

# Putting Intelligence Oversight on Stronger Footing

**Andy Johnson**

## Introduction

There is a legal and historical compact—a marriage of sorts—between the Congress and the Executive Branch over how intelligence activities are to be carried out and monitored. The marriage is a comparatively new one, going back 35 years to the creation of the Senate and House intelligence oversight committees. It is based on strong foundation—a common set of beliefs about the essential role of the Intelligence Community in providing for our national security. But this relationship also has created a dynamic tension which produces periods of fragile equilibrium followed by those of volatility fueled by suspicion, mistrust, and public recriminations.

The relationship reached its nadir under the Bush administration. After 9/11, the Bush administration misinterpreted its obligations under the National Security Act to keep Congress fully and currently informed of intelligence activities. This grievously undermined effective, legally required congressional oversight. The worst such abuse was the President Bush's so-called "terrorist surveillance program," which was kept from the full membership of the congressional oversight committees for over five years. While some covert action is subject to the "Gang of Eight" carve-out, which limits the scope of congressional notification to the bipartisan leadership of the two caucuses and intelligence committees, the Bush surveillance program was not such a program. As the marriage grew acrimonious, the children—the Intelligence Community—were caught in between the squabbling, unsure whether increasingly aggressive operations had solid legal grounding and congressional endorsement.

The Obama national security team recognized the severity of the problem it inherited and took steps in the past year to repair the damage done to the relationship by providing a fuller accounting of past and current intelligence activities. But the nettlesome issues of trust and transparency have again flared up as Congress seeks to finalize and pass the first intelligence authorization bill in five years to garner the President's signature. **The Obama administration should drop its objection to notifying all members of the intelligence committees when the President limits covert action briefings to the Gang of Eight.** Both chambers have proposed that excluded committee members get classified notification about the Gang of Eight briefings and a rudimentary sense of the topics discussed.

Such a reasonable step would remedy a weakness in the law that invites abuse without endangering the protection of already-classified information. Moreover, by embracing this reform, the Obama administration would be restoring trust and balance to the oversight relationship and ushering in a new era in which *all* of our nation's intelligence activities are strengthened by having been properly evaluated and endorsed by both the Executive Branch and Congress. Meeting the security threats and challenges of the 21st century will require this unity of purpose.

## **The Legislative Impasse**

Due to presidential veto and Republican objections, five years have passed since a bill authorizing the activities of the Intelligence Community has been passed by Congress and signed into law. The Senate and House have passed fiscal year 2010 intelligence authorization bills and are proceeding to a conference to reconcile differences. Both bills contain congressional notification provisions which would amend the National Security Act to improve Executive Branch reporting on all intelligence activities, with particular focus on the reporting of covert actions (*see attached descriptions of the relevant sections of the bills*). Both measures would end the practice of limiting notifications—of covert action or

otherwise—to the committee leadership, since this has rendered congressional oversight committees powerless to act as a body. While the approaches of the Senate and House bills differ, each would require that intelligence committee members outside the Gang of Eight not briefed of the intelligence activities be provided written notification, in general terms, of the main features of the activity and the President’s justification for its restriction.

On March 15, 2010, OMB Director Peter Orzag wrote to the leadership of the two intelligence committees conveying the concerns of the administration. He highlighted the congressional notification provisions as being among those “so serious that the President’s senior advisors would recommend that he veto the bill if they are included in a bill presented for his signature.”

## **The Case for Reforming the Congressional Notification Process**

While Director Orzag makes some valid points concerning the notification language contained in the Senate and House bills, the case for changing the law is nevertheless a strong one.

Congress is constitutionally required to oversee intelligence activities. Moreover, the statutory framework for this oversight is mandated in the National Security Act of 1947, which sets forth certain obligations on the President, including the requirement to keep the congressional intelligence committee membership “fully and currently informed” of all intelligence activities. The law does allow the President to limit access to a covert action finding to the Gang of Eight (the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leaders of the House and the majority and minority leaders of the Senate) and such other members of Congress as the President decides, if he determines that “it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States.”

*[See attached.]*

Invoking the “Gang of Eight” exception in the current Congress would mean denying most of the members of the two intelligence committees – 13 of 15 Senators and 19 of 21 House members – knowledge of and access to the finding. This is a mistake—these excluded members are entrusted with our nation’s most sensitive secrets and deal daily with matters that, if revealed to the public, would not only compromise American security but endanger lives. As committee members they are responsible for producing annual legislation authorizing the classified budget and clandestine human, signals and imagery intelligence collection operations of the Intelligence Community.

Occasionally limiting time- and operationally-sensitive details about certain intelligence operations to the Gang of Eight is sensible, justified and consistent with the intent of the law. But using the exception to operate controversial, multi-year programs beyond the scrutiny of Congress is not.

President Bush’s insistence on placing Gang of Eight limitations on both covert programs, such as the CIA’s detention and interrogation program, and non-covert programs, such as the NSA’s terrorist surveillance program, effectively short-circuited congressional oversight for over five years. All but a handful of members were kept in the dark and unwittingly approved funding for programs they did not know existed. The few members who were briefed were effectively gagged from informing their committee colleagues. Moreover, they were handcuffed from acting by the President’s limitation on access, since only the committee as a whole (and then, in turn, Congress) can act to change requested funding levels or restrict intelligence activities. When it came to these limited access programs, congressional oversight existed in name only.

The sole basis for the Gang of Eight restriction is a subjective determination by the President that while eight members of Congress can be trusted with the information, 36—the combined membership of the both intelligence committees—cannot. This dubious claim for Gang of Eight limitations is

weakened further when one considers the disproportionate number of Executive Branch employees that have access to these programs.

Our intelligence activities are stronger and more effective when congressional oversight is brought to bear. Tough questions are asked and careful attention is given to both the legality and effectiveness of proposed programs.

Congressional buy-in is important, particularly when, as is unfortunately all too often the case these days, clandestine activities or intelligence failures are publicly revealed.

## **Conclusion**

According to current law, restricting access to the Gang of Eight should occur only in extraordinary circumstances and be limited to covert action findings. But a loophole exists in the law which has been exploited in the past to render congressional oversight meaningless. The Obama administration should find common ground with Congress and close this loophole in a way that protects the President's solemn responsibility for safeguarding sensitive information from unauthorized disclosure while at the same time allowing all oversight committee members with access to the information it needs to do its job. By embracing this common-sense reform, the Obama administration would not only be restoring trust to a badly strained relationship, it would be providing the men and women of our Intelligence Community workforce with the confidence that they are carrying out their duties with the full support of both the Executive Branch and the Congress.

## **Addendum**

### **Report Language of Relevant Senate and House Bill Provisions**

Senate bill, S.1494, sections 331-334

*Section 331. General congressional oversight*

Section 331 amends the requirements for notifications to Congress under section 501 of the National Security Act of

1947 by adding a new paragraph stating that there shall be no exception to the requirements of Title V of the National Security Act of 1947 to inform the congressional intelligence committees of all intelligence activities and covert actions.

*Section 332. Improvement of notification of Congress regarding intelligence activities of the United States*

Section 332 further amends the requirements for notifications to Congress under Title V of the National Security Act of 1947. In the event the DNI or head of an Intelligence Community element does not provide to the full congressional intelligence committees the notification required by Section 502 (relating to intelligence activities other than covert actions) or Section 503 (relating to covert actions), the committees shall be provided notice of this fact. This notice must be submitted in writing in a classified form and include a description of the main features of the intelligence activity or covert action as well as a statement of the reasons for not briefing the full committee. The notice may not contain a restriction on access to it by all members of the committee.

This section also extends to Section 503 of the National Security Act of 1947 requirements now in Section 502 of the Act on the form and contents of reports. Accordingly, reports on covert actions now shall also contain a concise statement of any facts pertinent to the covert action and an explanation of the significance of the covert action. In addition, rather than the existing requirement to report changes only if they are 'significant,' under the amendment any change to a covert action finding must be reported.

*Section 333. Requirement to provide legal authority for intelligence activities*

Section 333 amends the National Security Act of 1947 by requiring that the congressional intelligence committees be provided with the legal authorities under which all covert action and all other intelligence activities are or were conducted.

*Section 334. Additional limitation on availability of funds for intelligence and intelligence-related activities*

Section 334 adds to the requirements of Section 504 of the National Security Act of 1947 an enforcement mechanism for the notification provisions in Sections 501 through 503. The section provides that funds may be obligated or expended for an intelligence activity only if the congressional intelligence committees have been 'fully and currently informed' of that activity. The committees will be considered to have been fully and currently informed only if all members of the committees are fully informed or, in the circumstances in which the amendments made by Section 332 apply, if the committees have been provided with a classified notice of the main features of the intelligence activity that does not contain a restriction on access by all members.

House bill, H.R.2701, section 321

*Section 321. Reporting on covert actions*

Section 321 changes the processes for reporting of intelligence activities, including covert actions, to the congressional intelligence committees.

Title V of the National Security Act of 1947 requires the President to ensure that the congressional intelligence committees are kept fully and currently informed of intelligence activities. Section 503 of the National Security Act enumerates specific procedures with respect to briefings on covert actions.

In the past, the Committee has struggled with the limitations imposed by the executive branch on reporting of intelligence activities. To address this problem, subsection (a) amends Section 501(a) of the National Security Act by explicitly requiring the President to brief the congressional intelligence committees on legal authorities, operational risks, resource concerns, and potential for failure at issue with respect to significant, anticipated, or ongoing intelligence activities.

Subsection (b) amends Section 501(c) of the National Security Act by requiring that the procedures governing the briefings must be in writing.

Subsection (c) amends Section 502 of the National Security Act by providing explicit guidance on how the President should brief the intelligence committees on legal issues related to intelligence activities.

Subsection (d) amends Section 503 of the National Security Act by applying the same explicit guidance in subsection (c) to briefings on covert actions. This subsection also replaces Section 503(c)(2), which allowed the President to limit reports on covert actions to the so-called 'Gang of Eight' -- the chairmen and ranking members of the intelligence committees, the Speaker and Minority Leader of the House of Representatives, and the majority and minority leaders of the Senate -- if the President determines that extraordinary circumstances affecting vital interests of the United States warrant limiting access.

This subsection replaces Section 503(c)(2) with a provision that 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. Also, in defining the term 'significant undertaking,' the subsection explicitly establishes certain conditions under which the President is required to provide information on a covert action program to the congressional intelligence committees.

This subsection further provides that, if a briefing on a finding or notice is restricted to certain members of the committees, the President shall provide those members with general information on the content of the finding or notice. It also allows any member of Congress to whom a covert action finding or notice has been reported to submit to the

DNI an objection concerning any part of that finding or notice, who must report that objection to the President in writing within 48 hours.

Additionally, this subsection requires that the President maintain a record of the members to whom a finding or notice has been reported and provide that record to the congressional intelligence committee in question within 30 days.

Finally, this subsection clarifies that, as a matter of construction, any reference in sections 501, 502, or 503 to a requirement that information be provided to the intelligence committees shall be construed to require that such information be provided to all members of those committees, except as provided in revised Section 503(c)(2).

The Committee understands well the need to protect intelligence information from unauthorized disclosure and the prerogatives of the executive branch with respect to the protection of classified information. However, these principles must be balanced against the constitutional requirement for congressional oversight.

Section 503 of the National Security Act attempted to establish a balance between the executive and legislative branches. Over the past eight years, the balance was tipped towards the executive at the expense of congressional oversight. That state of affairs was particularly troubling in light of the controversial nature of some of the programs that were not briefed to the full membership of the intelligence committees. This section resets that balance with respect for the executive branch's prerogatives, but with an eye on ensuring that Congress is able to fulfill its oversight responsibility.

## **Relevant Provisions of the Current Law**

*(underlining added for emphasis)*

Title V of the National Security Act of 1947 entitled  
*“Accountability for Intelligence Activities”*

Under Section 501, *“General Congressional Oversight Provisions”*

- “The President shall ensure the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity...” [Sec. 501(a)(1)]
- “The President shall ensure that any illegal intelligence activity is reported promptly to the congressional oversight committees, as well as any corrective action...” [Sec. 501(b)]
- “The House of Representatives and the Senate shall each establish by rule or resolution of such House, procedures to protect from unauthorized disclosure all classified information, and all information relating to intelligence sources and methods...” [Sec. 501(d)]

Under Section 502, *“Reporting on Intelligence Activities Other Than Covert Actions”*

- “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, the [Director of National Intelligence and other United States Government entities]...shall (1) keep the congressional intelligence committee fully and currently informed of all intelligence, other than a covert action (as defined in section 503(e)...; and (2) furnish the congressional oversight committee any information or material concerning intelligence activities, other than covert actions, which is within their custody or control, and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.” [Sec. 502(a)]

- “Any report relating to a significant anticipated intelligence activity or a significant failure...shall be in writing...” [Sec. 502(b)]

Under Section 503, “*Presidential Approval and Reporting of Covert Action*”

- Language in Sec. 502(a) regarding informing Congress and furnishing information is repeated and applies to covert actions
- “The President shall ensure that any finding approved... shall be reported to the congressional oversight committees as soon as possible after such approval and before the initiation of the covert action authorized by the finding...” [Sec. 503(c)(1)]
- “If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and 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 President.” [Sec. 503(c)(2)] Section 503 (c)(4) further requires a statement of reasons for limiting such access.

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