"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.

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 has been 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.

The use of Gang of Four notifications pre-dates the establishment of the congressional intelligence committees in the mid-1970s.[1] 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.[2] 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.[3]

In 1980, when Congress approved the new "Gang of Eight"[4] 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.[5] Congress conditioned these two reporting requirements on the need to protect from unauthorized disclosure classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.[6] Report language stated:

[1] The Senate Select Committee on Intelligence was established in 1976; the House Permanent Select on Intelligence was established in 1977.

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

[3] 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.

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

[5] See P.L. 96-450, Sec. 501 (a).

[6] Ibid.

> 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.[7] [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.[8] [emphasis added]

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.[9] 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.[10] Although legally

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

[8] See S. Rept. 102-85, accompanying S. 1325, which authorized FY1991 Intelligence appropriations.

[9] *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.

[10] 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, 94th 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 (continued...)

non-binding, the "sense of the Senate" resolution establishing the Senate 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.[11]

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[12] said:

> 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[13] we keep it to ourselves. Barry concurred. There were a couple of others we decided to tell to the entire committee.[14]

According to this same account, there were other sensitive operations about which the committee and its chairman received no notification.[15]

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.[16] According to at least one Gang of Four member, the choice to do so is not always the lawmakers' to make. Representative Silvestre Reyes, a former 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.[17]

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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.

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

[12] Senator Birch Bayh was named chairman after Senator Daniel Inouye, the Committee's first chairman, resigned as chairman.

[13] 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), 94th Congress.

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

[15] Ibid.

[16] See Shane Harris, "The Survivor," *National Journal*, June 6, 2009, pp. 36-43.

[17] Ibid, p. 42

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[18] 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.[19] Director of Central Intelligence Stansfield Turner briefed the full intelligence committees, but only after the operations had been conducted.[20]

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."[21]

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.'"[22]

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."[23] 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

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

[19] 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.

[20] 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 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.

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

[22] Ibid.

[23] Ibid.

was essential to meet extraordinary circumstances affecting vital U.S. interests.[24] 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."[25] 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.[26]

Distinctions Between Gang of Four and Gang of Eight Notifications

Gang of Four and Gang of Eight[27] 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. For example, 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[28] and provide a written statement setting forth the reasons for limiting notification to the Gang of Eight, rather than notifying the full membership of the intelligence committees.[29] The President also is required to provide the Gang of Eight advance notice of the covert action in question,[30] although the statute also recognizes the President's constitutional authority to withhold such prior notice altogether.[31] Finally, as a result of one of the changes to the Gang of Eight procedure approved by Congress and signed into law as part of the FY2010 Intelligence Authorization Act, the President is now required to ensure that all members of the intelligence committees are provided access to any Gang of Eight finding or

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

[25] Joint Explanatory Statement of the Committee of Conference, accompany 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 in statute.

[26] Ibid.

[27] 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.

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

[29] 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.

[30] 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.

[31] 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).

notification no later than 180 days after initial access was limited. If the president determines that continued limited access is warranted, he needs to issue a statement of reasons as to why.[32]

Another 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 particularly sensitive covert action programs.

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.[33]

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 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.[34] 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.[35]

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."[36]

[32] P.L. 111-259, the Intelligence Authorization Act for Fiscal Year 2010, Subtitle D, Sec. 331(c)(2)(B).

[33] See footnote 14.

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

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

[36] See letter from Representative Jane Harman to President George W. Bush, January 4, 2006, regarding the National (continued...)

Other critics contend that restricted notifications such as Gang of Eight and Gang of Four briefings have been "overused."[37] 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.[38]

IC Leadership Supports Gang of Four Notifications Under Certain Circumstances

During their respective confirmation proceedings before the Senate, General William Clapper, Director of National Intelligence (DNI), and Leon Panetta, Director of the Central Intelligence Agency (DCIA) 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 especially sensitive cases. Both officials cited the statutory requirement that informing the committees of 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 ... "[39]

DNI Clapper said that the DNI under statute has a degree of latitude in deciding how (not whether) to bring extremely sensitive matters to the committee's attention. "In certain rare circumstances, I believe it could be appropriate to brief only the Chairman and Vice Chairman of the intelligence committee on particular sensitive matters," Clapper wrote in response to pre-nomination hearing questions for the record. "Limited initial notifications should be undertaken only in the most exceptional circumstances."[40]

DCIA Panetta expressed similar views. "Where lives would be put at risk by disclosure, inadvertent or otherwise, of the information at issue, it may be prudent to confine knowledge of it to the leaders of the two intelligence committees," Panetta wrote in response to pre-nomination hearing questions. "In such cases, I would discuss my concerns with the leaders of the two committees and attempt to reach a mutual understanding in terms of how the information at issue should be handled within their respective committees, to include determining the point at which the full committees should be briefed."[41]

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Security Agency (NSA) electronic communications surveillance program, often referred to as the Terrorist Surveillance Program, or TSP.

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

[38] See Vicki Divoll, "Congress's Torture Bubble," *Washington Post*, May 13, 2009.

[39] National Security Act of 1947 as amended, Sec. 502 [50 U.S.C. 413b](a).

[40] Additional Pre-hearing Questions for James R. Clapper, Jr., Upon his nomination to be Director of National Intelligence, pp. 10-11, United States Select Committee on Intelligence. See http://intelligence.senate.gov/hearings/cfm?hearingsId=3648, "Hearings."

[41] Additional Prehearing Questions for The Honorable Leon E. Panetta upon his selection to be the Director of the Central Intelligence Agency, pp. 16-17. See http://intelligence.senate.gov/hearings/cfm?hearingsId=3648, "Hearings."

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.[42]

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.

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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[42] 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.