

**CONGRESSIONAL OVERSIGHT OF NATIONAL SECURITY**  
**REFORM AGENDA**

December 17, 2014\*

Congressional oversight of national security is broken. While Congress has a central role in authorizing, overseeing, and funding programs related to national security, it cannot perform its constitutionally required oversight role without each legislator having access to sufficient information.

In the 1970s, unconscionable abuses and breathtaking violations of law committed in the name of national security led to reforms.<sup>1</sup> These reforms have since eroded, and again members of Congress find themselves troubled by information obtained through leaks and news reports.<sup>2</sup> Many representatives have come to the conclusion that congressional oversight of the intelligence community does not work.<sup>3</sup> Congress must once again review how it conducts oversight and renew its commitment to meaningful stewardship of national security activities.<sup>4</sup>

The new Congress and upcoming transition in leadership of the House Permanent Select Committee on Intelligence (“HPSCI”) is the right time for modernization. When the 114<sup>th</sup> Congress convenes in January 2015, the House of Representatives should implement commonsense reforms to empower intelligence oversight by members of HPSCI, other committees of jurisdiction, and all elected representatives. In addition, the House should establish a special committee to address more complex concerns regarding intelligence community activities.

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<sup>1</sup> See, for example, the *Report of the Select Committee to Study Government Operations with Respect to Intelligence Activities*, also known as the "Church Committee" report, S Rept. 94-755 (1976), detailing assassination plots against foreign leaders, surveillance of domestic political activities, and much more, available at <http://www.intelligence.senate.gov/churchcommittee.html>.

<sup>2</sup> See, for example, *Bush's Fumbles Spur New Talk of Oversight on Hill*, Dana Milbank, The Washington Post (2005), available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/17/AR2005121700992.html>

<sup>3</sup> See, for example, <http://sensenbrenner.house.gov/news/documentsingle.aspx?DocumentID=355538>

<sup>4</sup> See, for example, *No Mere Oversight*, by Denis McDonough, Peter Rundlet, and Mara Rudman, Center for American Progress (2006), available at <http://www.americanprogress.org/issues/security/news/2006/06/13/2019/no-mere-oversight/>, which explores "how past congressional experience could be drawn upon today by the House and Senate Intelligence Committees to ensure effective intelligence gathering capabilities are the norm, not the exception."

## SUMMARY OF RECOMMENDATIONS

The following issues should be addressed in the rules package that accompanies the start of the 114th Congress:

### I. HPSCI Modernization

1. Modernize HPSCI Membership
2. Provide HPSCI Staff Designees
3. Add Accountability for Unclassified Intelligence Community Reports
4. Improve Responsiveness to House Membership
5. Make HPSCI More Transparent to House Members and the Public

### II. Empower All Members of Congress

1. Address Member Access to Executive Branch Communications to Congress
2. Allow Discussion of Public Domain Information
3. Provide Members with Sufficient Staff Assistance
4. Support Whistleblower Communications Through Official Channels
5. Improve Training for Members and Staff

### III. Review of Intelligence Community Activities

Establish a separate, broad-based review of the activities of the Intelligence Community since 9/11.

## HPSCI MODERNIZATION

### **1. Modernize HPSCI Membership**

Intelligence matters are of concern to all members of Congress and fall into the jurisdiction of many committees. However, the current structure of HPSCI acts to preclude access to those who have a duty to know. The lack of intelligence sharing in Congress and the need to restructure oversight was one of the topics addressed in the 9/11 Commission Report.<sup>5</sup>

Committee membership should be reconfigured as follows:

- The Intelligence Committee chair and ranking member continue to be designated by the Speaker and Minority Leader.
- To ensure their interests are represented, the chairman and ranking members of committees with jurisdiction over intelligence matters—Appropriations, Armed Services, Foreign Affairs, Homeland Security, Oversight and Government Reform, and Judiciary—also must serve on the Intelligence Committee or send a designee who is a member of each respective committee. As the 9/11 Commission noted in its final report, the September 11, 2001 attacks occurred in part because of a culture of “need to know” predominated over the more appropriate culture of “need to share.” For House members to fulfill their constitutional oversight responsibilities, the House and HPSCI must adopt the “need to share” model advocated by the Commission, and that includes bringing in other committees of jurisdiction.
- To reflect the diverse perspectives of the caucus, each party conference must choose members of the Intelligence Committee (4 for the majority, 3 for the minority) as follows: any member may nominate him or herself or a colleague to serve on the Committee, with a vote by secret ballot where votes are cast and counted under a ranked-choice voting system.

### **2. Provide HPSCI Staff Designees**

It is essential that HPSCI members have well-founded confidence in the advice they receive from staff. One way to align the interests of staff with the members who serve on the committee is to allow each member to designate (i.e. have authority to hire and fire) one staffer to serve as his or her designee to HPSCI. This is the current practice on the Senate Intelligence Committee.<sup>6</sup> It would help address concerns that HPSCI members are not afforded the same level of support as the Chair and Ranking Member. It also would allow HPSCI members to pursue matters that they consider to be important to a greater degree than currently possible, allowing for more oversight and a diversity of viewpoints.

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<sup>5</sup> See *The 9-11 Commission Report*, p 419, available at <http://www.9-11commission.gov/report/911Report.pdf>

<sup>6</sup> For insight into how this works, see *Congressional Oversight of Intelligence: One Perspective*, Mary Sturtevant, Senate Committee Staff (1992), available at <http://fas.org/irp/eprint/sturtevant.html>.

### **3. Add Accountability for Unclassified Intelligence Community Reports**

Each year, unclassified reports on intelligence and intelligence-related activities are submitted to HPSCI by the Director of National Intelligence, the Director of the Central Intelligence Agency, the Secretary of Defense, the Secretary of State, and the Director of the Federal Bureau of Investigation.<sup>7</sup> The Committee is given the discretion on whether to release an unclassified version of each report to the public. The rules should be changed to make that release of unclassified information mandatory. In the absence of a reason to the contrary, information on government activities should be publicly available.

### **4. Improve Responsiveness to House Membership**

The rules governing HPSCI's operation set forth a procedure by which the Committee *may* grant access to classified information to other committees or members of Congress.<sup>8</sup> The Committee is required to hold a vote "at the earliest practicable opportunity" and weighs several factors, none of which include the constitutional duty of members of Congress to exercise their legislative duties. An appeal of a denial to access such information is left to the Committee's discretion. In practice, news stories recount how requests for information by members of Congress on pending legislative matters were not responded to by the Committee for more than six weeks, or were denied without affording the requester an opportunity to make a presentation to the Committee, know the vote total, or learn how each member voted.<sup>9</sup>

As a constitutional matter, members of Congress should be considered to have the right to access these documents. Article I, Section 5 of the Constitution vests the Congress with maintaining its own records of its proceedings, including those requiring secrecy. Historically speaking, reforms in the 1970s provided greatly expanded access to national security material to members of the House.<sup>10</sup> Unless the information in question involves covert actions covered under existing statutory authorities that restrict said information to the leadership of the House, information in the custody of HPSCI should be made available to any House member (or appropriately cleared staff) upon request.

### **5. Make HPSCI More Transparent to House Members and the Public**

Even at a 40,000-foot level, the activities of the Intelligence Committee are too opaque for a democratic society. Several measures can address that opacity while keeping secret information that must be protected. This includes:

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<sup>7</sup> House Rule XI (c)(2).

<sup>8</sup> See House Intelligence Committee rule 14, available here: <http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/HPSCI%20Rules%20of%20Procedure%20-%2020113th%20Congress.pdf>.

<sup>9</sup> See *Members of Congress denied access to basic information about NSA*, the Guardian (August 2013), available at <http://www.theguardian.com/commentisfree/2013/aug/04/congress-nsa-denied-access>.

<sup>10</sup> See *Limited Oversight: Legislative Access to Intelligence Information in the United States and Canada*, Kathleen Clark and Nino Lomjaria (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2053455](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2053455), page 526.

- Provide at least three days' notice to all members of the House about the subject of and witnesses testifying before upcoming closed hearings;
- Provide public notice of the subject of closed hearings and the list of witnesses unless it would cause significant, articulable harm<sup>11</sup> that outweighs the public's interest in knowing;
- Provide members at least three days' notice in advance of classified briefings while Congress is in session, and longer when out of session;
- Conduct declassification reviews of closed session transcripts and publish them;
- Permit staff to speak about Committee procedures (but not substance), which will help promote understanding of whether the Committee is operating efficiently and effectively;
- Provide public notice of markups and release text and amendments at least 48 hours in advance of a meeting;
- Publish current and historical reports on Committee activities online;
- Review whether HPSCI is receiving all requested information and reports from the executive branch;
- Permit members and staff to keep notes from briefings on classified matters in a secure but easily-accessible location; and
- Permit members and staff to discuss with other appropriately cleared members and staff the substance of closed hearings, so long as HPSCI is notified when classified matters are discussed.

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<sup>11</sup> In other words, by default, legislative activities should be publicly available. For information to be withheld, it must be for a reason that is (1) real (and not merely speculative or inchoate) and (2) significant (because, when faced with insignificant concerns, the public interest in disclosure should be satisfied). The standard is: would disclosure reasonably be foreseen to cause articulable, significant harm.

## EMPOWER ALL MEMBERS OF CONGRESS

### 1. Member Access to Executive Branch Communications to Congress

According to the *Washington Post*, a letter sent by the "administration specifically to inform Congress of the government's mass collection of Americans' telephone communications data was withheld from lawmakers by leaders of the House Intelligence Committee in the months before a key vote affecting the future of the program."<sup>12</sup> Instead of this critical document, HPSCI held a briefing that in the eyes of some members was a wholly inadequate substitute.<sup>13</sup> The Committee's rules currently seriously impair the ability of members of the House to fulfill their constitutional oversight responsibilities.<sup>14</sup> The rules of the House should be changed to require HPSCI to distribute or make available at a secure location communications sent by the Executive Branch and directed to all members of Congress.<sup>15</sup> In addition, regular notice of receipt of materials should be provided to all members of Congress.

### 2. Allow Discussion of Publicly-Available Information

Members of Congress and their staff are not currently allowed to read information available on the Internet or in news publications that the executive branch has deemed classified.<sup>16</sup> Members of Congress are also subject to reprimand for sharing information already in the public domain.<sup>17</sup>

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<sup>12</sup> *House panel withheld document on NSA surveillance program from members*, by Peter Wallstein, *Washington Post* (August 16, 2013), available at [http://www.washingtonpost.com/politics/house-panel-withheld-document-on-nsa-surveillance-program-from-members/2013/08/16/944e728e-0672-11e3-9259-e2aaf5a5f84\\_story.html](http://www.washingtonpost.com/politics/house-panel-withheld-document-on-nsa-surveillance-program-from-members/2013/08/16/944e728e-0672-11e3-9259-e2aaf5a5f84_story.html).

<sup>13</sup> See *What Did Congress Really Know About NSA Tracking?*, National Public Radio, available at <http://www.npr.org/blogs/itsallpolitics/2013/06/11/190742087/what-did-congress-really-know-about-nsa-tracking>. "Still, lawmakers say getting 'briefed' doesn't mean knowing what's actually doing on." And even when briefed, Administration representatives did not reveal violations when asked about abuses. See <https://www.emptywheel.net/wp-content/uploads/2013/08/091019-Records-of-various-215-briefings.pdf>

<sup>14</sup> Indeed, the Rules of the House Intelligence Committee require "[a]ny materials provided to the Committee by the executive branch, if provided in whole or in part for the purpose of review by members of the Committee, shall be received or held by the Committee on a non-exclusive basis. Classified information provided to the Committee shall be considered to have been provided on an exclusive basis unless the executive branch provides a specific, written statement to the contrary." Rule 13(c) of the Rules of the House Permanent Select Committee on Intelligence, available at

<http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/HPSCI%20Rules%20of%20Procedure%20-%20113th%20Congress.pdf>. The same clause provides, however: "Access for Non-Committee Members." In the case of materials receive don a non-exclusive basis, the Chair, in consultation with the Ranking Member, may grant non-Committee members access to such material in accordance with ...."

<sup>15</sup> The amendment likely should be made to House Rule XI g(3) (A) and (B).

<sup>16</sup> See *Senate Staffers Told To Pretend Top Secret Documents Are Not Widely Available On Web*, Kashmir Hill, *Forbes* (June 2013), available at <http://www.forbes.com/sites/kashmirhill/2013/06/14/senate-staffers-told-to-pretend-top-secret-documents-are-not-widely-available-on-web/>. See also *Why the Library of Congress is Blocking Wikileaks*, Matt Raymond, *Library of Congress Blog* (December 2010), available at <http://blogs.loc.gov/loc/2010/12/why-the-library-of-congress-is-blocking-wikileaks/>.

<sup>17</sup> See *Members of Congress denied access to basic information about NSA*, Glenn Greenwald, *the Guardian* (August 2013), available at <http://www.theguardian.com/commentisfree/2013/aug/04/congress-nsa-denied-access>. "In early July, Grayson had staffers distribute to House members several slides published by the Guardian about NSA programs as part of Grayson's efforts to trigger debate in Congress. But, according to one staff member, Grayson's office was quickly told by the House Intelligence Committee that those slides were still classified, despite

This is an unreasonable restriction. Instead, members of Congress and their staffs should be allowed to make use of all information in the public domain as part of the exercise of their constitutional duties. When members publicly cite information that has not been declassified but is in the public domain, they should indicate as such and that it may not be authentic or complete, and that their reference to it is not a confirmation of its accuracy.

### **3. Provide Members with Sufficient Staff Assistance**

Law professor Kathleen Clark notes "In order for the members of Congress to actually take responsibility [for intelligence programs on which they have been briefed]... they must be armed with the legal and technical knowledge that will enable them to assess the legality of these intelligence programs."<sup>18</sup> Members of Congress can only cope with their crushing workloads by relying on expert staff, just as do senior members of the executive branch.<sup>19</sup> The following reforms would greatly strengthen members' ability to conduct oversight:

(1) All members of Congress should be allowed at least one staff member who has clearance<sup>20</sup> to the Top Secret/Special Compartmented Information (TS/SCI) level, to attend briefings as a representative of the member and provide counsel to him or her.<sup>21</sup>

(2) Clearance should be granted at a high enough level to allow staff to probe assertions and assumptions made by the intelligence community. Secret clearance is often insufficient for this task, allowing only a cursory level of detail. TS/SCI should be granted to staff upon the request of a Member so long as a staffer has been vetted for clearance. More than 660,000 executive branch employees already are cleared at TS/SCI, as are nearly 525,000 contractors; adding up to 435 staffers in congressional offices will help empower oversight without creating significant additional risks.

### **4. Support Whistleblower Communications Through Official Channels**

Federal employees and contractors who blow the whistle must be permitted to speak to their member of Congress, or a cleared staffer in the personal office or committee of jurisdiction

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having been published and discussed in the media, and directed Grayson to cease distribution or discussion of those materials in the House, warning that he could face sanctions if he continued."

<sup>18</sup> Clarke, p. 936.

<sup>19</sup> While there may be some concern about providing approximately 500 additional security clearances, it merely a drop in the bucket. According to the *Annual Intelligence Authorization Act Report on Security Clearance Determination for Fiscal Year 2010*, available at <http://fas.org/sgp/othergov/intel/clearance.pdf>, in October 2010 2,166,679 government employees held confidential/secret clearance; 666,008 employees held top secret (collateral and TS/SCI) clearance; plus an additional 541,097 contractors had confidential/secret clearance and 524,990 contractors had top secret clearance.

<sup>20</sup> Of course, the staffer should receive an appropriate security clearance in a fashion similar to that granted to Intelligence Committee staff under Rule XI (e)(2), but with the determination made by the member of Congress in consultation with the Intelligence Committee.

<sup>21</sup> The Church Committee had 135 staff members and the Pike Committee had 32 staff members, for example. See *Limited Oversight: Legislative Access to Intelligence Information in the United States and Canada*, Kathleen Clark and Nino Lomjaria (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2053455](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2053455), page 533, footnote 61.

without fear of reprisal.<sup>22</sup> Despite assertions to the contrary, such communications need not be routed through HPSCI, and House Rules should reaffirm that point.

## **5. Improve Training for Members and Staff**

While Congress provides training on how to handle classified information and general information on congressional oversight,<sup>23</sup> the current training is insufficient for the highly complex and sensitive responsibilities attached to national security oversight. The House should educate staff on the inherent constitutional rights of members of Congress to review national security-related information and the tools available to elected officials and congressional staff to effectuate that right.

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<sup>22</sup> See *The House Committee on Intelligence Oversight Needs Oversight of Its Own*, Rep. Rush Holt and Steven Aftergood, MSNBC (May 30, 2014), available at <http://www.msnbc.com/msnbc/who-watches-the-watchmen>.

<sup>23</sup> See, e.g., *Congressional Oversight Manual*, Congressional Research Service (2011), available at <http://fas.org/sgp/crs/misc/RL30240.pdf>.



## REVIEW OF INTELLIGENCE COMMITTEE ACTIVITIES

The last decade-and-a-half has witnessed major intelligence community failures. From the inability to connect the dots on 9/11<sup>24</sup> to false claims about weapons of mass destruction in Iraq,<sup>25</sup> from the unlawful commission of torture<sup>26</sup> to the inability to predict the Arab spring<sup>27</sup>, from lying to Congress about the NSA<sup>28</sup> to CIA surveillance of Senate staff<sup>29</sup>, the intelligence community has a credibility gap. Moreover, with recent revelations about secret government activities, to the apparent surprise of many members of Congress, it is increasingly clear that Congress has not engaged in effective oversight of the intelligence community.

The last time so many revelations of government misdeeds came to light in news reports,<sup>30</sup> Congress reacted by forming two special committees to investigate intelligence community activities. The reports by the Church<sup>31</sup> and Pike<sup>32</sup> Committees led to wholesale reforms of the intelligence community, including improving congressional oversight mechanisms.

The magnitude of current revelations and intelligence community failures leads to this conclusion: the House (and Senate) must establish a distinct, broad-based review of the activities of the intelligence community since 9/11. The House should establish a committee modeled after the Church or Pike Committees, provide it adequate staffing and financial support, and give it a broad mandate to review intelligence community activities, engage in public reporting wherever possible, and issue recommendations for reform.

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<sup>24</sup> See the *9/11 Commission Report*, available at <http://www.9-11commission.gov/report/>.

<sup>25</sup> See *How the White House Embraced Disputed Arms Intelligence*, David Barstow, New York Times (October 3, 2004), available at <http://www.nytimes.com/2004/10/03/international/middleeast/03tube.html>.

<sup>26</sup> See *Press Conference by the President* (August 1, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president>.

<sup>27</sup> See *U.S. intelligence official acknowledges missed Arab Spring signs*, Ken Dilanian, Los Angeles Times (July 19, 2012), available at [http://latimesblogs.latimes.com/world\\_now/2012/07/us-intelligence-official-acknowledges-missed-signs-ahead-of-arab-spring-.html](http://latimesblogs.latimes.com/world_now/2012/07/us-intelligence-official-acknowledges-missed-signs-ahead-of-arab-spring-.html).

<sup>28</sup> See *Obama admits intelligence chief fault over false Senate testimony*, Spencer Ackerman, The Guardian (January 31, 2014), available at <http://www.theguardian.com/world/2014/jan/31/obama-admits-intelligence-chief-fault-senate-testimony>.

<sup>29</sup> See *Report: Cia spied on Senate committee staff*, Stephanie Condon, CBS News (March 5, 2014), available at <http://www.cbsnews.com/news/report-cia-spied-on-senate-committee-staff/>.

<sup>30</sup> See, for example, *Huge C.I.A. Operation Report in U.S. Against Antiwar Forces, Other dissidents in Nixon Years*, Seymour Hersh (December 22, 1974), available at [http://www.nytimes.com/packages/pdf/politics/19741222\\_hersh.pdf](http://www.nytimes.com/packages/pdf/politics/19741222_hersh.pdf).

<sup>31</sup> See *Select Committee to Study Governmental Operations with Respect to Intelligence Committees*, available at <http://www.intelligence.senate.gov/churchcommittee.html>.

<sup>32</sup> See *U.S. Intelligence Agencies and Activities*, Mary Ferrell Foundation, available at <http://www.intelligence.senate.gov/churchcommittee.html>.