTRA. Thank you. Mr. Munson here is going to provide us with a front-row seat as to what happens when the requirements are not met. This is very much an intelligence issue. Many of these people that are housed in GTMO are individuals that we continue to gather intelligence from. So it is the responsibility of this committee.

We receive information on these detainees on a regular basis in our committee that we are briefed on. And to say that this is just solely the jurisdiction of the Armed Services Committee is totally

inaccurate. We get information on a regular basis as to who these folks are, how they may or may not be assisting us in our ability to comprehend the plans, intentions, and capabilities of al Qaeda and radical jihadists, and recognizing that if we move these individuals to another location, our ability to gather that intelligence may be compromised or may be limited, but we do know it will be changed.

It is very much an intelligence issue, and also an intelligence issue as to how this impacts a local community.

Chairwoman ESHOO. I would like to start the hearing.

Mr. HOEKSTRA. I am just asking for the same amount of time to respond to the Chairman's critique of the statement that I have. If you want to shut this down, we know you have the capability and authority to make that happen. I believe that would be a very unfortunate step to take.

Chairwoman ESHOO. I am not going to take any unfortunate steps today, Mr. Hoekstra. This hearing is clearly to examine the National Security Act. All of the members know that. This was a charge of the Chairman of the full committee to the full committee of members and what each subcommittee would do relative to the overall investigation and examination.

So I am very pleased that it is public. I think all the members of this subcommittee know what my preference is, and that is that we have as many public hearings so that the people of our country are well instructed. The statute does not address the right of locals to be informed about intelligence activities. It is certainly your prerogative to raise something that is in your State and a concern. We welcome the Minority witness from Standish, Michigan. We are very pleased to see you. But we are going to stick with the reason why we called this hearing today.

As I said in the beginning of my remarks, when we talk about the obligation to keep Congress fully and currently informed of intelligence activities, that that is an obligation that is really a solemn one.

So with that, I would like to once again welcome our panelists and I would like to introduce the Honorable L. Britt Snider, who is sitting in the middle of the table. That is in fine print there on the card. He served as the first statutory Inspector General of the Central Intelligence Agency from 1998 to 2001. Prior to that, he served as the General Counsel to the Senate Select Committee on Intelligence. He is the author of "The agency and the Hill: CIA's Relationship to Congress, 1946 to 2004."

If any member of the committee has not gotten that book, I would suggest that you do. Now it may not be the fastest moving page-turner, but it is so highly instructive and you will come away enriched, I believe, to learn the history, to understand the history that he has set forth so factually from after World War II up to the present moment. So thank you for your brilliant work. He is currently a visiting scholar for the CIA's Center for the Study of Intelligence.

Seated next to him is Mr. Fritz A.O. Schwarz, Jr., who has served as the General Counsel to the Church Committee. He is the coauthor of "Unchecked and Unbalanced: Presidential Power in a Time of Terror." He is currently the General Counsel to the Bren-

nan Center for Justice at the NYU School of Law. He is also a senior partner at Cravath, Swain and Moore in New York. We welcome you and we thank you for your brilliant work. I am also reading your book. I would recommend it to all the members of this committee.

Of course, we welcome Mr. David Munson, who is a private citizen from Standish, Michigan. Thank you for traveling to Washington, DC to be here with us.

STATEMENTS OF L. BRITT SNIDER, FORMER INSPECTOR GENERAL, CHURCH COMMITTEE; FRITZ A.O. SCHWARZ, JR. FORMER CHIEF COUNSEL, CHURCH COMMITTEE; AND DAVID E. MUNSON, PRIVATE CITIZEN, STANDISH, MICHIGAN

Chairwoman ESHOO. With that, we will begin with Mr. Snider. You are recognized and we look forward to your testimony.

STATEMENT OF L. BRITT SNIDER

Mr. SNIDER. Thank you, Madam Chairwoman. I would correct one thing. I was actually the second statutory IG at the CIA. Fred Hitz was my predecessor.

It is indeed a pleasure to be here with you today. I have been asked to provide a brief historical perspective on the congressional notification issue and limit my remarks to 10 minutes, which I am going to try to do, but it will require me to skip over fairly large portions of my prepared statement, so please bear with me while I go through this.

There was nothing that required intelligence agencies to keep Congress informed of their activities until the mid-1970s. Before that, what was shared with Congress was a matter of what a DCI believed Congress needed to know in terms of securing his appropriation each year, or what the DCI believed Congress needed to know in order to explain something that had found its way into the press.

Having said this, I found no instance in my research where a DCI ever refused a request from a chairman of one of his subcommittees during this early period. And as you all will recall, at that point, the subcommittees of the Armed Services Committees and Appropriations Committee on each side did oversight of the CIA. In fact, the DCIs took great pains to court their overseers during this early period. But they didn't ask very much of the agency at that point. All of them, I think, wondered if they were being told the whole story.

In fact, I came across instance after instance where they asked the DCI that question, whether they were being given the entire story. But they thought that the CIA was carrying out an important mission and they thought an overly inquisitive Congress could only detract from that mission. By the mid-1970s it had become painfully clear that the existing arrangements were inadequate.

The CIA subcommittees simply had not known of the alleged improprieties and illegalities that began coming to light during this period in wave after wave of press disclosures. I am referring to collecting political activities of U.S. citizens, interfering in the elections of democratic countries, building an infrastructure at the CIA to carry out political assassinations, conducting drug experiments

on unwitting subjects within the United States, these kinds of things. The CIA subcommittees were not aware of any of these activities and really didn't know enough to ask about them.

The congressional committees that were set up to investigate these activities, the Church Committee in the Senate and the Pike Committee here in the House, both recommended at the end of their work that permanent committees be established, dedicated to the oversight of the CIA and the rest of the intelligence Community. Of course, the Senate acted first, in May of 1976, to create the SSCI. The House took a bit longer, creating HPSCI in August of 1977.

I think if there were one thing Congress intended when they created these committees, it was to improve the awareness of Congress as an institution with respect to U.S. intelligence activities. In fact, one need to only look at the language of S. Res. 400 that created the Senate Intelligence Committee, which included among other things, "sense of the Senate" language that the heads of all intelligence agencies should keep the new committee fully and currently informed of their activities, including any significant anticipated activities—words that have become very familiar to all of us.

The resolution went on to say it was the sense of the Senate that intelligence agencies should provide any documentation that was requested by the committees. Also, it went on to say that the agencies should report any violation of law or executive branch regulation that they became aware of. These words were not legally binding upon the agencies, but they were the first expressions by either House of Congress in terms of what they expected intelligence agencies to do vis-a-vis the oversight committees they were creating.

Two years later, the Carter administration issued an executive order on intelligence which did make these obligations in the Senate resolution binding upon the intelligence agencies. Two years after that, Congress passed the Intelligence Oversight Act of 1980, incorporating them into statutory law that would now be binding on future administrations, not just the Carter administration.

The 1980 act also did several other things. It pared the number of committees to receive notice of covert actions under the old Hughes-Ryan amendment from eight committees to two—the two Intelligence Committees. It also gave the President the option of providing notice, where particularly sensitive intelligence activities were concerned, to a group of eight congressional leaders, the so-called Gang of Eight, rather than the committees as a whole. This option originally was to be available whether the intelligence activity involved sensitive collection or covert action.

In addition, where covert actions were concerned, the new law specifically recognized that there may be occasions where the President cannot provide prior notice either to the Gang of Eight or to the full committees, and that when that occurred, notice would be provided the committees "in a timely fashion," together with an explanation of why prior notice could not have been given.

The 1980 act was amended in 1991, both to take into account what had happened during the Iran-Contra scandal during the late 1980s, as well as to take into account the practice under the statute to that point.

The basic obligations of intelligence agencies vis-a-vis the committees remained the same, but several important adjustments were made in the notification process. One of these was to limit the Gang of Eight option to covert actions only, rather than making it available to notify the committees of any intelligence activity that was particularly sensitive.

While the timely fashion formulation was retained, where prior notice of the covert action had not been given, the committee said in report language they expected the notice to be provided, without exception, within a few days of the President's approving a covert action finding.

There have been no major changes to the notification requirements since 1991, although, as I point out in my prepared statement, there have been some changes in the practice under the statute.

Allow me to close now with just two observations and something of an eye to the future. Ever since the obligation to keep the oversight committees fully and currently informed first appeared in the law, there has been, as a practical matter, a degree of latitude in terms of how this should be done. From the very beginning, in fact, the heads of intelligence agencies would brief particularly sensitive intelligence activities, first with the leaders of the two oversight committees and perhaps their key staff, before providing notice to the committees as a whole. The purpose of these consultations would be to discuss how the sensitive matter at issue would be handled within the committee; when would the full committee be briefed, whether there were certain details that could be left out that were not crucial to the committee's ability to weigh the operation in question, whether documentary materials would be retained by the committee or kept within the executive branch, how many staff would be cleared, and so forth. The kind of things you might do to limit the security risk while still accommodating the needs of the committees.

There is nothing in the law that precludes this kind of consultation and, in fact, over the years I think it has been very useful to have had these discussions. I don't see them as a substitute for notice to the full committees, but rather as a way of getting there in a way that satisfies, to the extent we can, the interest of both branches.

The last observation I would make deals with the notice to the Gang of Eight and, from the standpoint of the Congress, it has never worked very well. The problem in my view has not been with notice to the Gang of Eight per se, but rather with how it has been implemented. It is weighed too heavily, I think, in favor of the executive branch. It does not sufficiently take into account congressional needs.

I don't think the Congress, when Congress provided this option, intended it to be that way, but I think that is the way it has evolved and been implemented. The statute itself simply says that in especially sensitive cases the President has the option of providing notice of covert actions to a smaller group. It doesn't say what this smaller group may do with the information. But the executive branch has told them. In fact, it has told them they can't

do anything with the information. And over the years, the Gang of Eight has acquiesced in what the executive branch has told them.

I think, personally, this has been a mistake, because when it has happened, it has effectively marginalized congressional oversight. It has meant that eight congressional leaders can only react to what they hear, without the advice of their professional staffs, without the advice of knowledgeable colleagues. And I think this is difficult for them to do, coming at it cold, having it presented to them in the most benign way possible.

If they decide they have a problem, they have to be able to articulate on the spot what that problem is in a convincing way. If they later decide they have a concern, then they have to take it upon themselves to go back and raise it with the administration. Again, they are going to have to rely on their own memory, because they weren't allowed to take notes at the briefings and there is no record of what they were told that they have access to.

And so just very few, I think, congressional leaders are going to be willing or able to do this. But rest assured, if whatever program they have been briefed about subsequently goes south, their buy-in will be touted by the administration very prominently.

I just simply don't think this is fair to the members involved. If the Gang of Eight option is to be kept, and I think an argument can be made that it should, then I think something needs to be done to restore the balance; something that better recognizes and accommodates the needs of the eight congressional leaders.

I personally think it can be done by each committee adopting procedures without amending the statute itself. But it would be desirable, I think, that these procedures be developed with the administration's participation and with their concurrence if this is going to work. I think this is possible if both branches operate in good faith.

Madam Chairwoman, I continue to hope that it will happen. Thank you.

Chairwoman ESHOO. Thank you, Mr. Snider, for your excellent testimony and, really, for all the contributions you have made to the well-being of our country. Again, we are honored to have you here.

[The statement of Mr. Snider follows:]

Statement of L. Britt Snider

Before the Subcommittee on Intelligence Community Management
of the House Permanent Select Committee on Intelligence

October 22, 2009

Madame Chairwoman, Ms. Myrick, Members of the Subcommittee, it is a pleasure to be with you this morning. I have been asked to provide a brief historical perspective on the congressional notification issue.

I would say, by way of background, that I served on the staff of the Church Committee in the Senate in the mid-1970s, then went to the Defense Department where I continued to be involved in intelligence oversight. I returned to the Senate Intelligence Committee staff at the beginning of 1987, as Iran-contra was unfolding, and stayed on as its General Counsel through 1995. After a hiatus as staff director of the Aspin Brown commission, and teaching for a short time at Cambridge, I came back to the CIA in 1997, first as a special counsel to DCI Tenet, and then was appointed by President Clinton as Inspector General in 1998. I retired from federal service in 2001, but continued to write about the congressional oversight of intelligence as well as teach a graduate-level course on it at Georgetown. More recently, I wrote a book under contract with the Agency about its relationship with Congress over the years. So, I've been dealing with this subject both as a practitioner and as an academic for quite some time.

There was nothing that required intelligence agencies to keep Congress informed of their activities until the mid-1970s. Before that, what was shared with Congress was a matter of what a DCI believed Congress needed to know in order to secure his appropriation each year, or else what the DCI believed Congress needed to know to explain something that had found its way into the press. The level of detail provided Congress varied not only from DCI to DCI, but it varied in terms of who the people doing the oversight were. During this early period, oversight of the CIA was handled by small, hand-picked subcommittees of the Armed Services committees and Appropriations committees in each house. Some of those doing the oversight were tougher than others; some were more demanding. But, by any standard, oversight was far more cursory, far less intrusive than it is today.

Having said that, I could find no instance in the course of my research when a DCI ever refused a request from the chairmen of one of his subcommittees. Indeed, DCIs took great pains to court them during these early years. But those doing oversight did not ask much of the Agency. All of them, I think, wondered if they were being given the whole story–in fact, they would seek such assurance from time to time from the DCI. But they thought CIA was carrying out an important mission, and that an overly inquisitive Congress could only detract from that. As its foremost overseer during most of this early period--Senator Richard Russell of Georgia--wrote in 1956, "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, it is the CIA."

By the mid-1970s, however, it had become painfully clear that the existing oversight arrangements were inadequate. The CIA subcommittees had simply not known of the alleged

improprieties and illegalities that suddenly began coming to light in wave after wave of press exposes: Collecting on the political activities of U.S. citizens, for example, using every kind of technique imaginable, from intercepting their communications and opening their mail to examining their tax returns. Interfering in the elections of democratic countries. Building an infrastructure at CIA to assassinate foreign heads of state. Doing drug experiments on unwitting subjects in the United States. The CIA subcommittees were not aware of any of these activities and did not know enough to ask.

The congressional committees that were set up to investigate these dubious activities–the Church Committee in the Senate and the Pike Committee in the House–both recommended at the end of their work that the old system be scrapped in favor of establishing separate oversight committees in each House dedicated to oversight of the CIA and the rest of the Intelligence Community. And, of course, the Senate acted first in May, 1976 to create the SSCI. The House took a bit longer, creating the HPSCI in August, 1977.

I think if there was one thing Congress intended when it created these committees, it was to improve the awareness of Congress as an institution, with respect to intelligence activities.

In fact, one only need look at Senate Resolution 400 that created the Senate Intelligence Committee to find, among other things, "sense of the Senate" language that the heads of intelligence agencies should keep the new select committee "fully and currently informed" of their activities "including any "significant anticipated activities." The resolution went on to say that it was the sense of the Senate that intelligence agencies should provide any documentation requested by the new committee, and report to it any violation of law or Executive branch regulations they became aware of. These words were not legally binding upon the agencies, but they were the first expressions by either house of Congress of what it was they expected intelligence agencies to do vis-a-vis these new oversight committees.

Two years earlier, Congress had enacted legislation that required that certain of its committees be informed of covert actions. This was the so-called Hughes-Ryan Amendment, enacted in 1974, which prohibited CIA from spending money for covert actions unless the President had personally found that they were important to the national security, and these "findings" had been reported to the "appropriate committees" of the Congress in a "timely" manner. The term "appropriate committees" was interpreted to include the two armed services committees in each house, the two appropriations committees, and the two foreign relations committees. When the intelligence committees were created, they were added to the list, bringing to a total of eight the number of committees that had to be notified of covert actions.

The Hughes-Ryan amendment did not say *how* notice was to be provided to these eight committees, and in practice, the notification process was haphazard and chaotic. Occasionally one of the committees receiving such notice would launch an inquiry into what they'd been told, but this was rare.

Regardless of how well the notification process worked in practice, however, the requirement to notify eight congressional committees of covert actions discouraged the Agency from doing them. Frank Carlucci, who was Deputy DCI at the time, told the Senate Intelligence

Committee in 1978 that CIA's capability to do covert action had essentially become "moribund" as a result of the notification requirement. As a practical matter, only the intelligence committees, by virtue of their secure infrastructures, were capable of doing oversight of covert action, and, as the intelligence committees began to establish themselves in the late 1970s, the other committees became increasingly willing to defer to them.

In 1978, the Carter Administration issued an Executive order on intelligence, following upon an earlier one issued by President Ford, and, among other things, it picked up the "sense of the Senate" language from S. Res. 400, I referred to a moment ago, and made it binding upon the Intelligence Community. Thus, for the first time, intelligence agencies would be required to keep the two intelligence committees fully and currently informed of their activities, including significant anticipated activities. They would have to tell the two intelligence committees not simply what they were doing, but what they planned to do, if it was "significant."

But the Carter Executive order provided that these obligations were to be carried out under procedures established by the President, and had to be "consistent with applicable authorities and duties, including those conferred by the Constitution...and by law to protect sources and methods." In fact, no implementing procedures were issued by President Carter in part because Congress at the time was considering incorporating the notification provisions into statute.

Indeed, two years after the Executive order issued, Congress passed such legislation. I'm referring, of course, to the Intelligence Oversight Act of 1980, enacted in the final year of the Carter Administration. The new law carried over the obligations that were in the Carter Executive order, making them binding on future Administrations–and this was particularly important to the two intelligence committees–but the Administration also insisted that the same kind of preambular language that had been used in the Executive order be carried over in the new statute.

Neither of the committees much liked these preambular clauses–they weren't sure how the Executive branch would interpret them–but in the end they accepted them in order to get the legislation enacted. So, you had one preambular clause saying essentially that the obligation to notify had to be consistent with all applicable authorities including those conferred by the Constitution. You had another saying notification had to be consistent with the protection of sources and methods. The committees accepted this latter clause because they were amenable to discussing with the Executive branch *how* notification of intelligence activities would be provided them, and to guard against this clause being used to justify withholding information from them altogether, they inserted a provision saying that nothing in the Act should be construed to suggest that the protection of sources and methods was justification in and of itself for withholding information from them.

So, the 1980 Act was a compromise that attempted to accommodate the interests of both branches. Overall, the committees believed, it was a significant improvement over the status quo.

Among other things, the new law pared the number of committees to receive notice of

covert actions from 8 to two, the two intelligence committees. This was something that both the Carter Administration and the committees wanted.

At the request of the Administration, the Act also gave the President the option of providing notice where particularly sensitive intelligence activities were concerned to a group of 8 congressional leaders–the so-called gang of 8–rather than the committees as a whole. This option was to be available whether the intelligence activity involved sensitive collection or covert action.

In addition, where covert actions were concerned, the new law specifically recognized that there may be occasions when the President could not provide prior notice–either to the committees or to the gang of 8–and that when this occurred, notice would be provided the committees "in a timely fashion" together with an explanation of why prior notice could not be given. The Administration argued that the President may have to act quickly to deal with a fast-moving situation, and there simply may not be time to provide notice to the Congress.

The 1980 Act was amended in 1991, both to take into account what had happened during the Iran contra scandal in the latter half of the 1980s, as well as take into account what the practice under the statute had been until that point. I was General Counsel of the SSCI when these amendments were enacted and heavily involved in their development.

The basic obligations of intelligence agencies vis-a-vis the oversight committees remained the same, but several important adjustments were made in the notification framework.

First, the preambular language suggesting the notification be consistent with the powers conferred by the Constitution was taken out. This issue had been raised by the Iran contra affair. The Office of Legal Counsel at the Justice Department had issued a legal opinion after the scandal came to light, interpreting the intelligence oversight statute, and had opined that the constitutional authorities of the President as commander in chief gave him "virtually unfettered discretion" when or if the intelligence committees would be notified. The committees themselves did not accept the notion that the Constitution provided the President such authority, but a court had never ruled on the issue. If such authority did exist in the Constitution, the committees reasoned, it existed whether this preambular language was in the statute or not. So, it came out, and the Bush Administration did not fight it.

Another important change brought about by the 1991 amendments limited the "gang of 8" option to covert actions, rather than making it available to notify the committees of any intelligence activity that was particularly sensitive. This was done for several reasons. First, the gang of 8 option had, to that point, only been used for covert action. Sensitive collection programs had been briefed to the committees as a whole. The view on the two intelligence committees was that if an agency was instituting a new, ongoing program to collect intelligence, they all needed to know about it, regardless of its sensitivity. This was what the committees were set up to do. They had to authorize the funding for these programs. How could they not know of them? Again, the Bush Administration did not resist the change.

Finally, the requirements for reporting covert actions to the Congress were broken out of

intelligence activities generally, and treated in a separate section of the law. The "timely fashion" formulation was retained when prior notice of a covert action had not been given, but the committees said in report language that they expected notice to be provided, without exception, within "a few days" of presidential approval. They also said in report language that while they did not agree that the Constitution allowed the President to withhold notice from the Congress altogether, they recognized a future President might assert such authority. The issue was left at that in the absence of an authoritative judicial opinion.

There have been no major changes to the congressional notification requirements since the 1991 Amendments. But I think it is fair to say that practice under the law has changed over time. It changed, for example, in the late 1990s when the CIA began to disclose more information to the committees about its collection operations, especially those that were experiencing problems. And, of course, it changed after 9/11, but there is no need for me to go into that with you.

I will, however, close with two observations and an eye towards the future.

Ever since the obligation to keep the oversight committees "fully and currently informed" first appeared in the law, there has been, as a practical matter, a degree of latitude in how this was done. From the very beginning, in fact, the heads of intelligence agencies would broach particularly sensitive intelligence activities first with the leaders of the two oversight committees, and perhaps their key staff, before providing notice to the committees as a whole. The purpose of these consultations would be to discuss how the sensitive matter at issue should be handled within the committee–*when* the full committee should be briefed, whether there were certain details that could be withheld without affecting the committee's ability to weigh the activity in question, whether documentary evidence would be kept at the committees, how many staff should be cleared–the kinds of things you might do to minimize the security risk while still satisfying the needs of the committees. There's nothing in the law that precludes this kind of consultation, and, in fact, over the years, I think it's been very useful to have these discussions. I do not see them as a *substitute* for notice to the full committees, but rather as a means of getting there and accommodating the needs of both branches.

The last observation I would make because I know you are wrestling with the issue in conference this year deals with notice to the gang of 8. From the standpoint of the Congress, it has never worked very well. The problem has been not with notice to the gang of 8 per se, but rather with how it's been implemented. It's weighted too heavily in favor of the Executive branch, and does not sufficiently take into account congressional needs. I don't think Congress, in providing for this option, intended it to be this way, but that's the way it's evolved. The statute itself simply says that in especially sensitive cases, the President has the option to provide notice of covert actions to the smaller group. It doesn't say what this group of congressional leaders can do with the information. But the Executive branch has told them--they can't do anything with it--and over the years the gang of 8 has acquiesced in what the Executive branch has told them, presumably out of fear that, if they don't abide by what the Executive branch says, it may withhold information from them the next time.

Unfortunately, though, whenever this has happened, it has effectively marginalized

congressional oversight of the activity being briefed. It has meant that the 8 congressional leaders can only react to what they hear, without advice from their professional staffs and without advice from knowledgeable colleagues. This is difficult for them to do, coming at it cold, and having it presented to them in the most benign way possible. If they do decide they have a problem, they have to be able to articulate what it is on the spot in a convincing way. If they *later* decide they have a concern, they have to take it upon themselves to go back and raise it with the Administration. Like Senator Rockefeller did a few years ago, they will even have to type their own letter since their secretaries can't be told. Nor are they allowed to take notes or given access to a record of what they were earlier told. They have to rely on their memory. If there is going to be any ongoing oversight of what they've been briefed about, they're going to have to do it themselves, including making the arrangements for it, because their staffs can't know. How many of these congressional leaders have the time and inclination to do this on their own? Almost none. But rest assured, if whatever program they've been briefed about subsequently goes south, their buy-in will be prominently touted by the Administration.

I don't think this is fair to the Members involved. If the gang of 8 option is to be kept, and I think an argument can be made that it should, then I think something needs to be done to restore the balance, something that better recognizes and accommodates the needs of the eight congressional leaders. I personally think it could be done by each committee adopting procedures, without amending the statute itself, but it would also be desirable that these be developed with and agreed to by the Administration. I believe this is possible if both branches operate in good faith, and I continue to hope that will happen.

Thank you, Madame Chairman.

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Chairwoman ESHOO. I now would like to recognize Mr. Schwarz.

STATEMENT OF FREDERICK A.O. SCHWARZ, JR.

Mr. SCHWARZ. Thank you, Madam Chair. Before the Church Committee and the Pike Committee, you could characterize Congress' role in overseeing the Intelligence Community as being "don't ask, don't tell." That was harmful to the Intelligence Community and to the United States.

The wonderful, longtime general counsel of the CIA, Lawrence Houston, said that the lack of congressional oversight caused problems for the CIA because "We became a little cocky about what we could do." The same thing could be said in spades for the FBI and could be said for the NSA.

Now the Church Committee laid out a whole lot of wrongdoing. Britt mentioned some of it. There is a chapter in my book that does more. I know at least one member here has a lot of the reports in his office. But I am not going to summarize all that wrongdoing. But I want to give a conclusion, which is that all of that improper, overreaching conduct harmful to the United States was directly enabled by lack of congressional notification and oversight. I think that fact is important in your thinking about today what is important for you to do.

Now on the technicalities of the current National Security Act, it seems to me that CIA Director Leon Panetta was correct in saying that the Gang of Eight notification should be limited to covert action. It should not cover, it should not have covered items like torture or wireless wiretapping which were, under the recent administration, used the Gang of Eight device and prevented, I think to the great harm of this country, adequate oversight of those actions, which have hurt us.

Now I also think that, assuming the Gang of Eight is kept, you can't have a process in which staff people are not allowed to participate. You shouldn't have a process in which each member is called in on their own instead of the group having a chance to deliberate. Also, I think the law should be clarified so that it is made clear that with respect to covert action itself, the Gang of Eight, if it is kept, should be limited to emergency, immediate covert actions, and should not cover long-term ongoing covert actions which, because they are long-term and ongoing, deserve the attention of this full committee, the full committee.

And to make a point about the committees in both the Senate and the House, they have had an exemplary record with respect to handling sensitive matters well. In fact, of course, it is true that there are far more breaches of security that come from the executive branch than come from the Congress. I don't think there have been any breaches of security that have come from the Congress after those committees were created. That was the hope. And you have all carried that out well.

And so the idea that it is dangerous to give information to the full committee is just not correct. And it is dangerous not to give the information to the full committee because important matters affecting our national security deserve discussion, deserve analysis.

I think another principle that is important is the Constitution. The Constitution provides that this body, the Congress, shall have

the lion's share of power. It is the Constitution that in Article I describes the Congress. As a scholar that I quote in my longer testimony says, "You could have had a fully functioning government if the Constitution had ended at the end of Article I."

Congress has enormous powers in the national security field. You have power over war. You have power to define and punish offenses against the law of nations—that would cover laws against torture, which you passed; you have powers to make rules for the government and regulation of the land and naval forces. Now, that is 1787 speech for the military and the security agencies—the land and naval forces. You have power to make rules for the government and regulation of those bodies.

And if you look at the Youngstown case which I refer to in my written testimony, Congress, if it has acted, has the greater power. But this isn't a question only of the Constitution and where power lies, even though it does lie with you. It is a question of the national interest.

I think that is the most important point about this discussion; which is, the national interest is well-served if there is responsible, informed dialogue between the executive branch and the Congress. The national interest is ill-served if there are policies devised in secret and with only a small cadre of executive branch officials within the branch considering them.

I use in my paper, my written testimony, the torture subject as sort of a case study. And it is a classic case study of the way—forget about what you think about that, ultimately. All of us probably have strong views on one side or another. But it is clear, I believe, that you should not have a decision like that made without any debate or discussion. If Congress is only brought into the process by a system that gives the Congress, this committee, insufficient information, using a stinted process, which is the way the Gang of Eight is now working—it is a stinted process—there are a number of harms that ensue.

First, the likelihood of unwise decisions increases. The Founding Fathers, James Madison, when he wrote his wonderful 51st Federalist, understood human nature. And human nature is such that men, he said—we would say men and women—are not angels. And since we are not angels, the import of that lesson is that decisions are better made if they are made with full information and after discussion and debate.

I believe that is the most important thing that you should consider as you determine how to either rewrite the National Security Act or talk about the issue with the executive branch.

The executive branch also is not well-served by decisions being made without adequate information. They tend to blow up in their face.

Of course, the final point I will make is when you have a system like the Gang of Eight—Britt referred to this at the very end of his testimony—usually things that were covered by secrecy come out. They don't come out because of this committee. They come out because of the press, they come out because executive branch people leak things. But they usually come out.

As Britt, coming from North Carolina, used this "go south," as apparently something bad—I am not sure he really meant that—

but when they "go south", inevitably there are going to be unseemly debates between the executive branch and the Congress over who was told what. And you shouldn't operate in a system where it is unclear who has been told what. You should operate in a system where the Congress, and the Congress' chosen on your issues—to make that mean this committee—should be fully and currently informed.

Thank you.

Chairwoman ESHOO. Thank you very much for your outstanding testimony, Mr. Schwarz.

[The statement of Mr. Schwarz follows:]

Statement of
Frederick A. O. Schwarz, Jr.

Before the Subcommittee on Intelligence Community Management of the House Permanent Select Committee on Intelligence. (October 22, 2009)

Relevant Background. I am currently Chief Counsel of the Brennan Center for Justice at NYU Law School. I was Chief Counsel for the Church Committee, which, in 1975-76, undertook the first investigation of the Intelligence Community, covering administrations from Franklin Delano Roosevelt through Richard Milhous Nixon. I am also the author (along with Aziz Huq) of *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (The New Press, 2007). I am currently working with Elizabeth Goitein, Director of the Brennan Center Liberty and National Security Project, on a book about excessive governmental secrecy.

Summary of Points:

A. History. Prior to the Church Committee (and the roughly parallel Pike Committee in the House), the Nation, the Executive Branch, and the Intelligence Community itself were all harmed by the lack of meaningful oversight of intelligence. The Church Committee, and the permanent committees established in the Senate in 1976 and the House in 1977, have proven that such congressional oversight can improve the working of government—and that congressional committees can handle sensitive information appropriately.

B. Principles that *Should* Govern "The Laws on Congressional Notification of Intelligence Activities." Britt Snider's written testimony lays out both useful history and practical problems with "Gang of Eight" notifications. In addition, in

my view, the current system, both as written and as applied, does not give sufficient weight to the role of Congress under the Constitution.

C. The Harms Caused by Insufficient Congressional Oversight. The current system results in insufficient oversight on vital issues. This leads to decisions that are not as well-considered as they should be. It also leads to foolishness, abuse and illegality. This, in turn, causes harm to the reputation of the Nation, as well as that of the Executive Branch, the Intelligence Community—and, indeed, Congress itself.

Discussion

1. History. Prior to the investigations of 1975-76, Congressional "oversight" of the Intelligence Community was an early version of "Don't Ask. Don't Tell." Congress gave the FBI a free ride. This was partly out of love, partly out of fear: love because the Bureau was highly respected for its widely publicized successes in fighting crime, and fear because the Bureau's massive covert intelligence gathering reached politicians too. Although the CIA had neither the FBI's reputation, nor its trove of embarrassing evidence, it too escaped congressional scrutiny. Senate and House Committees charged with oversight made no written records, asked no tough questions, and often indicated a preference *not* to know what was done. Indeed, as Senator Mike Mansfield put it in supporting the Resolution establishing the Church Committee:

> "It used to be fashionable … for members of Congress to say that insofar as the intelligence agencies were concerned, the less they knew about such questions, the better. Well, in my judgment, it is about time that attitude went out of fashion. It is time for the Senate to take the trouble and, yes, the risks, of knowing more rather than less."[1]

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[1] For the Mansfield quote, see Cong. Rec., 1/23/75, p. 1434. For general information on pre-Church Congressional Oversight, see (1) Frederick A. O. Schwarz, Jr. and Aziz Z.

As was said by Lawrence Houston, a long-time (and highly respected) CIA General Counsel, the lack of Congressional oversight caused problems for the CIA because "we became a little cocky about what we could do."[2]

While both the FBI and the CIA have done, and do, important and valuable work, the Church Committee revealed that the FBI had also undermined our democracy. And that the CIA had also undermined American's reputation in the world.[3] And every President from Roosevelt through Nixon had secretly seized greater power and then used their secret power to undermine the Constitution's checks and balances.

All this improper conduct and overreaching was directly enabled by lack of congressional notification and oversight.

Indeed, in secretly widening the scope of the FBI's power in the 1930s, and the CIA's power in the 1940s, presidents made a conscious decision to hide these expansions from the American public, and from Congress.

Thus, leading up to World War II, Franklin Roosevelt authorized the FBI to go beyond investigating "conduct forbidden by the laws of the United States", and to pursue a wide range of lawful domestic activity by casually throwing in the amorphous term "subversion" to the list of things the FBI was ordered to investigate. In ordering the

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Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (The New Press, 2007; paperback 2008), pp 19-20; and (2) Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community*, 1947-1989 (University of Tennessee Press, 1990), pp 4-9.

[2] See Smist, n.1, at p. 9.

[3] For more details, see *Unchecked and Unbalanced*, at Chap. 2, pp. 21-49, "Revelations of the Church Committee"; and Loch K. Johnson, *A Season of Inquiry: The Senate Intelligence Investigation* (University Press of Kentucky, 1985).

Bureau to expand its domestic security role, Roosevelt agreed with Bureau Director J. Edgar Hoover that it was "imperative" to proceed "with the utmost degree of secrecy . . . to avoid criticism or objections." Therefore, the expansion was kept from Congress, and the public.

As the Church Committee later revealed, over the following decades the vague term "subversion" opened the door to many secret FBI misdeeds. But because the expansion was blessed in secret, neither Congress nor the public had a chance to debate the issues. Nor was Congress alerted to the importance of watching how such an open-ended, amorphous grant of authority to the Bureau was, in fact, exercised.

The story is similar for the CIA.

In creating the CIA, the 1947 National Security Act emphasized coordination and evaluation of intelligence. It did not even mention covert action. However, a year later, the National Security Council secretly authorized the CIA to engage in covert action. Neither Congress, nor the public, had any chance to debate this transformative change, or to consider what covert tactics might be consistent with the nation's character. Again, as the Church Committee explained, this meant that the harm done from, for example, overthrowing the democratically elected governments in Iran and Chile could not be checked by Congress. In general, as the Church Committee found, the executive branch did not adequately consider the potential consequences of covert activity. Nor were covert tactics like assassination plots adequately reviewed.

The Church Committee and the permanent Senate and House Committees established in 1976 and 1977 have had exemplary records in protecting sensitive information. In the case of the Church Committee, the only leak of information was that

the gender of a mutual "friend" of a woman closely associated with President Kennedy and with the head of the Chicago Mafia -- who had been retained by the CIA to help in efforts to assassinate Fidel Castro -- was revealed to be female. While I do not have personal knowledge of the subsequent Committees records on keeping secrets, (i) I understand it has been exemplary and (ii) I am certain it has been better than the executive branch.

2. Principles That *Should* Govern "The Law on Congressional Notification." Apart from statutory construction or legislative history of the notification rules, Congress' requirement that the Executive keep [the Intelligence Committees] "fully and currently" informed should be construed broadly in favor of meaningful notification to Congress. As CIA Director Leon Panetta testified at his confirmation hearing, the "Gang of Eight" provisions should be read as limited to covert action. The Gang of Eight should not be used, for example, for intelligence programs such as torture or warrantless wiretapping.[4]

It is too easy to forget that it is Congress to whom the Constitution gives the lion's share of power. Thus, it is Congress, not the President, that is described in Article I of the Constitution.

Indeed, as Yale scholar Charles Black explained:

[4] With respect to covert action itself, moreover, the law should be clarified to make clear that Gang of Eight notifications do not cover an on-going covert action program, but rather should be limited to notification of immediate, emergency action, particularly where lives are at risk.

> "a complete, ongoing government, with all the necessary organs, could have been formed, and could have functioned down to now, if the Constitution had ended at the end of Article I."[5]

Congress is constitutionally assigned ample power over "national security" matters. It is given the power to declare war. And it has power, for example, to "define and punish...offenses against the Law of Nations," as well as power to "make rules for the government and regulation of the land and naval forces."

Too often in recent history, when claimed executive perogatives have come into perceived conflict with congressional authority, the executive branch has persuaded Congress that executive interests—whether national security related or otherwise—trump those of the legislature. Yet there is no constitutional basis for this notion. It anything, the opposite is the case. According to Justice Jackson's eloquent opinion in *Youngstown*, when executive authorities conflict with those of Congress, the President's powers are reduced by whatever powers Congress has over the subject—not the other way around. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter*.") (emphasis added).

In order to exercise its constitutional authorities and obligations, Congress must be entitled to information. Congress has chosen to channel certain intelligence information to the Intelligence Committees. Doing so was part of an appropriate inter-

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[5] Charles L. Black, Jr., "The Presidency and Congress," *Washington and Lee Law Review*, 32 (1975), 841, 843.

branch discussion that cut back on the cumbersome process of notification of, for example, covert action, to as many as eight committees. Nonetheless, that accommodation should not be interpreted as a concession that jurisdiction over intelligence matters is limited within Congress to the intelligence committees. To state the obvious, laws touching on intelligence activities—such as the National Security Act itself—must be voted on by all members of Congress. In addition, intelligence activities often involve aspects that implicate the jurisdiction of other committees, particularly the Judiciary Committees. It is an often overlooked fact that, while the National Security Act requires the provision of certain minimum information to the intelligence committees, a variety of other statutes require the reporting of particular intelligence-related matters to the Judiciary Committees as well.[6]

Moreover, Congress, having accommodated concerns of the Executive Branch, by streamlining the process for regular updates on intelligence information (other than information that, by statute must be more broadly reported), should not be seen to have authorized notifications that undermine the ability of the two Intelligence

[6] See, e.g., 50 U.S.C. 1803(f)(2) (FISA Court rules and procedures); 50 U.S.C. 1846(a) (uses of pen registers and tap and trace devices); 50 U.S.C. 1871(a)(4) (summary of any significant legal interpretations of FISA); 50 U.S.C. 1871(a)(5) (copies of all decisions and opinions issued by the FISA Court "that include significant construction or interpretation of" FISA); 18 U.S.C. 3511 note (any reports submitted to other committees about national security letters); 15 U.S.C. 1681v(f) (agency requests to consumer reporting agencies in connection with government intelligence/counterintelligence/ terrorism investigations); Section 106A of the Patriot Act reauthorization (Pub. L. 109-177) (DOJ Inspector General audit of the FBI's use of Section 215 authorities); Section 119 of the Patriot Act reauthorization (DOJ Inspector General audit of the FBI's use of national security letters); Section 126(a)(7) (any DOJ initiative that uses or intended to develop data-mining technology).

Committees to do their jobs consistent with the role assigned to Congress under the Constitution. And to do that job, the Committee needs information "fully and currently."

C. **Harms Caused by Insufficient Congressional Oversight.** If Congress is provided insufficient information, using a stinted process, a number of harms ensue. The likelihood of unwise decisions increases. So does the likelihood of abuse and illegality. For both reasons, the reputation of the Nation is more likely to suffer. And so too is the reputation of the Executive Branch, the Intelligence Community—and the Congress. Even proper actions that do go ahead after a stinted Congressional notification are at risk of seeming less legitimate. And, finally, an inadequate, stinted notification process like the Gang of Eight is bound to cause serious inter-branch controversy and hostility when a project becomes known and has gone badly.[7]

Let's illustrate these points by using the recent Administration's decision to descend to torture—doing so in violation of both statutory law and treaty obligation.

Even before the Gang of Eight is said to have been informed in some fashion, the closed nature of the Administration's own internal decision-making itself increased the risk of an unwise decision by reducing thoughtful consideration. And clearly the Gang was not informed of any of this.

We now know a lot about the flawed way in which this decision was reached. The opinion of John Yoo was kept secret within the Justice Department,

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[7] See the prescient prediction in Nicholas deB Katzenbach, "Foreign Policy, Public Opinion and Secrecy," *Foreign Affairs*, Vol. 52, No. 1, October, 1973, at p. 15 [If the policy in question fails, the fact of this kind of congressional consultation may create as many problems as it solves. Rarely will the members of Congress feel a truly shared responsibility. And the effort to put them in this position may easily result in recriminations about the nature and quality of the information provided."]

bypassing its normal review process. The Gang was not told this. Nor was it given the highly flawed opinion of Mr. Yoo.

Moreover, the White House decided to open the door to torture without listening to, or even telling, key government officials in the Department of State and the military. The Gang was also not told this.

Those who were shut out both within the Administration and in Congress could have made the case that adopting torture would weaken America with our allies, strengthen our enemies, and increase risks of harm to our soldiers or CIA agents when they were captured. Those who were shut out could have reminded both branches that starting with George Washington's orders during the Revolution, America had led the world on restricting coercion of prisoners of war. Those who were shut out could have protested our Nation's use of waterboarding by pointing out that after World War II, America had prosecuted Japanese soldiers as war criminals for using waterboarding on American prisoners. And those who were shut out could have shown that many other techniques authorized by the Bush/Cheney Administration had been copied from techniques used against American prisoners in the Korean War. But certainly none of this information was provided to the Gang of Eight. And the stinted process did not allow for exploration of any of these vital details.

Most importantly, the cramped secret process within the Executive Branch and with Congress shut out any debate about American values and the descent to torture.

However members of the Gang of Eight were told whatever they were told, they, and the Committee, had no opportunity to explore how the decision had been

reached, the true nature of what was being proposed,[8] or the risk of harm to the Nation, or American values.

All public figures have an obligation to consider the consistency of their actions with America's values. Those values have been a major part of America's reputation. They are a core part of our strength.

But crises have often tempted leaders to depart from America's values and to ignore the wise restraints that keep us free.[9]

Thus, as just one example, abandoning those values was explicitly recommended in 1954 by a top-secret report of a high level presidential task force. In the Cold War, the task force argued, "hitherto acceptable norms of human conduct do not apply." Tactics "more ruthless than [those] employed by the enemy" should be adopted.

Based upon its investigation, and exposure, of many secret, "ruthless" Cold War tactics deployed both at home and abroad, the Church Committee concluded that:

> "The United States must not adopt the tactics of the enemy. Means are as important as ends. Crises make it tempting to ignore the wise restraints that make [us] free. But each time we do so, each

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[8] As is chillingly shown in a recent *Atlantic* article by conservative pundit Andrew Sullivan, practices covered up by relatively innocuous sounding words like "sleep deprivation" or "stress position" are intended to, and do, cause excruciating physical and mental suffering without leaving tell tale signs. See, Andrew Sullivan, "Dear President Bush," *The Atlantic Magazine*, Vol. 304, No. 3, October, 2009, at pp. 78-88. When known, the details, such as no sleep for [180] hours, shock the conscience in a way blander labels cannot possibly do. But surely such blander labels were used with the Gang.

[9] Congress is not free from these temptations. But its more deliberative nature is designed to moderate or prevent excesses.

> time the means we use are wrong, our inner strength, the strength which makes us free, is lessened."[10]

Apt three decades ago, those words are even more apt today. For to combat the unspeakable acts of Bin Laden and his ilk, the prior Administration secretly resorted, for example, to torture—using techniques copied from our Korean War and World War II enemies.

And because they abandoned America's values, the secret policies of the recent Administration made us less safe. Less safe because our allies became less willing to cooperate. And less safe because they handed our mortal enemies a powerful recruiting tool.

Given the Gang of Eight process, Congress was foreclosed from playing its constitutional role in identifying those harms, and in determining the wisest long-term policies for America.

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[10] See, Church Committee, *Alleged Assassination Plots Involving Foreign Leaders*, Epilogue, p. 285. (Though this passage was in the Committee's Interim Report, it permeated all the Committee's work.)

Chairwoman ESHOO. Now we welcome the testimony of Mr. Munson.

STATEMENT OF DAVID E. MUNSON

Mr. MUNSON. Madam Chairwoman, I am thrilled to be here today and to talk to you about the situation in my hometown. I come from a county of 15,000 people, a city of 1,500, and I am a business owner there. I sell less than $200,000, or around $200,000 worth of goods in a restaurant. I have five employees. Fifty percent of my sales are food. And life is tough. It is very hard. We are having a very hard way to go.

The Governor decided to close the prisons—not just ours, but seven others—and the situation is such that there has been a lot of information coming to certain individuals in the town from the Federal Government or representatives of the Federal Government, and the people of the town have not been included in that when they come to town. They see city councilmen, county commissioners, other people in town. It is a selected few they talk to. And specifically DOD, Homeland Security, Representative Bart Stupak, Department of Corrections in Michigan—which is not your issue.

But we are having a hard time dealing with being number one on the list for the Guantanamo people. I mean this is what we are being told all the time. We are having a hard time dealing with that because we are not getting information from the Federal Government to the people in my area.

The last statement I saw was that "After we make the decision, you will have 45 days to deal with it." And that was by our Representative, Bart Stupak.

Now I would think that they would come and tell us, inform us as to what they want to do before they make the decision to take our prison and do something with it, that they would include the people in town.

We are just a small town, we are small people. We are trying to survive. This does not look like a win-win situation for us. Three hundred-thirty people have been transferred out of the prison to close the prison and it appears as though this whole scenario, with budget problems in Michigan, which every State has got budget problems, but this whole scenario with Standish Max was put together to bring these people here, to have a place to bring these people.

We would like to strongly object to what is going on; the lack of transparency I guess it is called, the lack of information. If we could have a town hall meeting and we could have the Federal Government come and present their option to us, we might be interested in it. But at this point, people are scared to death. They don't want Guantanamo North to be Standish Max. We don't want to be a jihad ward when Guantanamo is closed, because Standish Max does not have the protection that Guantanamo has. We don't have the infrastructure. We have 12 officers in our county and one police officer in our city. We couldn't handle anything close to what this kind of move would do to our community.

And so we would ask that if you have any power to do something with that, if you could get the Federal Government to come and let us know what their plans are—not after they have made their deci-

sion, but before they do. Some of the people in our—our mayor is on speed dial with a gentleman at DOD called Phillip Carter. We can't get him to answer e-mails, we can't get him to answer phone calls.

The mayor pro tempore is talking to him, some of the county commissioners. That all came out in a referendum they just passed on the 19th where they were going to accept Federal detainees, and instead they changed the wording to Federal prisoners. But during the city council meeting, the mayor did say he had talked to these people. The county commissioner said he had been talking to them, too. So why aren't the people in town?

We had a hundred people at our city council meeting. One person was in favor of it. Ninety-nine percent were against. We had a nonquorum city council meeting where some of the councilmen just discussed it with us. There were over a hundred people there. And 2 people were in favor of it, and 98, to give you a number, were against it.

Everything I read, everything I hear is that the local community is in favor of this. Even the township supervisors are not in favor of this. But a few people that they have wired in keep going to the press and saying that this is what everybody in the area is in favor of. And we are not.

So I thank Mr. Hoekstra for giving me some time to come and tell you that this is a very big issue in our town, even though I know it is not a big issue here. But the lack of transparency is very big.

Mr. Munson's statement follows.

Opening Statement of David Munson

Subcommittee on Intelligence Community Management

Permanent Select Committee on Intelligence
U.S. House of Representatives

Hearing on "Statutory Requirements for Congressional Notifications of Intelligence Activities."

October 28, 2009

Good morning, and thank you for inviting me to be here today.

My name is David Munson, and I have come to Washington today from Standish, Michigan. Today's hearing is about notifications of intelligence activities to Congress, and I wanted to testify about the problems that we are experiencing in Standish because Members of Congress cannot get basic information about the government's plans to bring Guantanamo detainees – dangerous, trained terrorists – to my community.

For people in Standish, this is not an academic exercise or a paper. It is about the future of our town. We have been trying to get information from the Department of Defense since June, and have repeatedly held community meetings to ask for full transparency, both directly and through our Congressmen:

6/5 Michigan Bureau of Prisons makes announcement
Lansing, Michigan

6/12 Resurection of the Lord Catholic Church Rally
In Standish, Michigan

7/10 MI Bureau at prison holds Meeting for Area Officials
At Standish Maximum Correctional Facility, Standish, Michigan

8/7 Representative Bart Stupak holds Meeting in Standish
Michigan

8/12 Michigan Department of Corrections holds Hearings
In Lansing, Michigan

8/20 Informational Town Hall meeting to discuss "GITMO"
Detainee Issue

10/12 Coalition to Stop Gitmo North holds Town Hall meeting

at Rochester High School, Rochester, Michigan

10/13 Coalition to Stop Gitmo North holds Legislative Briefing
In Lansing at Capital Building

10/13 Coalition to Stop Gitmo North holds Town Hall style
Meeting in Okemus at Kinawa Middle School

10/15 City Council "No Quorum" meeting

10/19 Special City Council Meeting

In all of these meetings, the people of Standish have clearly expressed the need to have more information. We still don't have it.

Chairwoman ESHOO. Mr. Munson, thank you again for traveling across the country to raise an issue that you care, obviously, a great deal about. I would not characterize any member of this committee as to not caring about the issue, which is enormously complex, relative to Guantanamo Bay, to the detainees, and how that is all going to be handled.

You have huge problems in the State of Michigan. States are struggling. You have characterized, obviously, the pain that is being felt in a small town and also the confusion because there is not, from what I hear from you, very good communication.

I pledge to work with—and I think other members of this subcommittee—to work with the Michigan delegation to help clear some of that out. As I understand it, the facility that is in your community was a State prison, not a Federal facility. To you, that is neither here nor there, because you are worried. You can always debate how people can think, but you can't tell them they are wrong for how they feel.

So we welcome your coming to Washington to share your views. As you know, as you can tell, this hearing is not set up to discuss Guantanamo.

We nonetheless welcome you. We thank you for your observations. And I commit, and I am sure other Members do, to work with the Michigan delegation first, that people in the community get very clear information. So while you obviously don't share the credentials that the other gentlemen at the table have, nonetheless we are glad that you are here. But we are not going to be spending—at least many of us here are not going to be spending time examining what you just said, because the hearing is not about Guantanamo, and I think that you appreciate that. That is no reflection on you. You are a gentleman and a fine citizen.

So let me start with the questions. Mr. Snider, in your testimony you discuss the administration's obligation to brief the committees "of significant anticipated intelligence activities." I think the key word here is "significant." Members of Congress obviously don't have the time to be briefed on every single intelligence activity, and we are not, so there must be some process for deciding which are the most important ones. Some activities are routine; some, as exposed, are highly controversial, as we have learned. The statute focuses on significant intelligence activities.

What factors, both Mr. Snider and Mr. Schwarz, should we look at to determine whether an activity is significant? That is my first question. And should we be looking at the level of the official who approved the activity, the impact or national interest if the activity were revealed? I think that should be taken into consideration, but you may want to comment on it. And the amount of money that is spent on the activity. And should we define—and this is, I guess, the top of my question, even though I am stating it last. Should we define what "significant" means in the statute, and how would that work?

Mr. SNIDER. All right. Let me see if I can answer all of that.

I think there are a number of factors that agencies consider. And, by the way, I would just point out it is the responsibility under the law of the head of the intelligence agency involved to make that decision, whether, in fact, Congress needs to be notified

because it has a significant anticipated—or significant intelligence——

Chairwoman ESHOO. Can I just interrupt here? If in my view, or I should say in my experience, if it is left to the individual, does that not start to become multiple choice and chip away at really what is significant and that it be defined? I think this is where we somehow have come off the rails, so to speak, because it seems to be a choice which then bumps up against being fully and currently informed.

Mr. SNIDER. My personal view is, I think, resting that responsibility with the agency head is the appropriate place to put it, because if someone is going to make a determination that Congress does not need to be informed because the activity is, quote, not significant, it seems to me that person ought to be the agency head. He should be accountable for that decision, whether Congress is informed or not.

And in terms of the factors that they might consider, whether the activity they are contemplating is new in terms of its target or in terms of its methodology. Some of the other factors you alluded to, the amount of resources, personnel involved; the likely impact that what they are contemplating will have on the agency's mission; the likelihood that it might be disclosed and criticized; what risks do you run.

So I think there are any number of factors that agencies do weigh in terms of whether Congress needs to be told about something new that they are planning to do.

I don't think I would include activities that are just percolating, ideas that are percolating down in the agencies themselves that have not at least achieved the status of management approval or recognition or whatever. I think that is reaching too low, but otherwise I think the system works reasonably well based on my experience when I was working in it.

Chairwoman ESHOO. Mr. Schwarz.

Mr. SCHWARZ. I had had—first thing in hearing your question I wanted to comment on a little bit was the word "brief." I mean, that does bide on when the administration should come forward. But I think Congress needs to watch out about thinking that it is just a passive recipient of the briefing when the briefing comes, because, as you know, you have the opportunity and the right to explore on your own part and inquire as well as be briefed.

I am not sure you are going to define "significant" in a law way, but I wrote down four factors. One would be how is it handled within the administration itself, within the executive branch itself. If the executive branch tries to have something decided by only a tiny group of people, that almost is by definition something that is significant.

So then I think another example where something clearly would be significant is where it goes against existing law. I mean, under the theory of John Yoo and also the former Vice President, the White House could disobey the law as English kings could in the 1600s. But if they are doing something which goes against the law, even if they incorrectly think they have the right to do that, that surely is something that the Congress should be brought in on.

And then what is the potential harm to the Nation if the matter is disclosed? That is a reason to increase the likelihood that this committee is involved, because it is a recognition something is important. And your record is exemplary on not disclosing things.

And then finally, cost is a factor, but there are many very important things which don't cost very much. I think the torture program didn't cost very much, but it is a torture program, and they should have used that word honestly. It doesn't cost very much, but it hurt the Nation enormously.

Chairwoman ESHOO. Thank you.

I just have one more question, and then I want to get to the Ranking Member, and there are so many Members here to participate.

Can either one of you instruct us as to—because you know the history of this so well—why there were not any penalties built into the statute if there were violations of it?

When I read it, that is one of the things that, in reading it, that stood out.

Mr. SCHWARZ. I think probably the first answer is nobody thought of that, because they thought it was such a great thing to have a permanent committee and so forth.

The best penalty for governmental failures is criticism, it seems to me. I am not sure that penalties that—which say if the head of the CIA doesn't tell you, they have got to hide in the corner or something like that. I think if someone fails to do what they should do, and what they should do on the Constitution, the best penalty is disclosure and disagreement. It is my gut on it.

Chairwoman ESHOO. Mr. Snider.

Mr. SNIDER. I would just say on one point while the statute itself doesn't contain any criminal penalties, you have had agency employees disciplined by their own agency for failing to abide by the congressional notification requirements.

Chairwoman ESHOO. Can you give us some examples of that; not the names, but what happened to them?

Mr. SNIDER. It happened in connection with the Guatemala case back in 1994.

Chairwoman ESHOO. But what happened to individuals? Did they lose their jobs, or what happened?

Mr. SNIDER. I can't recall. I think they just received reprimands, I am not sure. I do remember—it has happened in the past. It is not as if agencies don't take this seriously. I just point that out.

Chairwoman ESHOO. Yes. I am not suggesting that they don't take it seriously. It needs to be, but it just stood out to me that there wasn't, and I thought you might know some of the history here. Thank you.

With that I would like to recognize our wonderful Ranking Member Mrs. Myrick.

Mrs. MYRICK. Thank you, Madam Chairwoman.

Mr. Snider, and I am quoting something that was recently said, in recent press reports Senator Bond, who is the Ranking Member of the Senate Intelligence Committee, indicated his view that a growing number of disclosures of highly secret programs, tactics and other information had caused irreparable damage to the U.S. Intelligence Community.

How does this problem affect the willingness of the executive branch to share information with Congress? What can be done about it?

And there is a second part of that that is just a personal gripe of mine, and that is I am new to the committee, but a lot of what we are told simply I have read about in the press before I am told here on the committee, and it is very aggravating. And so, you know, I don't know how and where; it obviously doesn't come from us, because we don't have it, but yet this is becoming more and more of an issue on a lot of sensitive issues that that committee deals with, in my opinion.

Mr. SNIDER. Well, I should point out to you that I am retired. I left the government 8 years ago.

Mrs. MYRICK. Smart.

Mr. SNIDER. So in terms of my experience, my experience is fairly dated. I can tell you when I was in the government and in the CIA for the last 4 years of my career, there was an incredible amount of information shared with the two committees back in the 1990s. I presume that is still continuing.

Mrs. MYRICK. I am not saying we don't get information, but, I mean, there have been several incidences within the last year actually of things, and probably before that. I wasn't on the committee; I am just new to the committee this year. But you will see it in The Washington Post or The New York Times or something, and we haven't been notified.

Mr. SNIDER. Well, I presume you would complain under those circumstances if you think you should have been notified. I think there are always slip-ups, and then there are things that aren't slip-ups, but are more intentional. But I don't have—I am not able to really give you an explanation of why they didn't tell you.

Mrs. MYRICK. Some of this is leaks, and I understand you just referred to that, and I understand that.

Mr. Schwarz, do you have a comment?

Mr. SCHWARZ. The one thought I had in listening to you and Britt, if you feel you have not appropriately been informed, Congress is entitled to hold a hearing, and in this case you would hold it in executive session about why you weren't informed. That is within your prerogative to do. And I think that is the sort of republican remedy for a wrong, using the "republican" as James Madison did, when you are worried about you want to go to things that are republican, like getting the information.

Mrs. MYRICK. But it is so after the fact.

Mr. SCHWARZ. Yes, but still, I mean, if you hold a hearing, and it turns out there was wrongdoing, that is going to make it less likely that there is wrongdoing the next time.

Mrs. MYRICK. Happen again.

Mr. SCHWARZ. Yeah.

Mrs. MYRICK. Thank you.

Mr. Munson, I just wanted to say to you that I completely understand where you are coming from, because North Carolina is one of the States that has been mentioned as a place to put these detainees as well. And our people in North Carolina have the same concerns that you do of not getting any information, or not being notified, or not being told. And then there is a concern of what

would happen if the people are released, and you know what can come from that.

I also appreciate your being here today.

Mr. MUNSON. Thank you, ma'am.

Mrs. MYRICK. I yield back, Madam Chairwoman.

Chairwoman ESHOO. Thank you.

Mr. Holt. Wonderful participant, member of this committee, very thoughtful, everyone knows that. And he is a rocket scientist.

Mr. HOLT. Thank you, Madam Chair, and I thank the witnesses for their testimony today and even more for their long record of good citizenship and public service.

The witnesses have laid out clearly that congressional oversight is not only required constitutionally and legally, but that it is also beneficial from a practical point of view and from the point of view of organizational structure and management.

One would hope that the Intelligence Community and the national security community at large would seek the consultation, the oversight and notification of Congress, but evidently not. So we have to talk about how we are going to accomplish that.

It is, I must say, offensive to me and to some of us, I believe, when people say that, well, this must be restricted for the sake of national security. I mean, Congress has as much responsibility to provide for the common defense. Our oath of office is clear and unmistakable on this, and as the witnesses have commented, I think the history is pretty clear that leaks, the breaches of classified material, of the confidentiality do not seem to be coming from the legislative branch. I am sure national security reporters could certify to this, and I have actually suggested several times that they do that, but that is another matter.

So because of the frequent lack of cooperation of the Intelligence Community, I would say that under the best of circumstances we are hampered, critically hampered, in doing our job. Some days I go so far as to say that under the best of circumstances, we cannot conduct the oversight that it is our responsibility to perform. Every other committee in Congress has outside interest groups, active citizen groups and others helping to perform that oversight, whether it is the Sierra Club or the American Trucking Association or the National Education Association or whatever. We don't have that benefit, nor is there a culture of whistleblowing in the Intelligence Community, so we depend on this information.

Now, earlier the Chair commented on the significance of the word "significant." I would actually highlight a different word as the most significant one, which is "informed." In fact, the law that requires fully and currently informed Congress has been turned into congressional notification. And I would appreciate a comment on whether you think that is—should be and is—the intended meaning of the phrase that Congress should be kept fully and currently informed, whether it is notification or consultation.

If there is another round of questions, I will talk about what besides covert action should be covered, because we do specify covert action; maybe we could specify other things. I would like to talk about the gray area between Title 10 and Title 50 in the U.S. Code where there is a lot of activity that is taking place that may or may not be intelligence, but it seems very much like intelligence to me

and should be included in notification to the intelligence committees.

Before I give up the microphone, I just also wanted to make sure that in this discussion everyone is aware that there has been a significant change here in the House of Representatives in the last couple of years in response to the recommendations of the 9/11 Commission. We have created the Select Intelligence Oversight Panel, composed of some members of this committee and some appropriators to take advantage of the power of the purse, to provide better coordination between authorizing and appropriating and to enhance oversight. And that panel, which I have the honor of chairing, is coordinating with this committee in this general oversight effort that the Chair of this committee mentioned in his opening remarks.

So I guess I have used up all of my time. If there is a comment about this notification, consultation informing matter, I would welcome that.

Mr. SCHWARZ. It is wonderfully refreshing to see a man who is a scientist by training to be so very, very precise and sharp with words, which I first saw when I met you wearing my environmental hat. But there is a difference between being notified and being informed, and being informed is what the experience that led to these committees calls for. I mean, that is what the Church Committee really found out, that not being informed means there are more likely to be things that are illegal, unfair, embarrassing, bad for the country. I thought that was a very, very important point of emphasis. Notification is a partial tool toward informed, but the obligation of the executives should be to keep this committee informed. I think that was very terrific.

Mr. SNIDER. I would simply agree with that. When I think of notifications, I think of formal notices of new programs or new operations or something like that. I think of being informed, including consultation, before something is done, having a back and forth; not just being told this is what is happening, but rather have a give and take with the committees. So I think being informed is broader than simply notification.

Mr. HOLT. And notification can become perfunctory.

Mr. SNIDER. Yes.

Mr. HOLT. Thank you, Madam Chair.

Chairwoman ESHOO. Thank you, Mr. Holt.

The Chair is pleased to recognize Mr. Hoekstra.

Mr. HOEKSTRA. Thank you.

Mr. Munson, you are in a unique kind of position because you can kind of relate to where certain Members of Congress may feel at a time when the Gang of Eight has been briefed on an issue, but the rest of Congress has not been briefed on. When I take a look at what is going on in Standish, in Michigan, you are at a position where you believe that other people have been given information that you may not have been—that may not have been shared with other people in the community; is that right?

Mr. MUNSON. That is correct, from the Federal Government, yes.

Mr. HOEKSTRA. And the information is primarily information that may have been coming from a Phil Carter in the Department of Defense, and perhaps some of that information is—or he had

shared certain kinds of information perhaps with the mayor, the city manager, that stays very close hold.

Mr. MUNSON. Yes, they seem to be on speed dial together.

Mr. HOEKSTRA. And that is information that you have asked for and other people in the community have asked for?

Mr. MUNSON. We have asked them a lot of questions, and we are not getting many answers, and they are making decisions that the people in the community don't like. We raised over 400, almost 500, signatures from people from the time they posted their 4 o'clock meeting on Friday, and they had it at 4 o'clock on Monday, just by going to the churches and explaining the Guantanamo issue to bring it up for this resolution that they had, and these people freely signed these petitions and wanted more information.

Mr. HOEKSTRA. And you are also aware that a number of State legislators have had and requested this same kind of information from the Federal Government?

Mr. MUNSON. Yes. Tim Moore, our representative in the 97th district; Joe Haveman, the representative in your old district has asked for it, and there is nothing forthcoming. Mike Bishop has even asked for it. He is senate majority leader.

Mr. HOEKSTRA. And I believe that this week the State—or the State senate judiciary committee held a hearing where they brought in the Michigan Corrections Department, and the Michigan Department of Corrections has indicated that they have had no discussion with the Federal Government or with the Department of Defense on this issue as well.

Mr. MUNSON. They seem to be totally in the dark.

Mr. HOEKSTRA. It is much of the same kind of information. We have got a number of requests in from our office and from this committee because it is an issue this committee has responsibility for. We are responsible for the military intelligence programs and falls well within our jurisdiction. Had requests into the Department of Defense and the individuals responsible for this program, supposedly the individuals that are making and having the discussions with local officials, and say, hey, just share with us maybe what you shared with the city manager in Standish. And they seem to be very, very reluctant. To date they have been totally unwilling to share that kind of information with us.

Mr. MUNSON. People in my area are scared to death. They don't know what is going on. They feel like they are being pushed—this issue is being pushed on them, and they are scared, they are just frightened.

Mr. HOEKSTRA. And it is really no different that maybe perhaps some of the frustrations that Members of Congress may feel when there are classified programs where the information is very, very close hold; then it is kind of like they are frustrated as well that they can't get access to more information.

I am also assuming that you have read press reports about what Department of Defense has been telling the folks locally about what the impact may be; is that correct?

Mr. MUNSON. There have been some reports, but there really has not been any facts or any real information, just small reports they were here, or they were there, or they said this, or they said that.

Mr. HOEKSTRA. But there have been discussions about how many jobs it might bring into the district. I think those were press reports, right?

Mr. MUNSON. Right. They were talking about 1,000 jobs, 500 from DOD and 500 from Homeland Security.

Mr. HOEKSTRA. So, I mean, again, you are in the same position sometimes that Members of Congress are in in that we may read about something in the press before the information has been shared with us in a formal way.

Mr. MUNSON. They said at city council meeting, it finally came out, that this was whispered across the table at the prison when DOD and Homeland Security were there, and everybody in the county ran with it, we are going to get 1,000 more jobs. And that is what drove all of this speculation on how the prison was going to be used. We just asked the Federal Government to come tell us what they are going to do.

Mr. HOEKSTRA. I think you have asked the Federal Government for information. Just give us the background of who these people are and what they have done; give us your experience with housing them in Guantanamo; have there been any special challenges that you have incurred with housing them, just so that you would have a better understanding.

But I very much appreciate your being here and recognizing that sometimes what you have gone through are some of same experiences that we go through here in Congress when we can't get the information that we need to make the kinds of decisions that we need to make.

Thank you very much.

Mr. MUNSON. Thank you.

Chairwoman ESHOO. We have been notified that votes will begin 11:30. What I would like to do is to come back. There are Members who haven't had the opportunity to ask questions of the witnesses.

But we still have some more time now, because the bells haven't gone off. Before I recognize Ms. Schakowsky, let me ask you this, Mr. Munson: Is this correct or not correct, and I come from local government, that this was a local government discussion that Mr. Hoekstra just had with you? It reminds me of my days on the board of supervisors in San Mateo County in California, which I cherish. There is a huge upset in the community for all the obvious reasons. And, of course, Guantanamo adds a whole another layer of issues to that.

From what I have read in press reports, you were for this to begin with, and then you changed your mind after speaking to Mr. Hoekstra; is that correct?

Mr. MUNSON. I was coming to Washington to lobby for it and when I talked to Mr. Hoekstra, and he said——

Chairwoman ESHOO. And you are entitled to change your mind. I just wanted it know if that was the case.

Mr. MUNSON. Well, the reason I changed my mind is because I was picketing outside the prison to keep it open, and when he said that these people would be at risk, I see 20, 30 people driving in and out of there in their cars a day, and, yes, if this was an issue, these people would be at risk. So I changed my mind.

Chairwoman ESHOO. I just wanted to establish that. Yeah, thank you. Good. Everyone is entitled to change their minds.

Ms. Schakowsky.

Ms. SCHAKOWSKY. Thank you, Madam Chairwoman. I appreciate this hearing.

I have to say I am somewhat surprised that the Ranking Member feels that we ought to be talking about something else, because on a bipartisan basis, as Mrs. Myrick indicated, we have over the last—this is just my—I am finishing my third year on the committee—time and again read in the newspaper or seen on television something that clearly should have been reported to us, where we should have been informed, where the Intelligence Community comes back and says, mea culpa, we should have told you, and situations where we have been misled. We have been told information that actually is either not complete or actually inaccurate. So now I am looking, and I can't see it anymore. Mr. Snider, it absolutely happens, and has happened with too great of frequency in our committee.

Next Tuesday we will continue this discussion, this subcommittee, and mine, the oversight and investigation committee, is going to go further. We are going to examine how the Intelligence Community implements the laws we are discussing today.

I wanted to ask you, Mr. Holt asked about the word "inform" and Ms. Eshoo about the word "significant." I want to ask about anticipated activities and how you think that we can define, or if we need to define, "anticipated committees" and perhaps refine that.

Mr. Schwarz, I guess you mentioned to some extent that it shouldn't be conversations, but what should it be?

Mr. SCHWARZ. How to define "anticipated"?

Chairwoman ESHOO. Speak up.

Mr. SCHWARZ. I would suppose that Congress plays a particularly valuable role when the issue is something that is anticipated, because then you can give your wisdom, bring your perspectives, which include being more in touch with the local communities. So I would say anticipated should not be seen as sort of a secondary issue for Congress, but a major issue for Congress. You can really make a difference when it is anticipated.

Ms. SCHAKOWSKY. Does the National Security Act require the executive branch, Mr. Snider, in your view, to notify the committee of anticipated covert actions?

Mr. SNIDER. Yes, it does require prior notice of covert actions. It also recognizes there may be circumstances where the President is unable to provide prior notice, and he then would provide notice in a timely fashion. Congress recognized the possibility that the President may have to act on an emergency basis to protect the country's interests, and there just simply wasn't time to brief the committees. But that was the only circumstance that was contemplated when that language was written.

Ms. SCHAKOWSKY. The Director of National Intelligence Office unclassified January 2006 policy memorandum, which defines how the Intelligence Community must notify Congress about intelligence activities. The policy memorandum does not appear to require the consideration of a specific amount of money. I realize it

may not be the only factor when assessing a program's significance. Should it? I ask either one of you.

Mr. SNIDER. I am not familiar with what you are referring to, but I would certainly say it would be one of the factors to be considered in whether something is significant or not is how much money it was going to cost. I don't know whether that was a purposeful omission or what. I just haven't seen what you are referring to.

Ms. SCHAKOWSKY. Mr. Schwarz, do you think there ought to be a threshold or some way to describe the amount of resources, money put into it?

Mr. SCHWARZ. Well, I mean, as I said in answer to the Chair's question at the very beginning, there are lots of important things that don't cost very much money. I guess anything that costs a lot of money is important, but there are things that don't cost——

Ms. SCHAKOWSKY. I agree with that, but regardless of those other factors, do you think that it is important that money be and funding be a part of that, and should there be more specificity?

Mr. SCHWARZ. Perhaps. I haven't thought that through enough to be very helpful to you. I think as long as you don't imply from doing that that the things that cost less are not important. You have got to watch out people reading implications into things you write.

Ms. SCHAKOWSKY. That is good advice.

Thank you, and I yield back.

Chairwoman ESHOO. I think—thank you. I think what we will do is we will go over. Is it time to vote?

Mr. HOLT. We are 5 minutes into it.

Chairwoman ESHOO. Should we take one more? Why don't we move to Mr. Thornberry. And then when Mr. Thornberry completes his questioning, we will take a break, with your patience, and take the three votes and come back, because I know Members still have questions.

Mr. HOEKSTRA. I have a note that says the first vote will be held open for approximately 30 minutes to accommodate the Afghan briefing. You guys will be able to figure that out better than what I can.

Chairwoman ESHOO. All right. Whey don't we keep going? We will ask our staff to keep us in the loop on the clock being held open, but we will take advantage of the time that another briefing is stretching the time on the first vote.

Mr. Thornberry, you are recognized. Thank you for your contributions to the subcommittee and your patience this morning.

Mr. THORNBERRY. Well, thank you, Madam Chair. I appreciate it.

And, Mr. Munson, thank you for being here.

As I listen to the other testimony, one of the themes that comes through is freer information flow results in better discussions, and that is what you are trying to get at where the rubber meets the road. And I appreciate very much you being here.

Let me ask you all your reaction, because I have had an amendment to the National Security Act that basically says the presumption is that the administration shares everything with the Intelligence Committee. If the President wants to restrict it to some group less than the full Intelligence Committee, he needs to ask to do that, and the Chair and the Ranking Member of the full com-

mittee will jointly decide whether to agree with the President's request to restrict it to a smaller number. If they agree to restrict it or agree not to restrict it, then they decide who among the committee will be notified, but it would be Congress's decision. If the Chair and the Ranking Member disagree, it would be restricted as the President requests.

But part of the point is, Mr. Snider, I think it gets to your point where it requires consultation and discussion back and forth about how that notification or information will go. The other advantage, it seems to me, is it requires the Chair and the Ranking Member work together, which sometimes has been difficult.

Anyway, let me just get your reaction to that presumption, Congress gets everything unless the President says to restrict it, and the Chair and Ranking Member decide on that request.

Mr. SNIDER. So this would take the place of the Gang of Eight?

Mr. THORNBERRY. Yes.

Mr. SNIDER. And would it also take the place of fully and currently informing the committee as a whole?

Mr. THORNBERRY. It would actually put the presumption for fully and currently informing the committee of everything, unless the President has a specific request, and then the Chair and Ranking Member have to act on that request jointly.

Mr. SNIDER. Well, I haven't thought about it, but as you point out, I do like the idea of consultation between the executive branch and the committees in terms of how something sensitive should be handled, and this would seem to provide for it. Now, it seems to me you are leaving a lot of power in the hands of the two leaders of your committee to agree.

Mr. THORNBERRY. Certainly.

Mr. SNIDER. And if they couldn't agree, obviously you would have a committee that was not told.

Mr. THORNBERRY. It would be the President's restriction would take effect, that is true.

Mr. Schwarz.

Mr. SCHWARZ. Well, I think the idea of more consultation is a good one. Historically with the Church Committee it was notable that there never was a difference between the six Democratic Members and the five Republican Members on getting information. There were sometimes some differences on how to construe it or what to do about it. But John Tower, who was the Vice Chair, was extremely vigorous in pushing for getting information.

So I think this is truly a bipartisan issue where the interest of the Congress as an institution are——

Mr. THORNBERRY. Well, as a matter of fact, what I outlined was jointly agreed to by the Majority and Minority on this committee last year, but for some reason it was not supported bipartisanly this year. But it was a bipartisan agreement to do just like I outlined last year.

Let me ask one other thing, because we are limited on time. What do you do in a situation where Members of Congress are informed, but they deny that they were ever informed? We have had a long—several instances, whether it is the terrorist surveillance program or the enhanced interrogation program, where Members of Congress say, no, they never told me. And you look at the record,

and there were 15 briefings on one, 40 on the other. You get a prominent Member in political trouble, and she says, oh, they lie to us all the time.

How you do deal with that where in a way it is political cover for Members in leadership or perhaps on the committee to deny that they were ever briefed, where, in fact, they were?

Mr. SNIDER. I have long thought that all "Gang of Eight" briefings should be transcribed. There should be a transcript so there is no question of what the Members were told. And it would be available to the Members who were briefed. You know, it could be done. I don't know why it isn't done. That would take care of the problem, it seems to me.

Mr. SCHWARZ. I think I love his transcribed idea, and you can keep those transcripts, as you know, totally secure. I think that is a great idea. It is almost inevitable that when you have these informal briefings, that there are going to be differences about what was said. I don't think it is a fault of either side. I think it is almost inevitable if you have this system that it is going to lead later on to disagreements about what was said, particularly about, I would think, the adequacy of what was said.

Mr. THORNBERRY. Thank you.

Chairwoman ESHOO. Thank you.

Mr. THORNBERRY. This is a very interesting discussion that I think we are going to—really deserves a lot more examination. But I can't help but think that the tighter the noose is around secrecy, that the less—that what is diminished are the things that we are talking about and the outcomes that we have experienced. I mean, the Gang of Eight and the way it has operated, it is not so much their fault, the Members that happen to be a part of it, but it hasn't, in my view, served us well. There are no records kept whatsoever, nothing. And yet we know that there is a safe, there needs to be, and some of the Nation's top jewels in terms of secrets are kept there.

Now, if this is such sensitive information, why wouldn't there be a documentation of the time, the date, the place, the participants and the content of a meeting? I mean, that just, to me, really defies common sense. And then the outcomes as a result of this, unfortunately for the country, have turned into highly partisan debates and views that are held, and fingers are pointed, and fault and blame are assessed. And all of it is on the front pages of the newspaper, which, you know, in the last analysis, I don't think that is where that should be.

At any rate, how are we doing on time?

VOICE. Four minutes left.

Chairwoman ESHOO. I think we ought to go and take the vote. You all get to take a break.

Are they going to keep it open?

Mrs. MYRICK. They said they were going to hold it open.

Chairwoman ESHOO. Three hundred eighty people haven't voted. I think we can take Mr. Rogers.

Mr. ROGERS. I think this Gang of Eight idea is just an awful idea anyway. I think the Ranking Member has been good about it. I think it is a bipartisan effort. It is just not a good way to conduct oversight of 16 agencies.

And to Mr. Schwarz's point, I do believe that we have the responsibility to go ask questions as well. We cannot be passive observers in what is a very dynamic and, by culture, secretive organization. It is up to us to extract that information.

I have to say I have never felt, when I have gone and asked questions, that I have been lied to, even about programs that have been briefed to the Gang of Eight that by showing up and asking questions you can get information on. I have never been told I can't get it, which is kind of an interesting dilemma. So I think we can fix this problem relatively simply by making sure that the law is clear about what they must and what they must not—I want to get into more of that.

Mr. Munson, thanks for being here. I do think this is a great irony that here is an example that will impact a community more than anything that I can think of, especially in a community like Standish where you can't get access to the full information. And I just want to ask you a few questions, things that I would want to know.

Have they briefed you as a community about the risks of bringing this many terrorists and housing them in one facility in your town?

Mr. MUNSON. We have asked that question. These guys are rock stars of the jihad movement, and we got no answers.

Mr. ROGERS. So they have given you no answer.

Did they inform you that there have been prison breaks and attacks on these prisons in Yemen trying to free terrorists? Did they tell you about this?

Mr. MUNSON. We have heard about it from the experts that came to our town hall meetings.

Mr. ROGERS. But the Federal Government has not briefed——

Mr. MUNSON. The Federal Government has not——

Mr. ROGERS. A quick yes or no, if I can, just based on time, if you don't mind. How about Iraq? Did they tell you about the prison break and the attack on the prison in Iraq?

Mr. MUNSON. No.

Mr. ROGERS. Morocco? Beirut?

Mr. MUNSON. No.

Mr. ROGERS. Philippines?

Mr. MUNSON. No.

Mr. ROGERS. Singapore?

Mr. MUNSON. No.

Mr. ROGERS. How about this year a British prison where a group of terrorists were planning a pretty aggressive attack, including outside help?

Mr. MUNSON. The government has told us nothing.

Mr. ROGERS. So here is a great example of why this is more than just a prison, isn't it?

Mr. MUNSON. Yes.

Mr. ROGERS. This isn't just a prison where somebody gets convicted, they have the will to live, they go and serve their time, and they hopefully get rehabilitated, certainly debatable, but go back to their community, correct?

Mr. MUNSON. Correct.

Mr. ROGERS. This is not that.

Mr. MUNSON. No.

Mr. ROGERS. And so here is somebody who has a business in this community who could stand to gain by 1,000 jobs if that, in fact, were real.

Mr. MUNSON. Real.

Mr. ROGERS. And you have the courage to stand up and say, I am not sure this is good for the community, but, gee, I would sure like the information to make an informed decision.

Mr. MUNSON. The information would be really nice.

Mr. ROGERS. You are just asking for some information that might help you make a better decision.

Mr. MUNSON. Yes, sir, we all are.

Mr. ROGERS. And they have not told what risk these prisoners pose to even prison guards and the experiences they have had at Guantanamo Bay, have they?

Mr. MUNSON. Haven't heard a thing from the government.

Mr. ROGERS. I can understand your frustration, and now I think and I hope at least the public can understand sometimes our frustration when we are expected to make a decision that might alter our communities, our national security. You don't get the right amount of information, so it impacts Congress as much as it impacts a local community in the great State of Michigan and a great town like Standish.

Mr. MUNSON. Thank you. Yes, sir.

Mr. ROGERS. Would you be open-minded if they were to give you all of the information in a forum that was acceptable to the community where you could ask questions, tough questions, about the British prison break, and the Yemen, and Iraq, and Singapore and what it means to be a target for these kinds of operations?

Mr. MUNSON. We have been asking for them to come to our community and give it to us, and there are no answers. Nobody answers the e-mails or phone calls.

Mr. ROGERS. Did your local community vote by city council on this issue?

Mr. MUNSON. City council voted by resolution to allow Federal prisoners. They take the words "Federal detainees" out of it.

Mr. ROGERS. And did they give any indication that they had received information that the community was not receiving in order to make that vote?

Mr. MUNSON. They had conversations with people from the government, DOD, Homeland Security and these meetings that they have had at the prison across the table. That is where the 1,000 jobs came from. But the community knows nothing about it. It is driving this need to bring these people here.

Mr. ROGERS. I appreciate you having the courage to be here and the courage to forego any profit that you might make by having 1,000 jobs plop down in your community. I think that takes courage and certainly foresight of the dangers that might arise by bringing this many of the world's worst into one community.

I see I am out of time. I wish I had time to talk about Gang of Eight. I do think we have to work out legislatively so it is very clear. I think it is not so clear. It wasn't clear to us. When I read the law, it is not very clear. I think when the Intelligence Commu-

nity reads it, it is not clear to them. I think this is something that we can probably work out in a bipartisan way.

Chairwoman ESHOO. And that is exactly the purpose of this hearing.

Mr. Munson, just before we break, let me ask you this: Has the Michigan congressional delegation on a bipartisan basis come together to request that whomever has responsibility for this in the executive branch to meet with the locals? Are you aware of that? Or maybe I should be asking Mr. Hoekstra and Mr. Rogers. They are both from Michigan. But again, this sounds exactly like something that I would have dealt with when I was in local government, and that does not diminish its importance. But is there a bipartisan team from the Michigan delegation that has requested—not just Mr. Hoekstra, because I know he has got some candidacy involved in this.

Mr. HOEKSTRA. Excuse me, ma'am, you are questioning my motives.

Chairwoman ESHOO. No, I am not.

Mr. HOEKSTRA. Yes, you are. That is totally inappropriate.

Chairwoman ESHOO. I am asking is there a bipartisan team from the Michigan congressional delegation that has requested assistance in the form of a team to come and make some kind of presentation and answer the questions to the good people in Standish? That is all I am asking. Do you know if there is, Mr. Munson?

Mr. MUNSON. A lot of people, a lot of Representatives have said things, but there has been no team put together to do that.

Chairwoman ESHOO. Okay. Thank you.

All right. We will resume after we finish voting. Thank you.

[Recess.]

Chairwoman ESHOO. Thank you for your patience and waiting for us to go across the street to cast our votes and return. With that, I am pleased to recognize Mr. Hastings, a highly respected and valued member not only of this subcommittee, but of the full committee.

Mr. Hastings.

Mr. HASTINGS. Thank you very much, Madam Chair. Thank you for holding this hearing.

Mr. Snider and Mr. Schwarz, both of you have cast an awful lot of clarity on a subject that I think cries out for clarity and language in a statute that cries out for specificity.

Madam Chair, I regret very much that Mr. Munson is not here, and I would reference it just because we do have a record and maybe Mr. Hoekstra would hear my comments through this. I would be telling Mr. Munson. If he were her, that I have proposed legislation that fixes not only his problem, but all these Congresspeople with this "not in my backyard" business. All that is playing pure, unadulterated politics when the deal goes down, and that is whether it is Hoekstra, Democrats, or anybody else.

But the legislation that I have proposed that I think all of this committee ought look at deals with the policy of detention, not the place. And that is what we don't have here at this level. We don't have the policy.

Now, my scrivening may not be all that is needed, but the simple fact of the matter is we could do something about detention policy,

and it wouldn't matter whether a person were held in Guantanamo, Bagram, or outside my house, if we have a policy that deals with this matter.

So I hope those words find Mr. Munson well, wherever he is, and I will tell Mr. Hoekstra again about my legislation.

Madam Chair, let me give my bona fides to the gentlemen at the table. I think personally that the Gang of Eight first ought to change its name to "come see two" people. The reason I say that, anytime you mention a gang, it has a negative connotation. And that is in there just for whatever it is worth.

But as a member of this committee, I personally am opposed to the statutory provisions that have allowed this nuanced group of people to get together, that can't do anything, can't tell us, and then, in the final analysis, we are ill-informed.

One of the things I know is this: We ostensibly hold the power of the purse and authorize and appropriate. But when we are notified of covert actions, we are responsible for the cost. When we are not notified of covert actions, we are responsible for the cost. And among the constituency—and a part of our constituency is the larger body of Congresspersons—we are thought to have this information that we don't have.

So if you look at this statute—and I am sure you two gentlemen especially have read it and both of you would know this to be true—if you read any statute, each time you read it, you can reference matters that you could change or see. Let me give you two good examples.

Under "see two people", the President determines if it is essential to limit access. And then it goes on. The second-to-the-last sentence, it identifies those persons, and then says, "and the minority leader of the House, the majority and minority leaders of the Senate, and such other Member or Members of the congressional leadership as may be included by the President." So it isn't as exclusive as it sounds.

And then in D, "The President shall ensure that the Intelligence Committee," and then it has an "or," and if I were changing this statute, I would say "and/or." And I tend to come down where you are, Mr. Snider, and that is that I can make a case for the Gang of Eight, but here is what experience has taught me, not just in the Intelligence Committee but as a citizen of this country.

There has been a bending and swaying of the pendulum between the executive and the legislative branch and indeed the judicial branch of government that kind of goes ignored sometimes, but is necessary. But the pendulum swings back and forth. And I am not talking about ideologically, I am talking about power.

And what has happened in more recent vintage since President Nixon, not just as it relates to intelligence, but Presidents generally have arrogated unto themselves more and more power, not just in the intelligence arena, but generally, and have been less and less transparent, and that includes Clinton, Bush, and the new administration in my judgment.

There are ways to be transparent. And if I have any question at all, it would be what you think could be done, and I hear you with reference to it being worked out between the administration and the committees. I thoroughly agree with that. But there needs to

be yet another kind of mechanism to make that happen. And I don't know how to do that. Otherwise, we are at the mercy of the executive branch and it leaves us in the wilderness repeatedly. And I for one am about changing the statute to balance the powers.

If I have said anything that is deserving of comment, I would appreciate it.

Mr. SNIDER. Well, I simply agree with virtually everything you said. I think you are on target. I have already elaborated on my views on the Gang of Eight. I won't repeat all of that.

I think the balance—we don't have the balance that we need right now. Something needs to be done. I think this is the time to do it.

Mr. SCHWARZ. I think the best—on the constitutional side, Congress has the power. And they shouldn't let it slip between their fingers. You have the power. Presidents of both parties consistently and increasingly have tried to take the power. You have the power of the purse.

I think in making the record for change that results in you being more realistically fully and currently informed, the best way to do that is not to argue the abstractions of where the power lies under the Constitution, but by showing with concrete examples how the current system has led to more harmful decisions that hurt the country. And I think making a record on that gets the public on your side and is the most convincing way to arrive at change.

Mr. HASTINGS. Thank you both. Thank you, Madam Chair.

Chairwoman ESHOO. Mr. Hastings, we have time, if you have any follow-up questions. I would be glad to allot you any time you want to use. I know that there were a couple of members that said they would come back. So if there is something where you want to follow up.

While you are thinking about it, I just want to say to our witnesses that you have given us very practical advice today. It really is what we need. There are many frustrations that have surfaced here today with the members, that comments have made on both sides of the aisle on this whole issue of the Congress being informed.

We talk about briefings, and yet when I hear the description of some of them, especially "Gang of Eight," they sound like drive-by briefings. This really does not comport with the solemnness of the responsibilities that both the executive branch and the legislative branch have in this particular area.

As Mr. Holt said earlier, and I think I said in my opening statement, we don't deal with the push-and-pull of many constituencies here. That is not what this committee does. Most of what we do is done behind closed doors, by necessity.

But I think what troubles so many of us, and this has been cumulative—it is not fault or blame—I think it is cumulative, where the executive branch really holds so much more sway today in this area, and the Congress less and less. I am not interested in the Congress having more power just to have the power, but I do think that it needs to be shared. And I think when there is equality between the two, if I might use that expression, then the respect and the good will will be forthcoming and that we will enjoy more of

that. And when we do, there will be, I think, a better, a stronger bond between the two, which I think the work really calls for.

Mr. Hastings, I asked if you wanted more time. I don't think you need it. Thank you for coming back.

I am happy to recognize Mr. Holt and to thank him for coming back for a second round of questions.

Mr. HOLT. Well, it was certainly an easy decision to come back after this brief recess because this is a critically important issue. It gets to the heart of the role of Congress in protecting our national security to provide for the common defense. It is a very rich subject, legally and constitutionally. Really, nothing could be more important.

Let me pursue a little bit more the specification of what should be briefed. It is now specified in the law that covert action is something that requires special attention, as well it should. I sometimes wonder, though, whether by specifying things, it makes it easy to neglect other things.

So I wanted to explore a little bit how far you think we should go in specifying what needs to be briefed. I will leave it that general and ask both witnesses for comments.

Mr. SNIDER. I guess I am skeptical of trying to be more specific than "fully and currently" for the very reason you just mentioned, that I think when you start trying to be too specific, then you are going to leave out things that, if you just thought about them, you would have included.

I think there is always going to be an element of judgment in terms of exactly what needs to be briefed to the committees and how far that needs to go that the agencies will first make and then presumably they will discuss it with the committees and get their sense of the situation. That is the way things should work, I think.

Mr. HOLT. Let me broaden the question a little bit, if I may, before you take it on, Mr. Schwarz. Similarly, by specifying who should be briefed, say the Gang of Eight, does it make it easier to neglect briefing a larger group? You may not know enough about the internal functioning of Congress—and this is worth remembering—this is, I think beyond argument, that the congressional authorizing committees, this committee and the corresponding Senate committee, are not very good at notifying other Members of their bodies about things that they should know. That is part of our responsibility. I don't think our record is very good in that.

Mr. SCHWARZ. When the question of specificity first was put on the table, or examples, I tried to think of some things that would be particularly important to be briefed on or to inquire into. But I agree with Britt, and I think you said it too, it can be dangerous to in the law specify certain things, because the implication is then, well, if it is not covered, we don't have to.

So it might be that you could do more by way of legislative history or, where you are going through confirmation hearings, going over those kinds of questions. I at least think you ought to be cautious in making a list in the statute of things to be—that have to be informed.

Mr. SNIDER. Going to your second question, if I may, if you go back and look at the legislative history of the Gang of Eight option when it was put into the statute—and there is not a lot of it, but

from what there is, it seems pretty clear to me that Congress intended that the full committees would be briefed on what the Gang of Eight had been briefed on when the sensitivity or whatever had caused the Gang of Eight briefing in the first place had passed. It seems to me that still should be the operating principle.

There should be a point where Gang of Eight briefings, whatever the subject matter was, will be provided to the full committee. I think that is one of the things I mentioned earlier that could be written into procedures that the committee adopts, both on each side.

So you make that just standing operating procedure rather than having to have the Gang of Eight think about doing it.

Mr. SCHWARZ. That is consistent with the little footnote I have on page 5 of my testimony, that even with covert action, if there is retained any special Gang of Eight, it should only be for something that is immediate emergency and it should not cover ongoing covert action programs at all. There is no reason why they should be briefed to just the Gang of Eight.

There is an analogy, historical analogy to Abraham Lincoln and how he handled emergency powers in a way that contrasts with certainly what was done over the last 8 years and what has been done often.

The Civil War started. Troops were coming south through Baltimore. They had to walk from one train to another to change trains to come down to defend Washington, DC, and 16 were killed by a mob in Baltimore. And then the mayor of Baltimore said, I am going to tear down the bridges so no more troops can come from the North to get to the South to protect Washington, DC.

Lincoln then suspended habeas corpus, arrested the mayor and maybe some other people, and held them. It is clear that only Congress has the right to suspend habeas corpus. On the other hand, Congress was not in session. So Lincoln said to the Congress, "Here's what I did and here's why I did it. And if you think I shouldn't, please punish me. If you think I did right, please ratify what I did."

It seems to me that is a good historical principle, for there is a difference between how, in the short term, matters of importance—that was not about secrecy. He acted openly in arresting the mayor of Baltimore. I think it illustrates powerfully the difference between short-term emergency action by a President; like in the short term telling your committee about something where they are about to fly into Iran to rescue some hostages, for example. But that is very different than keeping the thing secret from the whole committee or the whole Nation.

Maybe that is a wandering.

Mr. HOLT. That is helpful. Maybe we don't need a congressional committee to establish for the record that Abraham Lincoln was a wise leader. But it certainly is a useful precedent.

May I continue?

Chairwoman ESHOO. I know Mr. Snider has a one o'clock. I just have one more question. But certainly make use of the time to ask another question.

Mr. HOLT. Thank you. I had suggested earlier that I would begin to explore the gray area between the U.S. Code Title 10 activities

and Title 50 activities. There is a lot going on in the world these days. There is a lot that one could imagine that is going on in the world these days, whether it be remote killings or assassinations or intelligence collection that falls—or other kinds of actions that fall somewhere between Title 10 and Title 50, depending on who does them and how they are done.

It has become the practice here on the Hill not to brief some of those activities. It is not clear whether some of those activities are briefed to anyone. But, in any case, they are often not briefed to the Intelligence Committees when I think a reasonable person would say there are intelligence activities or there are significant intelligence components of the activities.

Is there anything that you can tell us about the history of this, whether this has been examined, and can you give us any guidance for the current day?

Mr. SNIDER. This has been a longstanding issue. I dealt with it very often when I was general counsel of the Senate Intelligence Committee 15 years ago. The basic problem is that you have military intelligence people doing things overseas. They could be gathering intelligence, could be covert actions. Could be things that they are doing ostensibly as part of a military operation to prepare the battlefield, or however you want to call it.

From the standpoint of the Committee, they look like activities within the Intelligence Committee's jurisdiction, but because they are considered by at least the Defense Department to be part of a military operation, they say jurisdiction belongs to the Armed Services Committee. And, as you point out, sometimes the Armed Services Committees get notice and sometimes they don't, of what is being done in preparation for a military operation or is part of a military operation. But I think that is where the problem comes, in that area.

If it is not being done as part of a military operation or preparing for it, then I think it is clearly a covert action or intelligence gathering by the military that is under the jurisdiction of this committee. It would require Presidential finding if it were a covert action.

Mr. SCHWARZ. I am not sure I have anything to add to Britt on that.

Mr. HOLT. Do you see any language that is necessary, legislative language, that would be helpful in clarifying this?

Mr. SNIDER. We struggled with this. The definition of covert action—you probably remember in the statute—we struggled with this for about a year with the Armed Services Committee in the Senate, and finally excluded traditional military operations from the definition of covert action. And then we went into report language for several pages in terms of what was a traditional military operation.

That is the only place I know where we tried to resolve this issue back in 1991, 1992. That is all I can point you to. The fact that it still is an issue just shows me it hasn't been resolved.

Mr. SCHWARZ. I did the Church Committee, and then after that was over and the committee was established, I went back to the practice of law and did city government and lots of other things. I do know that when the Senate at least was setting up its Perma-

nent Select Committee on Intelligence, some of the barons—I think they were called—of the other committees tried to get in the way of it happening. And did they possibly even affect questions like the budget authority of the Intelligence Committees? They may have.

So these, in a way, intramural rivalries, have been important for a long time.

Mr. HOLT. This has to do with the Church Committee. I believe it was the case, and maybe you could quickly summarize, Mr. Schwarz, I believe that the Church Committee expanded its scope as it followed threads that it uncovered as the investigation got underway. I think there may well be some lessons for us as we undertake what we are doing here.

So far, it is a less focused investigation than what the Church Committee was designed to do. But in fact it seems to me that the Church Committee didn't really stick to its focus; that it broadened considerably as it followed threads.

So I am wondering whether there are any lessons for us.

Mr. SCHWARZ. A, your factual premise is true. You start out thinking you know some things, but you find out there is a lot you don't know. I think a lesson is to make sure you press to get information and, most importantly, documents, because that is where so often the stories really lie. And they open doors, they open your minds up.

I know that was vital to our running an effective investigation and vital to finding other, as I think you put it, threads to look at. Maybe they were bigger than threads. That is one important thing.

I think also necessary for successful investigations or committees is that you establish reliability on being able to keep secrets. The Church Committee definitely did that. There was only one leak from the committee, which was the gender of a woman who happened to be a "friend" of both President Kennedy and the head of the Mafia in Chicago. And that was relevant to who knew what about Castro.

Chairwoman ESHOO. And you have that in your extended remarks.

Mr. HOLT. Just quickly. I don't mean to interrupt. You had more to say on that subject?

Mr. SCHWARZ. Not really.

Mr. HOLT. On the matter of classification, how much of the proceedings of the Church Committee remains classified and do you believe that some of it should—should there be more that should be released and should we go about trying to get that released?

Mr. SCHWARZ. There is more that should be released—not on the domestic side, because they never tried to stop us from doing anything on the domestic side, the FBI particularly. On the foreign side, we had the assassinations report, which is probably the best study of covert action because it really gets into how it is authorized, how does it go right, how does it go wrong.

But then there was the assassination of the CIA station chief in Athens. They tried to—Kissinger and others tried to tar the two committees with involvement in that, which was totally false. Bush, as CIA director, had to withdraw an accusation he made. But it did, on the foreign side, it slowed down release.

So there are still classified elements of the final report dealing with foreign intelligence that have not come out. And, my goodness gracious, they are more than 30 years old now, and why shouldn't those come out?

Mr. HOLT. And they are stored at the Archives now?

Mr. SCHWARZ. I am not sure where they are.

Mr. HOLT. Thank you very much. Your testimony has been very helpful to me.

Chairwoman ESHOO. Thank you, Mr. Holt. I just want to ask this question quickly and then we will close. And thank you for giving us more than half a day of the best of what you know. Your testimony has been incredibly enlightening for the subcommittee. We are very grateful to you.

My last question is: In determining whether a particular intelligence activity should be briefed to Congress, does it matter whether that activity is "operational?"

Let me give you an example of why I am asking this question. It is not the only example, but it is a recent one. Everyone has read about the situation this last June when the CIA director came and he did what he was supposed to do. He was informed by his own people, I believe on June 23, that there had been a program set up and running since 2001, and they informed him of that in 2009. And he came, as I said, following the law, the next day, and informed us.

There was then a debate that spilled out that the agency had really not done anything that could be considered to fly in the face of the National Security Act because it wasn't "operational."

First of all, I never thought that stuff should be discussed, but then it poured out all over. So I ask it not only by the most recent experience, but as we move forward and we examine what we need to fix, if there needs to be a rewrite, if there are additions or subtractions, how would you advise us on this issue of "operational?"

Mr. SNIDER. I have never heard that distinction before. In fact, I don't think it is a valid distinction.

Ms. ESHOO. I think that is the answer.

Mr. SNIDER. I don't think that is what you should be focusing on. It doesn't matter. That is not the test, from my standpoint.

I am sorry I have to leave. I have a meeting that I have been trying to set up for weeks.

Chairwoman ESHOO. We know that. Thank you so much, Mr. Snider, both for today and all of what you have done for our country and your service to it and your great writings. Thank you.

Mr. SCHWARZ. It was nice. I hadn't seen Britt since the last day of the Church Committee.

Ms. ESHOO. Glad we could bring you together.

Mr. SCHWARZ. There is a logical flaw with not giving you information about something because it is not yet operational. The logical flaw is, suddenly it may become operational; then it is an emergency, and then they would say because it is an emergency, we can only tell the Gang of Eight or something.

Another flaw with not telling you things that are hatched—I mean baked but not yet hatched—is Congress contributes to wisdom, too, and they can help guide the administration on would it be a smart thing to go down this road or not.

I could give you, in the case of the efforts to assassinate people, there was, on the one hand, an ongoing operational effort in the CIA to kill various foreign leaders. When Kennedy came into office, his national security head, McGeorge Bundy, called in the head of covert action for the CIA and said, I would like you to create a standby capacity to assassinate foreign leaders.

Now the interesting thing was that the guy who Bundy spoke to was deeply involved in the ongoing effort to assassinate foreign leaders. So there was this sort of standby capacity that also was the same thing as what they were already doing.

I think that just illustrates—that particular example illustrates how much better it would be not to say Congress is always going to be right when it puts its wisdom—brings its wisdom to bear, but these are important decisions that matter to the country. And having them discussed in a wider circle is going to make it more likely the decision is right and less likely it is wrong.

Chairwoman ESHOO. Thank you very, very much, again, not only for the wisdom that you have shared with us this morning but your service to our country over so many years. And major, major contributions. I think today has been so enlightening. And you can see from both sides of the aisle the burning interest in this.

I think at the end of the day, on a bipartisan basis, each one of us understands what an enormous stake we have in this, what a solemn responsibility exists not only with the House Intelligence Committee, but the power that must be protected in the Congress in order to exercise, as you referred to, the wisdom and what that can bring about throughout the system. Because, at the end of the day, having responsibility for national security is the top responsibility for Members of Congress. And this committee and the work that it does with the Intelligence Community, where so many, really hundreds of thousands of individuals, work every day to protect our country, we have the responsibility to make this stronger and better.

We know that some things have gone off the tracks. I look forward to more hearings. And we would like to ask you, Mr. Schwarz, as we did the others, that you be on standby—not the type of standby you just described during the Kennedy administration, but on standby to assist us in this all-important work as we take this examination on, and hopefully from this subcommittee produce a product that the rest of our colleagues will find worthy and the Congress will find worthy if we so choose to make the changes that are necessary.

Mr. SCHWARZ. I was really honored to be here and happy to help.

Chairwoman ESHOO. You honored us with your presence. I would like to thank the staffs from the both sides of the aisle; the Minority staff for the work that they did to help prepare their members for today and bringing Mr. Munson from Michigan. I think it was a big day for him. As he said, a real honor. I think he learned something as he listened to our discussion of the National Security Act.

I think on that note, too, that I hope that some of us will reach out to members of the Michigan delegation on a bipartisan basis to see how we may be able to assist them; that jurisdiction of where prisons are to be sited does not rest with this committee, but

that doesn't mean that that jurisdiction should stop us from reaching out and being helpful. I will certainly do that.

And to our wonderful staff, exceptional staff on the Majority side, especially Mieke, who has done so much to put this together, thank you.

With that, the committee is adjourned. Thank you.

[Whereupon, at 1:04 p.m., the subcommittee was adjourned.]