



Sensitive Covert Action Notifications: Oversight Options For Congress

Alfred Cumming
Specialist in Intelligence and National Security

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Summary

Legislation enacted in 1980 gave the executive branch authority to limit advance notification of especially sensitive covert actions to eight Members of Congress—the “Gang of Eight”—when the President determines that it is essential to limit prior notice in order to meet extraordinary circumstances affecting U.S. vital interests. In such cases, the executive branch is permitted by statute to limit notification to the chairmen and ranking minority members of the two congressional intelligence committees, the Speaker and minority leader of the House, and Senate majority and minority leaders, rather than to notify the full intelligence committees, as is required in cases involving covert actions determined to be less sensitive.

In approving this new procedure in 1980, during the Iran hostage crisis, Congress said it intended to preserve operational secrecy in those “rare” cases involving especially sensitive covert actions while providing the President with advance consultation with the leaders in Congress and the leadership of the intelligence committees who have special expertise and responsibility in intelligence matters. The intent appeared to some to be to provide the President, on a short-term basis, a greater degree of operational security as long as sensitive operations were underway. In 1991, in a further elaboration of its intent following the Iran-Contra Affair, Congressional report language stated that limiting notification to the Gang of Eight should occur only in situations involving covert actions of such extraordinary sensitivity or risk to life that knowledge of such activity should be restricted to as few individuals as possible.

In its mark-up of the FY2010 Intelligence Authorization Act, the House Permanent Select Committee on Intelligence (HPSCI) eliminated the Gang of Eight statutory provision, adopting instead a statutory requirement that each of the intelligence committees establish written procedures to govern such notifications. According to Committee report language, the adopted provision vests the authority to limit such briefings with the committees, rather than the President. In approving the provision, the Committee rejected an amendment that would have authorized the Committee Chairman and Ranking Member to decide whether to comply with a presidential request to limit access to certain intelligence information, including covert actions. The rejected provision stipulated that if the Chairman and Ranking Member of each of the intelligence committees were unable to agree on whether or how to limit such access, access would be limited if the President so requested.

With Congress considering a possible change, this memorandum describes the statutory provision authorizing Gang of Eight notifications, reviews the legislative history of the provision, and examines both the impact of such notifications on congressional oversight as well as options that Congress might consider to possibly improve oversight.

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Requirements for Notifications of Sensitive Covert Actions to Congress

Under current statute, the President generally is required keep the congressional intelligence committees fully and currently informed of all covert actions¹ and that any covert action² “finding”³ shall be reported to the committees as soon as possible after such approval and before the initiation of the covert action authorized by the finding.

If, however, the President determines that it is essential to limit access to a covert action finding in order to “meet extraordinary circumstances affecting vital interests of the United States,”⁴ then rather than providing advanced notification to the full congressional intelligence committees, as is generally required, the President may limit such notification to the “Gang of Eight,” and any other congressional leaders he may choose to inform. The statute defines the “Gang of Eight” as being comprised of the chairmen and ranking members of the two congressional intelligence committees and the House and Senate majority and minority leadership.⁵

In report language accompanying the 1980 enactment, Congress established its intent to preserve the secrecy necessary for very sensitive covert actions, while providing the President with a process for consulting in advance with congressional leaders, including the intelligence committee chairmen and ranking minority members, “who have special expertise and responsibility in intelligence matters.”⁶ Such consultation, according to Congress, would ensure strong oversight, while at the same time, “share the President’s burden on difficult decisions concerning significant activities.”⁷

In 1991, following the Iran-Contra Affair,⁸ Intelligence Conference Committee Conferees more specifically stated that Gang of Eight notifications should be used only when “the President is faced with a covert action of such extraordinary sensitivity *or risk to life* that knowledge of the

¹ National Security Act as amended, Sec. 503 [50 U.S.C. 413b] (b) and (c).

² A covert action is defined in statute as an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly. See the National Security Act of 1947, Sec. 503(e), 50 U.S.C. 413b(e).

³ A Finding is a presidential determination that an activity is necessary to “support identifiable foreign policy objectives” and “is important to the national security of the United States.” See Intelligence Authorization Act for FY1991, P.L. 102-88, Title VI, Sec. 602 (a) (2), 50 U.S.C. 413b (a).

⁴ National Security Act of 1947 as amended, Sec. 503 [50 U.S.C. 413b] (c) (2). See Addendum A, Title V of the National Security Act as amended. The authorization for Gang of Eight notification also permits the President to notify “such other Member or Members of the congressional leadership as may be included by the President.”

⁵ Ibid.

⁶ Addendum A, S.Rept. 96-730, 96th Cong., 2nd sess. (1980), p. 10. This report accompanied S. 2284, from which Title V of P.L. 96-450 is derived. Gang of Eight notification was included in a new Title V, Sec. 501, Sec. 501 (a) (1) added to the National Security Act of 1947 as amended by Sec. 407 (a) (3) of P.L. 96-450.

⁷ Ibid.

⁸ The Iran-Contra affair was a secret initiative by the administration of President Ronald Reagan in the 1980s to provide funds to the Nicaraguan Democratic Resistance from profits gained by selling arms to Iran. The purpose was at least two-fold: to financially support the Nicaraguan Democratic Resistance and to secure the release of American hostages held by pro-Iranian groups in Lebanon.

covert action should be restricted to as few individuals as possible.”⁹ Congressional 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.¹⁰

Additional Gang of Eight Requirements

In addition to having to determine that vital interests are implicated, the President must comply with four additional statutory conditions in notifying the Gang of Eight. First, the President is required to provide a statement setting out the reasons for limiting notification to the Gang of Eight, rather than the full intelligence committees.¹¹ The two intelligence committee chairmen, both Gang of Eight Members, also must be provided signed copies of the covert action finding in question.¹² Third, the President is required to provide the Gang of Eight advance notice of the covert action in question.¹³ And, lastly, 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.¹⁴

When Prior Notice to the Gang of Eight is Withheld

Although the statute requires that the President provide the Gang of Eight advance notice of certain covert actions, it also recognizes the President’s constitutional authority to withhold such prior notice altogether by imposing certain additional conditions on the President should the decision be made to withhold. If prior notice is withheld, the President must “fully inform” the congressional intelligence committees¹⁵ in a “timely fashion”¹⁶ after the commencement of the

⁹ Joint Explanatory Statement of the Committee of Conference, accompanying Conf.Rept. 102-166, 102nd Congress, 1st 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 repeated in statute.

¹⁰ *Ibid.*

¹¹ National Security Act of 1947 as amended, Sec. 503 [50 U.S.C. 413b] (c) (4). The statute does not explicitly specify whether such a statement should be in writing, nor specifically to whom such a statement should be provided.

¹² *Ibid.*

¹³ National Security Act of 1947 as amended, 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. Sec. 503 [50 U.S.C. 413b] (a) (1) requires a written finding unless immediate action by the U.S. is required and time does not permit preparation of a written finding. In the latter situation, a contemporaneous written record must be immediately reduced to a written finding as soon as possible within 48 hours.

¹⁴ *Ibid.*, (d).

¹⁵ National Security Act of 1947 as amended, Sec. 503 [50 U.S.C. 413b] (c) (3).

¹⁶ *Ibid.* What constitutes “timely fashion” was the subject of intense debate between the congressional intelligence committees and the executive branch during the consideration of the fiscal year 1991 Intelligence Authorization Act. At that time, House and Senate intelligence committee conferees noted that the executive branch had asserted that the President’s constitutional authorities “permit the President to withhold notice of covert actions from the committees for as long as he deems necessary.” The conferees disputed the President’s assertion, claiming that the appropriate meaning of “timely fashion” is “within a few days.” Specifically, conferees stated, “While the conferees recognize that they cannot foreclose by statute the possibility that the President may assert a constitutional basis for withholding notice of covert actions for periods longer than ‘a few days,’ they believe that the President’s stated intention to act under the ‘timely notice’ requirement of existing law to make a notification ‘within a few days’ is the appropriate manner to proceed under this provision, and is consistent with what the conferees believe is its meaning and intent.” The (continued...)

covert action. The President also is required to provide a statement of the reasons for withholding prior notice to the Gang of Eight.¹⁷ In other words, a decision by the executive branch to withhold prior notice from the Gang of Eight would appear to effectively prevent the executive branch from limiting an-after-the-fact notification to the Gang of Eight, even if the President had determined initially that the covert action in question warranted Gang of Eight treatment. Rather, barring prior notice to the Gang of Eight, the executive branch would then be required to inform the full intelligence committees of the covert action in “timely fashion.” In doing so, Congress appeared to envision a covert action, the initiation of which would require short-term period of heightened operational security.

Congress Signaled Its Intent That the Gang of Eight Would Decide When To Inform the Intelligence Committees

During the Senate’s 1980 debate of the Gang of Eight provision, congressional sponsors said their intent was that the Gang of Eight would reserve the right to determine the appropriate time to inform the full intelligence committees of the covert action of which they had been notified.¹⁸

The position of sponsors that the Gang of Eight would determine when to notify the full intelligence committees underscores the point that while the statute provides the President this limited notification option, it appears to be largely silent on what happens after the President exercises this particular option. Sponsors thus made it clear that they expected the intelligence committees to establish certain procedures to govern how the Gang of Eight was to notify the full intelligence committees. Senator Walter Huddleston, Senate floor manager for the legislation, said “... the intent is that the full oversight committees will be fully informed at such time the eight leaders determine is appropriate. The committees will establish the procedures for the discharge of this responsibility...”¹⁹

Senator Huddleston’s comments referred to Sec. 501(c) of Title V of the National Security Act which stipulates that “The President and the congressional intelligence committees shall each establish such procedures as may be necessary to carry out the provisions of this title.”

(...continued)

conference report included the text of a letter sent to the chairman of the House Intelligence Committee, in which President George H.W. Bush stated: “In those rare instances where prior notice is not provided, I anticipate that notice will be provided within a few days. Any withholding beyond this period will be based upon my assertion of authorities granted this office by the Constitution...” See H.Conf.Rept. 102-166, 102nd Cong., 1st sess., pp. 27-28 (1991). Despite President George H.W. Bush’s refusal to commit to either “timely” notification as defined by Congress, or any notification at all, Robert M. Gates, President George H.W. Bush’s nominee as Director of Central Intelligence, said he believed that non-notification should be withheld for no more than a few days at the most, and that he would contemplate resignation if it extended beyond that time period. See Congressional Quarterly Almanac, 102nd Cong., 1st sess., 1991, Vol. XLVII, p. 482.

¹⁷ Ibid.

¹⁸ See Addendum B, copy of the Senate debate as recorded in the Congressional Record, 96th Congress, 2nd Session, Volume 126—Part 20, September 17, 1980 to September 24, 1980. See p. 17693.

¹⁹ Ibid, p. 17693.

With regard to Sec. 501(c), Senate report language stated:

The authority for procedures established by the Select Committees is based on the current practices of the committees in establishing their own rules. One or both committees may, for example, adopt procedures under which designated members are assigned responsibility on behalf of the committee to receive information in particular types of circumstances, such as when all members cannot attend a meeting or when certain highly sensitive information is involved.²⁰

Congressional intent thus appeared to be that the collective membership of each intelligence committee, rather than the Committee leadership, would develop such procedures.²¹ Moreover, the rules that each committee have subsequently adopted, while they deal in detail as to how the committees are to conduct their business, do not appear to address any procedures that might guide Gang of Eight notifications generally. Rather, to the extent that any such procedures have been adopted, those procedures appear to have been put into place at the executive branch's insistence, according to congressional participants.²²

Congress Approved Gang of Eight Notifications in 1980, Following the Iran Hostage Rescue Attempt

Congress approved the Gang of Eight notification provision in 1980 as part of a broader package of statutory intelligence oversight measures generally aimed at tightening intelligence oversight while also providing the Central Intelligence Agency (CIA) greater leeway to carry out covert operations,²³ following a failed covert operation to rescue American embassy hostages in Iran.²⁴

Congressional approval came after President Jimmy Carter decided not to notify the intelligence committees of the operation in advance because of concerns over operational security and the risk of disclosure. Director of Central Intelligence Stansfield Turner briefed the congressional intelligence committees only after the operations had been conducted. Although most members reportedly expressed their understanding of the demands for secrecy and thus the

²⁰ See addendum B, S.Rept. 96-730, 96th Cong, 2nd sess. See p. 13 of the report.

²¹ Ibid, p. 12.

²² Letter from Representative Jane Harman to President George W. Bush, January 4, 2006. Another example of the informality which sometimes informs the intelligence notification process involves so-called Gang of Four notifications. The Gang of Four consists of the chairmen of the congressional intelligence committees, the Vice Chairman of the Senate Intelligence Committee and the Ranking Member of the House Intelligence Committee. The executive branch frequently limits certain intelligence notifications to these four Members, sometimes including committee staff directors, even though neither statute, or committee rules, appear to make provision for such notifications.

²³ Congressional Quarterly Almanac, Vol. XXXVI, 1980, p. 66.

²⁴ 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 Nov. 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 helicopters and a refueling plane left seven American rescuers dead. An earlier effort resulted in the successful extrication of six 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.

Administration's decision to withhold prior notification,²⁵ Senate Intelligence Committee Chairman Birch Bayh expressed concern that the executive branch's action reflected a distrust of the committees. He suggested that future administrations could address disclosure concerns by notifying a more limited number of Members "so that at least somebody in the oversight mechanism would know If oversight is to function better, you first need it to function [at all]."²⁶ Such sentiments appear to have contributed to the subsequent decision by Congress to permit the executive branch to notify the Gang of Eight in such cases.²⁷

Authority of Gang of Eight to Affect Covert Action

Even with statutory arrangements governing covert action, including Gang of Eight covert actions, Congress does not have the authority under statute to veto outright a covert action. Indeed, former Senator Howard Baker successfully pushed the inclusion in the 1980 legislative package of a provision making clear that Congress did not have approval authority over the initiation of any particular covert action.²⁸

Nonetheless, the Gang of Eight Members, as do the intelligence committees, arguably have the authority to influence whether and how such covert actions are conducted over time. For example, Members could express opposition to the initiation of a particular covert action. Some observers assert that in the absence of Members' agreement to the initiation of the covert action involved, barring such agreement, an administration would have to think carefully before proceeding with such a covert action as planned.²⁹

The Gang of Eight over time could also influence funding for such operations. Initial funding for a covert action generally comes from the CIA's Reserve for Contingency Fund, for which Congress provides an annual appropriation. Once appropriated, the CIA can fund a covert action using money from this fund, without having to seek congressional approval. But the executive branch generally must seek additional funds to replenish the reserve on an annual basis. If the Gang of Eight, including the two committee chairmen and ranking members were to agree not to continue funding for a certain covert action, they arguably could impress on the membership of the two committees not to replenish the reserve fund, providing they informed the committees of the covert action, a decision which the congressional sponsors said they intended to be left to the discretion of the Gang of Eight in any case.

²⁵ At the time, the Hughes-Ryan Amendment of 1974 requiring that the executive branch report on Central Intelligence Agency covert operations to as many as eight congressional committees, including the intelligence committees, was still the law.

²⁶ 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.

²⁷ *Ibid.*

²⁸ National Security Act of 1947 as amended, Sec. 501[50 U.S.C. 413] (a) (2).

²⁹ 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. 311. See also Mike Soraghan, "Reyes Backs Pelosi On Intel Briefings," *The Hill*, May 1, 2009. House Intelligence Committee Ranking Member Peter Hoekstra reportedly stated that Members of Congress are able to challenge policies they disagree with. "This is nuts, this saying, 'I couldn't do anything,'" Hoekstra told the Hill, adding that he at least once complained to then President Bush and got a policy changed, according to the newspaper.

Thus, the Gang of Eight could influence the intelligence committees to increase, decrease or eliminate authorized funding of a particular covert action. Some observers point out, however, that the leaders' overall effectiveness in influencing a particular covert action turns at least as much on their capability to conduct effective oversight of covert action as it does on their legal authority.

Impact on Congressional Intelligence Oversight

The impact of Gang of Eight notifications on the effectiveness of congressional intelligence oversight continues to be debated.

Supporters of the Gang of Eight process contend that such notifications continue to serve their original purpose, which, they assert, is to protect operational security of particularly sensitive covert actions that involve vital U.S. interests while still involving Congress in oversight. Further, they point out that although Members receiving these notifications may be constrained in sharing detailed information about 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.³⁰ Supporters also argue that Members receiving these restricted briefings have at their disposal a number of legislative remedies if they decide to oppose a particular covert action program, including the capability to use the appropriations process to withhold funding until the executive branch behaves according to Congress's will.³¹

Critics counter with the following points. First, they say, Gang of Eight notifications do not provide for effective congressional oversight because participating Members "cannot take notes, seek the advice of their counsel, or even discuss the issues raise with their committee colleagues."³² Second, they contend that Gang of Eight notifications have been "overused."³³ Third, they assert that, in certain instances, the executive branch did not provide an opportunity to Gang of Eight Members to approve or disapprove of the program being briefed to them.³⁴ And fourth, they contend that the "limited information provided Congress was so overly restricted that it prevented members of Congress from conducting meaningful oversight."³⁵

³⁰ See Congressional Quarterly transcript of press conference given by Representative Peter Hoekstra, December 21, 2005.

³¹ See Tim Starks, "Pelosi Controversy Suggests Changes to Congressional Briefings Are Due," *Congressional Quarterly*, May 14, 2009.

³² 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.

³³ See Tim Starks, "Pelosi Controversy Suggests Changes to Congressional Briefings Are Due," *Congressional Quarterly*, May 14, 2009.

³⁴ Press release from Senator John D. (Jay) Rockefeller, December 19, 2005, commenting on the Terrorist Surveillance Program initiated by the George W. Bush Administration. As discussed earlier in this memorandum, under Sec. 501(a)(2), nothing in Title V "shall be construed as requiring the approval of the congressional intelligence committees as a condition precedent to the initiation of any significant anticipated intelligence activity.

³⁵ *Ibid.*

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

During their respective Senate confirmation hearings, Director of National Intelligence (DNI) Dennis Blair and CIA Director Leon Panetta 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. DNI Blair said both programs "... 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 use in these programs was not expressly allowed."³⁶ Director Panetta said "the NSA surveillance program was not a covert action program, and, therefore, limiting notification to the "gang of eight" was inappropriate."³⁷ DNI Blair said that, because of the restrictive nature of Gang of Eight notifications in these two instances, "the intelligence committees were prevented from carrying out their oversight responsibilities."³⁸ Director Panetta, expressing similar sentiments, said that such limited notifications "restrict the ability of the intelligence committees to conduct oversight."³⁹

³⁶ 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>.

³⁷ 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>. In his response, Director Panetta did not address whether the CIA's detention, interrogation and rendition program was an intelligence collection program, or a covert action program. Former CIA Director Michael Hayden, has said that the program "... began life as a covert action ... " See Australian Broadcasting Corporation, *AM*, April 17, 2009.

Before the notification briefings were subsequently expanded to include more Members, the executive treated both programs as particularly sensitive collection programs insofar as 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. The Bush Administration 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>.

³⁸ 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>.

³⁹ 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>.

House Intelligence Committee Eliminates Gang of Eight Procedure in FY2010 Intelligence Authorization Act

In marking up its version of the FY2010 Intelligence Authorization Act, the House Intelligence Committee replaced the Gang of Eight statutory provision, adopting in its place a statutory requirement that each of the intelligence committees establish written procedures as may be necessary to govern such notifications.

The current Gang of Eight statutory provision stipulates:

If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interest of the United States, the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and the minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President⁴⁰

The substitute language approved by the House Intelligence Committee stipulates:

If, pursuant to the procedures established by each of the congressional intelligence committees under Section 501(c), one of the congressional intelligence committees determines that not all members of that committee are required to have access to a finding under this subsection, the President may limit access to such findings or such notice as provided in such procedures.⁴¹

According to Committee report language, the provision:

requires the President to brief all members of the congressional intelligence committees, but implicitly provides for the possibility of more restricted briefings pursuant to the written procedures established by the congressional intelligence committees, pursuant to the revised Section 501 (c). This language vests the authority to limit the briefings with the committees, rather than the President.⁴²

The Report's reference to a revision of Sec. 501 of the National Security Act pertained to the Committee's approval of statutory language requiring that the President and the congressional intelligence committees each establish such "written" procedures as may be necessary to carry out the statutes provisions.⁴³ Current statute does require that any such procedures be in writing.

In approving the new provision, the committee rejected an amendment that would have authorized the Committee's Chairman and Ranking Member to decide whether to comply with a presidential request to limit access to certain intelligence information, including covert actions.

⁴⁰ Sec. 503 of the National Security Act [50 U.S.C. 413b] (c)(2).

⁴¹ See Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, Sec. 321 [111th Congress, 1st sess.].

⁴² See H.Rept. 111-186, accompanying the Intelligence Authorization Act for Fiscal Year 2010, pp. 21-22 [111th Congress, 1st sess.].

⁴³ See Intelligence Authorization Act for 2010, H.R. 2701, Sec. 321 (b).

The rejected amendment stipulated that if the Chairman and Ranking Member were unable to agree on whether or how to limit such access, access to the information would be limited if so requested by the President.⁴⁴

According to the views of the Minority contained in the report, the provision adopted by the Committee:

nowhere creates a statutory presumption that all Members of the Committee should be briefed. Instead, it would require the Committee to unilaterally develop procedures for the handling of reporting on sensitive matters, even though the President has significant constitutional authorities in the area of national security that Courts have repeatedly said must be considered with and balanced against the authorities of Congress. The provision nowhere provides a mechanism for ensuring that decisions within the Committee are made on a bipartisan basis or for reconciling any dispute between the branches with respect to such reporting, which is a receipt for Constitutional gridlock that could be disastrous with respect to such sensitive matters.⁴⁵

The House Intelligence Committee Adopted Several Other Covert Action-Related Measures as Part of FY2010 Intelligence Bill

The House Intelligence Committee adopted several additional statutory changes with regard to covert action notifications. One such change would require that the information or material concerning covert actions include any information or material relating to the legal authority under which a covert action is being or was conducted, and any information or material relating to legal issues upon which guidance was sought in carrying out or planning the covert action, including dissenting legal views.⁴⁶

Another change would require that the President provide Members who are not notified of a particular covert action, pursuant to the procedures established by the each of the committees, with general information on the content of the covert action.⁴⁷

The Committee also adopted a provision that would permit a member who objects to a particular covert action that has been notified to submit an objection to the Director of National Intelligence. The DNI is required to notify the President of the objection no later than 48 hours after the objection has been submitted.⁴⁸

Finally, the committee approved covert action-related provisions that would:

⁴⁴ See Intelligence Authorization Act For 2009, H.R. 5959, Sec. 502 (b). This language applied to reports of intelligence activities other than covert action. The amendment offered to the FY2010 Intelligence Authorization Act during the Committee's markup was extended to include reporting of covert actions.

⁴⁵ See H.Rept. 111-186, accompanying the Intelligence Authorization Act for Fiscal Year 2010, *Minority Views*, p. 3 [111th Congress, 1st sess.].

⁴⁶ See H.R. 2701, Intelligence Authorization Act for Fiscal Year 2010, Sec. 321 (d).

⁴⁷ *Ibid.*, (g) (2).

⁴⁸ *Ibid.*, (g) (1).

- require that the CIA inspector general audit each covert action every three years;⁴⁹
- require that the President maintain a record of the Members of Congress notified of a covert action and to provide such record within 30 days after the notification is provided;⁵⁰ and
- define the current statutory phrase “significant undertaking” to mean an activity involving the potential for loss of life; requiring an expansion of existing authorities, including authorities relating to research, development, or operations; resulting in the expenditure of significant funds or other resources; requiring notification under section 504; giving rise to a significant risk of disclosing intelligence sources or methods; or possibly causing serious damage to the diplomatic relations if the activity were to be disclosed without authorization.⁵¹

Gang of Eight Notifications: The Historic Record

Notwithstanding the continuing debate over the merits of such notifications, what remains less clear is the historic record of compliance with Gang of Eight provisions set out in statute. Questions include: have such notifications generally been limited to covert actions, ones that conform to congressional intent that such covert actions be highly sensitive and involve the risk to life? When prior notification is limited to the Gang of Eight, has the executive branch provided an explanatory statement as to why it limited notification to the Gang of Eight? If the Gang of Eight is not provided prior notice, has the executive branch then informed the intelligence committees at a later date and provided a reason why prior notification was not provided? Has the Gang of Eight, once notified, ever then made a determination to notify the intelligence committees, a prerogative envisioned by its congressional sponsors? Have the congressional intelligence committees, at any time since they were established, attempted to develop procedures to guide Gang of Eight notifications, as envisioned by the sponsors of the Gang of Eight provision?

Possible Gang of Eight Options

The 111th Congress, in its assessment, could deem that the Gang of Eight notification procedure, as currently provided for in statute and by practice, continues to strike a reasonable balance between the twin objectives of operational security and congressional oversight. If, however, changes are sought, Congress could consider the following options.

Alternative One

Congress could adopt the approach approved by the House Intelligence Committee during its markup of the FY2010 Intelligence Authorization Act. This approach would eliminate the Gang of Eight statutory provision, according to its sponsors, substituting instead a provision that its

⁴⁹ Ibid, Sec. 411.

⁵⁰ Ibid, (g) (3).

⁵¹ Ibid, (d) (2).

sponsors said would require that the President brief all members of the congressional intelligence committees, while implicitly providing for the possibility of more restricted briefings pursuant to the written procedures that would be established by the congressional intelligence committees as may be necessary to carry out the statute's provisions.

Alternative Two

Congress could adopt the provision supported by some members of the House Intelligence Committee but ultimately rejected by a majority of the Committee membership that would have authorized the Chairmen and Ranking Members of the intelligence committees to decide whether to comply with a presidential request to limit access to certain intelligence information, including covert actions. The amendment stipulated that if the Chairman and Ranking Member were unable to agree on whether or how to limit such access, access to the information would be limited, if so requested by the President.

Alternative Three

If Congress were to decide to preserve the Gang of Eight notification procedure, but were to consider modifying the process, such modifications could include specifying explicitly in statute that:

- Gang of Eight notifications are permitted only in situations involving covert action, rather than in those situations involving non-covert action programs, including sensitive intelligence collection programs;
- a Gang of Eight notification remain in place as long as sensitive operations are underway. Once such operational sensitivities no longer prevail, however, the full membership of the intelligence committees would be informed;
- Gang of Eight Members, rather than the executive branch, will decide when to notify the full membership of the intelligence committees.
- the executive branch be required to provide a statement of the reasons, *in writing*, for limiting notification to the Gang of Eight, and that the executive branch provide a *written* statement to the congressional intelligence committees in a timely fashion when it does not provide prior notice of a covert action to the Gang of Eight.
- Pursuant to Sec. 501(c) of the National Security Act, which requires the establishment of procedures as may be necessary to carry out the provisions of the statute, Congress could require that the congressional intelligence committees establish certain procedures that would govern Gang of Eight notifications, as the sponsors of the Gang of Eight provision apparently originally intended. Such procedures could include permitting Gang of Eight Members to take notes as such briefings and establishing a process of more formal consultation between Gang of Eight Members.⁵²

⁵² Given the demands of timing and scheduling, according to former executive branch officials, in the interest of time, Gang of Eight Members are sometimes notified by secure phone. If scheduling permits, briefings are provided to Gang of Eight Members, often on an individual basis. It is unclear whether Gang of Eight Members ever have requested to be (continued...)

Alternative Four

Congress statutorily could eliminate the Gang of Eight procedure and bring sensitive covert actions notifications back within the intelligence committee structure by permitting the President to limit initial briefings of such operations to the Chairmen and Ranking members of the two intelligence committees, the so-called “Gang of Four” formulation. Under this change, committee leadership could be permitted to consult with House and Senate leaders, and staff, and inform the full intelligence committees when they determine it to be appropriate.

Alternative Five

Congress statutorily could require that the executive branch inform the full membership of the intelligence committees of all covert actions, irrespective of their perceived sensitivity.

Conclusion: Striking a Balance

Striking the proper balance between effective oversight and security remains a challenge to Congress and the executive. Doing so in cases involving particularly sensitive covert actions presents a special challenge. Success turns on a number of factors, not the least of which is the degree of comity and trust that defines 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 what it views as being an appropriate flow of information, thus enabling effective oversight.

Author Contact Information

Alfred Cumming
Specialist in Intelligence and National Security
acumming@crs.loc.gov, 7-7739

(...continued)

briefed as a group, or whether certain time and scheduling constraints would make such a request practical.