



# **“Gang of Four” Congressional Intelligence Notifications**

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## Summary

“Gang of Four” intelligence notifications generally are oral briefings of certain particularly sensitive *non-covert action intelligence activities*, including principally, but not exclusively, intelligence collection programs, that the Intelligence Community typically limits to the chairmen and ranking members of the two congressional intelligence committees, and at times, but not always, to their respective staff directors.

Gang of Four notifications are not based in statute but have constituted a practice generally accepted by the leadership of the intelligence committees and that is employed when the Intelligence Community believes a particular intelligence activity to be of such sensitivity that a restricted notification is warranted in order to reduce the risk of disclosure, inadvertent or otherwise. Intelligence activities viewed as being less sensitive typically are briefed to the full membership of each committee.

In either case—whether a given briefing about non-covert action intelligence activities is limited to the Gang of Four, or provided to the full membership of the intelligence committees—the current statute conditions the provision of any such information on the need to protect from unauthorized disclosure classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.

Congress has said that its intent in this regard is that in extremely rare circumstances a need to preserve essential secrecy may result in a decision not to impart certain sensitive aspects of operations or collection programs to the intelligence oversight committees in order to protect extremely sensitive intelligence sources and methods. With regard to the phrase “other exceptionally sensitive matters,” Congress has said its intent in using this phrase is to refer to other extremely sensitive categories of classified information such as information concerning the operational details of military deployment and extraordinarily sensitive diplomatic contacts, which the intelligence committees do not routinely require to satisfy their responsibilities.

This report reviews the history of Gang of Four notification process and compares this procedure with that of the “Gang of Eight” notification procedure. The “Gang of Eight” procedure is statutorily based and provides that that the Chairmen and Ranking Members of the intelligence committee, along with the Speaker and minority leader of the House, and Senate majority and minority leaders—rather than the full membership of the intelligence committees—are to receive prior notice of particularly sensitive *covert action* programs, if the President determines that limited access to such programs is essential to meet extraordinary circumstances affecting vital U.S. interests.

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## Not Statute-Based “Gang of Four” Briefings

The “Gang of Four” intelligence notification procedure has no basis in statute. Nor is such a procedure referenced in the rules of either of the two congressional intelligence committees. Rather, this particular notification procedure could be reasonably characterized as a more informal notification procedure that, over time, has come to be used by the executive branch, and generally accepted by the leadership of the intelligence committees, to provide limited notification of particularly sensitive intelligence activities to the committees’ chairmen and ranking members. At times, the committees’ majority and minority staff directors have been included in such briefings.

The use of Gang of Four notifications pre-dates the establishment of the congressional intelligence committees in the mid-1970s.<sup>1</sup> Initially, such limited notifications were used to inform relevant congressional committee leadership of especially sensitive intelligence matters, including both covert action and intelligence collection programs.<sup>2</sup> Observers commenting on such notifications used during this time period characterized them as being oral and often cursory, and being limited to committee chairmen and ranking members and one or two senior staff members.<sup>3</sup>

In 1980, when Congress approved the new “Gang of Eight”<sup>4</sup> notification procedure for particularly sensitive covert action programs, use of the Gang of Four process came to be generally limited to notifying the committee leadership of sensitive non-covert action intelligence programs.

## Protection of Sources and Methods or Other Exceptionally Sensitive Matters

In 1980, Congress also adopted statutory language requiring that, except for covert action notifications, which are governed by a separate set of statutory requirements, the Intelligence Community is obligated to keep the congressional intelligence committees fully and currently informed of all intelligence activities and furnished with any information or material concerning such intelligence activities.<sup>5</sup> Congress conditioned these two reporting requirements on the need

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<sup>1</sup> The Senate Select Committee on Intelligence was established in 1976; the House Permanent Select on Intelligence was established in 1977.

<sup>2</sup> See *The CIA and Congress; the Untold Story From Truman to Kennedy*, by David M. Barrett, University Press of Kansas, 2005, pp. 100-103.

<sup>3</sup> See L. Britt Snider, *The Agency and the Hill, CIA’s Relationship With Congress, 1946-2004*, (Washington, D.C.: Center For the Study of Intelligence, Central Intelligence Agency, 2008), p. 281. See also Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community, Second Edition, 1947-1994*, The University of Tennessee Press, 1994, p. 119.

<sup>4</sup> See the National Security Act of 1947 as amended, Sec. 503 [50 U.S.C. 413b] (c) (2).

<sup>5</sup> See P.L. 96-450, Sec. 501 (a).

to protect from unauthorized disclosure classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.<sup>6</sup> Report language stated:

The Administration recognizes that the intelligence oversight committees of the House and Senate are authorized to receive such information. However, it is recognized that in *extremely rare circumstances* a need to preserve essential secrecy may result in a decision not to impart *certain sensitive aspects* of operations or collection programs to the oversight committees in order to protect *extremely sensitive* intelligence sources and methods.<sup>7</sup> [emphasis added]

In 1991, Congress adopted new but similar language with regard to the protection of sources and methods, adding in statute the phrase "other exceptionally sensitive matters." Doing so, according to accompanying report language, would more accurately reflect and was intended to have the same meaning as the legislative history of the 1980 statutory change. The Report language stated that the added phrase:

... is intended to refer to other extremely sensitive categories of classified information such as information concerning the *operational details* of military deployments, and *extraordinarily sensitive diplomatic contacts*, which the intelligence committees *do not routinely* require to satisfy their responsibilities.<sup>8</sup> [emphasis added]

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<sup>6</sup> Ibid.

<sup>7</sup> See S.Rept. 96-730, p. 6 [96<sup>th</sup> Congress, 1<sup>st</sup> sess.] This Report accompanied S. 2284, a proposed Intelligence Oversight Act of 1980.

<sup>8</sup> See S. Rept. 102-85, accompanying S. 1325, which authorized FY1991 Intelligence appropriations.

The issue of Intelligence Community reporting obligations has been raised anew in recently published reports, reportedly prompting the House Intelligence Committee to launch an investigation to determine whether there was any past decision or direction to withhold information from the Committee. Committee Republicans have asserted that the investigation represents an effort to protect Democratic leader, House Speaker Nancy Pelosi, who has asserted that the CIA misled her about its terrorist interrogation program. See Tabassum Zakaria, "U.S. House Launches Investigation into CIA Program," *Reuters*, July 17, 2009, and "House Intel Committee to Investigate CIA Program," *Associated Press*, July 17, 2009. Senate Intelligence Chairman Dianne Feinstein reportedly has said that current Director of Central Intelligence Leon Panetta recently told lawmakers that former Vice President Richard Cheney had ordered that information regarding a secret Central Intelligence Agency initiative had been withheld from the congressional intelligence committees. Sen. Feinstein was quoted as saying, "We were kept in the dark. That's something that should never, ever happen again." Withholding such information from Congress, she reportedly said, "is a big problem, because the law is very clear." See Siobhan Gorman, "CIA Had Secret Al Qaeda Plan," *Wall Street Journal*, July 13, 2009. Other Members of the Intelligence Committees reportedly have disagreed with Sen. Feinstein's assessment, in whole or in part. Sen. Christopher Bond, Vice Chairman of the Senate Intelligence Committee, was quoted as saying, "There is absolutely no evidence that anyone lied to or misled Congress." Bond also reportedly stated, "The CIA doesn't have the time, we don't have the time, to be briefed on everything the agency's doing around the world. Every time they sneeze, we don't hear about it, unless it's a significant impact, or there's a major impact on our activity. And this was another activity to collect better information on potential threats. It did not work ... it's not an interrogation program. It didn't even rise to the level of covert action." See Ronald Kessler, "Sen. Bond: Democrats Conducting 'Jihad' to Protect Pelosi" *Newsmax.com*, July 13, 2009. Senator Bond also reportedly has stated that the Committee's records indicate that the CIA appropriately notified Members of the CIA's program, a claim which Chairman Feinstein rejected. See Chris Strohm, "Bond Fires Back at Democrats Over CIA's Secret Program," *Congress Daily/A.M.*, July 16, 2009. Congressman Peter Hoekstra, Ranking Member of the House Intelligence Committee, reportedly stated that that he would not judge the CIA harshly in the case of the unidentified program, because it was not fully operational. But he said that in general, the CIA had not been as forthcoming as the law required. See Scott Shane, "Cheney is Linked to Concealment of the C.I.A. Project," *New York Times*, July 12, 2009. According to other reports, former President George W. Bush authorized killing al-Qaida leaders shortly after Sept. 11 terrorist attacks, and that Congress was made aware of that. However, according to this report, Director Panetta also told Members that according to notes that he had been given on the early months of the program, then-Vice President Cheney directed the CIA not to inform Congress of the specifics of the secret program. See Pamela Hess, "Officials: CIA Program Targeted al-Qaida (continued...)

## Use of Limited Notifications Continued After Establishment of Congressional Intelligence Committees

In the wake of congressional investigations undertaken in the mid-1970s that documented a pattern of misconduct on the part of U.S. intelligence agencies, Congress tightened its oversight of the Intelligence Community by establishing intelligence committees in the House and Senate that were to be exclusively devoted to intelligence oversight. Until these two committees were established, Congress's oversight of the intelligence agencies, although more assertive than is generally understood, particularly insofar as the Central Intelligence Agency (CIA) was concerned, was generally viewed as limited and informal.<sup>9</sup> That approach began to change in the face of the revelations of wrong-doing by the Intelligence Community.

In the resolutions establishing the intelligence committees, Congress set out several new obligations that, at least in the case of the Senate, emphasized certain executive branch obligations to keep the two new intelligence committees fully and currently informed of all intelligence activities, including both collection and covert action programs.<sup>10</sup> Although legally non-binding, the "sense of the Senate" resolution establishing the committee also stated that the intelligence agencies should keep the committee informed of "any significant anticipated activities," and provide such information as may be requested by the committee relating to matters within its jurisdiction. Although the House did not include similar language in its resolution, both committees took the position that they were "appropriate committees" for the purposes of receiving notice of covert actions, a position to which the administration of President Jimmy Carter acquiesced.<sup>11</sup>

Despite the Senate's directive that the Senate's new intelligence committee be kept fully and currently informed of all intelligence activities, the executive branch continued its practice of limiting notification of certain sensitive intelligence activities, including covert and collection operations, to the committees' chairmen and ranking members—the Gang of Four—with the apparent acquiescence of the committees' leadership. According to one account, the Committee's chairman, Senator Birch Bayh<sup>12</sup> said:

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Leaders," *Associated Press*, July 13, 2009.

<sup>9</sup> See *The CIA and Congress; the Untold Story From Truman to Kennedy*, by David M. Barrett, University Press of Kansas, 2005, for an overview of congressional intelligence oversight during this period.

<sup>10</sup> The origin of the phrase "fully and currently informed" is the requirement contained in Sec. 202 of the Atomic Energy Act of 1946. The language also is contained in S.Res. 400, 94<sup>th</sup> Congress and, according to congressional sponsors who inserted the language in statute, the requirement has well served both the Joint Committee on Atomic Energy and the Senate Intelligence Committee by ensuring that the Committee would remain informed in such detail as the Committee required. Sponsors pointed out in report language accompanying the statutory change that the responsibility of the executive branch is not limited to providing full and complete information upon request from the intelligence committees but, rather, includes "an affirmative duty on the part of the head of each entity to keep the committees fully and currently informed all major policies, directive, and intelligence activities." See S.Rept. 96-730, p. 7, accompanying S. 2284, the Intelligence Oversight Act of 1980, May 15, 1980.

<sup>11</sup> See "Legislative Oversight of Intelligence Activities: The U.S. Experience," Report prepared by the Select Committee on Intelligence, United States Senate, 103<sup>rd</sup> Congress, 2<sup>nd</sup> sess., October 1994, p. 6.

<sup>12</sup> Senator Birch Bayh was named chairman after Senator Daniel Inouye, the Committee's first chairman, resigned as (continued...)

There were a couple of other areas where the president wouldn't tell the entire committee. He let me know but not the entire committee. I suggested to Goldwater<sup>13</sup> we keep it to ourselves. Barry concurred. There were a couple of others we decided to tell to the entire committee.<sup>14</sup>

According to this same account, there were other sensitive operations about which the committee and its chairman received no notification.<sup>15</sup>

Gang of Four members reportedly continue to keep the contents of sensitive briefings to themselves, although on certain occasions, the chairman and ranking member of the House Intelligence Committee reportedly have agreed to share the information with their respective party leaders.<sup>16</sup> According to at least one Gang of Four member, the choice to do so is not always the lawmakers' to make. Representative Silvestre Reyes, the current chairman of the House Intelligence Committee, reportedly said that, during the administration of President George W. Bush, he was unable to have legal counsel or subject matter experts in attendance during such restricted briefings, leaving the committee unable to conduct oversight. "We were at a huge disadvantage, because [the administration and the intelligence community] called the shots," Reyes reportedly stated.<sup>17</sup>

## 1979 Iran Hostage Crisis

Although Senate Intelligence Committee Chairman Bayh appeared to accept the practice of restricted Gang of Four notifications, he reportedly was furious<sup>18</sup> when he learned President Carter had not informed him in advance of the 1980 covert efforts to rescue U.S. hostages held in Iran because of concerns over operational security and the risk of disclosure.<sup>19</sup> Director of Central Intelligence Stansfield Turner briefed the full intelligence committees, but only after the operations had been conducted.<sup>20</sup>

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chairman.

<sup>13</sup> Senator Barry Goldwater was the Committee's vice chairman during this period of time. The Senate Intelligence Committee's establishing resolution called for the establishment of a committee vice chairman, rather than a "ranking member." The vice chairman acts in the "place and stead" of the committee chairman in the absence of the chairman. See S.Res. 400, Sec. 2 (c), 94<sup>th</sup> Congress.

<sup>14</sup> See Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community, Second Edition, 1947-1994*, The University of Tennessee Press, 1994, p. 121.

<sup>15</sup> Ibid.

<sup>16</sup> See Shane Harris, "The Survivor," *National Journal*, June 6, 2009, pp. 36-43.

<sup>17</sup> Ibid, p. 42

<sup>18</sup> See Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community, Second Edition, 1947-1994*, The University of Tennessee Press, 1994, p. 121.

<sup>19</sup> At the time of the 1980 Iran covert hostage rescue operation, existing law—the 1974 Hughes-Ryan Amendment—required notification of any proposed covert action program to up to eight congressional committees "in a timely fashion"—a phrase generally interpreted to mean that the president could inform Congress of covert operations after the fact. See the Congressional Quarterly Almanac, Vol. XXXVI, 1980, p. 66.

<sup>20</sup> There actually were two separate operations—both of which constituted covert actions, since neither was undertaken to collect intelligence—to rescue U.S. embassy personnel after Iranian "students" overran the U.S. Embassy in Tehran on November 4, 1979. The failed operation involved an attempted airborne rescue of U.S. hostages which was aborted when three of the rescue helicopters experienced mechanical difficulties. A subsequent collision of one of the (continued...)

Bayh expressed his concern that the executive branch’s action reflected a distrust of the intelligence committees. “It would have been so easy to tell us,” he was quoted as saying. “Any leaker of that information would be hung up by his thumbs. I expressed my anger to Carter about not informing us. Carter had a thing about not being able to trust the committee.”<sup>21</sup>

Other members of the Committee, however, apparently were quite sympathetic to the administration’s concerns and expressed their understanding of the demands of secrecy and the subsequent decision to withhold prior notification. One, a senior Republican on the Committee, was quoted as saying, “The more people you tell, the more danger there is of losing life. I say: ‘To hell with the Congress.’”<sup>22</sup>

Despite the overall sympathy shown for President Carter’s position by other members of the intelligence committees, Senator Bayh suggested that future administrations could address disclosure concerns by notifying a more limited number of members, a special subcommittee of five or seven, “so that at least somebody in the oversight mechanism would know .... If oversight is to function better, you first need it to function.”<sup>23</sup> This general sentiment appeared to prevail.

Later in 1980, Congress approved in statute the new Gang of Eight notification procedure. Henceforth, the intelligence committees’ leadership, the Speaker and minority leader of the House, and Senate majority and minority leaders, were to be provided prior notice of particularly sensitive *covert action* programs if the President determined that limited access to such programs was essential to meet extraordinary circumstances affecting vital U.S. interests.<sup>24</sup> At that time, neither the statute nor accompanying report language further defined what would constitute “extraordinary circumstances affecting vital U.S. interests,” although in 1991, Intelligence Conference Committee Conferees stated that the Gang of Eight notification procedure should be invoked when “the President is faced with a covert action of such extraordinary sensitivity or risk to life that knowledge of the covert action should be restricted to as few individuals as possible.”<sup>25</sup> Conferees also indicated that they expected the executive branch to hold itself to the same standard by similarly limiting knowledge of such sensitive covert actions within the executive.<sup>26</sup>

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helicopters and a refueling plane left several American rescuers dead. An earlier effort resulted in the successful extrication of Americans who had been working at the U.S. embassy but had avoided capture by taking refuge in the residences of the Canadian ambassador and deputy chief of mission. See L. Britt Snider, *The Agency and the Hill, CIA’s Relationship With Congress, 1946-2004*, (Washington, D.C.: Center For the Study of Intelligence, Central Intelligence Agency, 2008), p. 283.

<sup>21</sup> See Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community, Second Edition, 1947-1994*, The University of Tennessee Press, 1994, p. 121.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> See the National Security Act of 1947 as amended, Sec. 503 [50 U.S.C. 413b] (c).

<sup>25</sup> Joint Explanatory Statement of the Committee of Conference, accompany Conf.Rept. 102-166, 102<sup>nd</sup> Congress, 1<sup>st</sup> sess. (1991), p. 28. The Joint Explanatory Statement accompanied H.R. 1455, the FY1991 Intelligence Authorization, Act, which was subsequently signed into law (P.L. 102-88). The “risk to life” language is not in statute.

<sup>26</sup> Ibid.



## Distinctions Between Gang of Four and Gang of Eight Notifications

Gang of Four and Gang of Eight<sup>27</sup> notifications differ in several ways. A principal difference is that the Gang of Four notification procedure is not based in statute, as previously mentioned, but rather is a more informal notification process that generally has been accepted by the leadership of the intelligence committees over time.

By contrast, the Gang of Eight procedure is provided for in statute, and imposes certain legal obligations on the executive branch. When employing this particular notification procedure, the President must make a determination that vital U.S. interests are at stake if a notification is to be restricted to the Gang of Eight<sup>28</sup> and provide a statement setting forth the reasons for limiting notification to the Gang of Eight, rather than notifying the full membership of the intelligence committees.<sup>29</sup> The President also is required to provide the Gang of Eight advance notice of the covert action in question,<sup>30</sup> although the statute also recognizes the President’s constitutional authority to withhold such prior notice altogether.<sup>31</sup> Finally, the chairmen of the intelligence committees, both Gang of Eight Members, must be provided signed copies of the covert action finding in question,<sup>32</sup> and Gang of Eight Members must be notified of any significant changes in a previously approved covert action, or any significant undertaking pursuant to a previously approved finding.<sup>33</sup>

A second distinction between the two notification procedures, at least since 1980 when the Gang of Eight procedure was first adopted in statute, is that Gang of Four notifications generally are limited to non-covert action intelligence activities, including principally but not exclusively intelligence collection programs viewed by the Intelligence Community as being particularly sensitive. Gang of Eight notifications, by contrast, are statutorily limited to especially sensitive covert action programs.

Third, the two procedures also appear to differ with regard to certain restrictions that have been placed on Members who are briefed. With regard to Gang of Eight briefings, Members have been unable to take notes, seek the advice of their counsel, or discuss the issues raised with their committee colleagues.<sup>34</sup> Historically, such conditions appear to have been imposed by the

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<sup>27</sup> For an in-depth review of Gang of Eight procedures, see CRS Report R40691, *Sensitive Covert Action Notifications: Oversight Options for Congress*, by Alfred Cumming.

<sup>28</sup> See the National Security Act of 1947 as amended, Sec. 503 [50 U.S.C. 413b](c)(2).

<sup>29</sup> *Ibid.*, Sec. 503 [50 U.S.C. 413b](c)(4). That statute does not explicitly specify whether such a statement must be in writing, nor does it explicitly specify to whom such a statement should be provided.

<sup>30</sup> *Ibid.*, Sec. 503 [50 U.S.C. 413b](c)(2). The President must comply with these last two requirements—providing signed copies of the covert action and providing advance notification—when notifying the full committees of covert action operations that are determined to be less sensitive than Gang of Eight covert actions.

<sup>31</sup> If, however, the President withholds prior notice for the Gang of Eight, he must “fully inform” the congressional intelligence committees in a “timely fashion” after commencement of the covert action in question. See the National Security Act of 1947 as amended, Sec. 503 [50 U.S.C. 413b](c)(3).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, (d).

<sup>34</sup> See letter from Representative Jane Harman to President George W. Bush, January 4, 2006, regarding the National Security Agency (NSA) electronic communications surveillance program, often referred to as the Terrorist Surveillance (continued...)

executive branch and to have been generally complied with by those Members who have been notified.<sup>35</sup> With regard to Gang of Four procedures, however, such procedures appear to have been generally more informal and flexible. For example, staff directors have been included in certain Gang of Four briefings, and note-taking, at least in certain instances, has not been explicitly prohibited.

Notwithstanding these distinctions, there arguably is no provision in statute that restricts whether and how the Chairmen and Ranking Members of the intelligence committees share with committee members information pertaining to intelligence activities that the executive branch has provided only to the committee leadership, either through Gang of Four or Gang of Eight notifications. Nor apparently is there any statutory provision which sets forth any procedures that would govern the access of appropriately cleared committee staff to such classified information. As discussed earlier, there have been instances when intelligence committee leadership has decided to inform the full membership of the intelligence committees of certain Gang of Four notifications.<sup>36</sup>

Despite a statutory provision directing the intelligence committees to establish certain procedures that may be necessary to carry out the statutory provisions requiring that the committees be kept fully and currently informed of intelligence activities, the committees apparently have not established such procedures with regard to Gang of Four and Gang of Eight notifications.<sup>37</sup> If the intelligence committees were to do so, congressional intent would appear to indicate that the establishment of such procedures would be a committee responsibility, rather than one left to the discretion of the committees' chairmen and ranking members.<sup>38</sup>

## Impact of Limited Notifications on Congressional Oversight

The impact of such limited congressional intelligence notification procedures as Gang of Four and Gang of Eight continues to be debated.

Supporters of Gang of Eight notifications, for example, assert that such restricted notifications continue to serve their original purpose, which is to protect operational security of particularly sensitive intelligence activities while they are on-going. Further, they point out that although Members receiving these notifications may be constrained in sharing detailed information about

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Program, or TSP.

<sup>35</sup> See Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community, Second Edition, 1947-1994*, The University of Tennessee Press, 1994, p. 119.

<sup>36</sup> See footnote 14.

<sup>37</sup> In marking up its version of the FY2010 Intelligence Authorization Act, the House Permanent Select Committee on Intelligence replaced the Gang of Eight statutory provision, adopting instead a statutory requirement that each of the intelligence committees establish written procedures as may be necessary to govern such notifications. The executive branch on July 8, 2009, issued a Statement of Administration which stated that the President's senior advisors would recommend that the President veto the FY2010 Intelligence Authorization Act if the Committee's language was retained in the final bill.

<sup>38</sup> See S.Rept. 96-730, 96<sup>th</sup> Cong., 2<sup>nd</sup> sess. (1980), p. 12. This report accompanied S. 2284, from which Title V of P.L. 96-450 is derived.

the notifications with other intelligence committee members and staff, these same Members can raise concerns directly with the President and the congressional leadership and thereby seek to have any concerns addressed.<sup>39</sup> Supporters also argue that Members receiving these restricted briefings have at their disposal a number of legislative remedies if they decide to oppose particular programs, including the capability to use the appropriations process to withhold funding until the executive branch behaves according to Congress’s will.<sup>40</sup>

Some critics counter that restricted notifications such as Gang of Eight do not provide for effective congressional oversight because participating Members “cannot take notes, seek the advice of their counsel, or even discuss the issues raised with their committee colleagues.”<sup>41</sup> Other critics contend that restricted notifications such as Gang of Eight and Gang of Four briefings have been “overused.”<sup>42</sup> Some critics also assert, with regard to the Gang of Four notification procedure, that its use is unlawful because such a procedure is not statutorily based.<sup>43</sup>

## **Directors of National Intelligence and Central Intelligence Agency Critical of Gang of Eight Notifications For Non-Covert Actions**

During his Senate confirmation hearings, Director of National Intelligence (DNI) Admiral Dennis Blair criticized the use of the Gang of Eight notification procedure to notify Congress of the National Security Agency’s (NSA) electronic communications surveillance program—often referred to as the Terrorist Surveillance Program, or TSP—and the CIA’s detention, interrogation and rendition program. Both programs, DNI Blair said, “... involved sensitive collection activities rather than covert actions. The “Gang of 8” notice is available ... only where notice of covert action is concerned, and its used in these programs was not expressly allowed.”<sup>44</sup> DNI Blair said that because of the restrictive nature of Gang of Eight notifications, its use in these two

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<sup>39</sup> See Congressional Quarterly transcript of press conference given by Representative Peter Hoekstra, December 21, 2005.

<sup>40</sup> See Tim Starks, “Pelosi Controversy Suggests Changes to Congressional Briefings Are Due,” *Congressional Quarterly*, May 14, 2009.

<sup>41</sup> See letter from Representative Jane Harman to President George W. Bush, January 4, 2006, regarding the National Security Agency (NSA) electronic communications surveillance program, often referred to as the Terrorist Surveillance Program, or TSP.

<sup>42</sup> See Tim Starks, “Pelosi Controversy Suggests Changes to Congressional Briefings Are Due,” *Congressional Quarterly*, May 14, 2009.

<sup>43</sup> See Vicki Divoll, “Congress’s Torture Bubble,” *Washington Post*, May 13, 2009.

<sup>44</sup> See “Additional Pre-hearing Questions for Dennis C. Blair upon nomination to be Director of National Intelligence,” Question/Answer 4(C), at [<http://intelligence.senate.gov/090122/blairresponses.pdf>].

Before the notification briefings were expanded to include more members, the executive appeared to treat both programs as particularly sensitive collection programs insofar as congressional notification was concerned, in that it limited its initial notification to the Gang of Four. See letter from Representative Jane Harman to President George W. Bush, December 21, 2005, in which she makes reference to the Administration’s use of the Gang of Four notification process, used initially to notify Congress of the NSA’s terrorist surveillance program. The Bush Administration apparently also employed the Gang of Four notification procedure to notify Congress of the CIA’s detention, interrogation and rendition program. See “Members Briefings on Enhanced Interrogation Techniques (EITs),” released by the CIA on May 6, 2009. A listing of the briefings can be found at <http://www.humanevents.com/downloads-pdfs/EIT%20Briefings.pdf>.

instances prevented the intelligence committees “from carrying out their oversight responsibilities.”<sup>45</sup>

CIA Director (DCIA) Panetta, during his confirmation process, said the NSA’s Surveillance Program was not a covert action program, and thus restricting notification of that program to the Gang of Eight was “inappropriate.”<sup>46</sup> Although in his response DCIA Panetta did not address whether the CIA’s detention, interrogation and rendition program was an intelligence collection program, or a covert action program, he did assert that where covert action is concerned, the Gang of Eight notification procedure “ought to be limited to extraordinary cases, where operational details will be revealed whose disclosure might jeopardize those involved ... This result might be justified so long as lives remain at risk, but not after the danger has passed.”<sup>47</sup> He went on to say that restricted Gang of Eight notifications deny the eight Members the ability to conduct oversight because they “cannot tell anyone else what they have heard, and are thereby denied the ability to seek professional advice from their staffs or consult with knowledgeable members.”<sup>48</sup>

## **Both Directors Support Gang of Four Notifications Under Certain Circumstances**

During their respective confirmations, DNI Blair and DCIA Panetta said they would limit the use of notification of certain sensitive intelligence activities, other than covert actions, to the chairmen and ranking members of the intelligence committees for special cases involving the potential for the loss of life if an intelligence operation were to be exposed. Both officials prefaced their respective statements by referencing the statutory requirement that informing the committees of such intelligence activities be done “To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters ...”<sup>49</sup> Both officials said they interpreted the phrase to provide a degree of latitude in deciding how—not whether—extremely sensitive matters would be brought to the committees’ attention.

DNI Blair stated, “In such cases, it may be prudent to begin by notifying the leaders and staff directors of the intelligence committees and attempt to reach an accommodation with them in terms of how and when the committee as a whole should be brought into the matter in question.”<sup>50</sup>

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<sup>45</sup> See “Additional Pre-hearing Questions for Dennis C. Blair upon nomination to be Director of National Intelligence,” Question/Answer 4(C), at <http://intelligence.senate.gov/090122/blairresponses.pdf>.

<sup>46</sup> See “Additional Pre-hearing Questions for the Record For the Honorable Leon E. Panetta upon his selection to be the Director of The Central Intelligence Agency,” Question/Answer 23 at <http://intelligence.senate.gov/090205/answers.pdf>.

<sup>47</sup> Ibid. Although DCIA Panetta did not address whether the CIA’s detention, interrogation and rendition program was an intelligence collection program, or a covert action program, former DCIA Michael Hayden has said that the program “... began life as a covert action ...” See Australian Broadcasting Corporation, *AM*, April 17, 2009.

<sup>48</sup> Ibid.

<sup>49</sup> See the National Security Act of 1947 as amended, Sec. 502 [50 U.S.C. 413b](a).

<sup>50</sup> See “Additional Pre-hearing Questions for Dennis C. Blair upon nomination to be Director of National Intelligence,” Question/Answer 4(A), at <http://intelligence.senate.gov/090122/blairresponses.pdf>.

In responding specifically to a question for the record as to when he would believe notification of an intelligence activity may be limited to the chairman and vice chairman or ranking member, DNI Blair referred specifically to “extremely sensitive” collection activities “... which could involve the loss of life if disclosed – I would go to the leaders of the intelligence committees first, to discuss my concerns and how and when notice could prudently be provided to the entire committee.”<sup>51</sup>

## Conclusion

The Gang of Four notification procedure has no basis in statute. Rather, this procedure could be reasonably characterized as a more informal notification process that, at various times, has been used by the executive branch, to provide limited notification of particularly sensitive intelligence activities to the chairmen and ranking members of the intelligence committees. The Gang of Four procedure appears to have been a practice that has been generally accepted by the chairmen and ranking members of the intelligence committees over time, although there is some indication that, on occasion, committee leadership has resisted the executive branch and its use of this particular notification procedure.<sup>52</sup>

Further, in approving Sec. 501[50 U.S.C. 413](c) of the National Security Act of 1947, which calls on the President and the congressional intelligence committees to establish such procedures as may be necessary to carry out the provisions of this title—referring to the Act’s Title V—it appears that congressional intent was that the full membership of the committees, rather than the chairmen and ranking members, would determine such procedures. No such procedures appear to have been developed with regard to the Gang of Four and Gang of Eight notifications.

The Gang of Eight notification procedure, by contrast, is based in statute. Its use is limited to especially sensitive covert actions in which the President determines that such limited notification is essential to meet extraordinary circumstances affecting vital U.S. interests.

Striking the proper balance between effective oversight and security remains a challenge for Congress and the executive. Doing so in cases involving particularly sensitive collection and covert action programs presents a special challenge. Success turns on a number of factors, not the least of which is the degree of comity and trust that exists in the relationship between the legislative and executive branches. More trust can lead to greater flexibility in notification procedures. When trust in the relationship is lacking, however, the legislative branch may see a need to tighten and make more precise the notification architecture, so as to assure, in its view, that an appropriate flow of information occurs, thus enabling effective oversight.

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<sup>51</sup> Ibid, Question/Answer 4(D).

<sup>52</sup> See hearing transcript of testimony presented by former House Intelligence Committee Chairman Lee Hamilton before the Senate Select Committee on Intelligence: “Open Hearing: Congressional Oversight,” November 13, 2007.

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