Statement of

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Relevant Background. I am currently Chief Counsel of the Brennan Center for Justice at NYU Law School. I was Chief Counsel for the Church Committee, which, in 1975-76, undertook the first investigation of the Intelligence Community, covering administrations from Franklin Delano Roosevelt through Richard Milhous Nixon. I am also the author (along with Aziz Huq) of *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (The New Press, 2007). I am currently working with Elizabeth Goitein, Director of the Brennan Center Liberty and National Security Project, on a book about excessive governmental secrecy.

Summary of Points:

A. History. Prior to the Church Committee (and the roughly parallel Pike Committee in the House), the Nation, the Executive Branch, and the Intelligence Community itself were all harmed by the lack of meaningful oversight of intelligence. The Church Committee, and the permanent committees established in the Senate in 1976 and the House in 1977, have proven that such congressional oversight can improve the working of government—and that congressional committees can handle sensitive information appropriately.

B. Principles that *Should* Govern "The Laws on Congressional Notification of Intelligence Activities." Britt Snider's written testimony lays out both useful history and practical problems with "Gang of Eight" notifications. In addition, in my view, the current system, both as written and as applied, does not give sufficient weight to the role of Congress under the Constitution.

C. The Harms Caused by Insufficient Congressional Oversight. The current system results in insufficient oversight on vital issues. This leads to decisions that are not as well-considered as they should be. It also leads to foolishness, abuse and illegality. This, in turn, causes harm to the reputation of the Nation, as well as that of the Executive Branch, the Intelligence Community—and, indeed, Congress itself.

Discussion

1. History. Prior to the investigations of 1975-76, Congressional "oversight" of the Intelligence Community was an early version of "Don't Ask. Don't Tell." Congress gave the FBI a free ride. This was partly out of love, partly out of fear: love because the Bureau was highly respected for its widely publicized successes in fighting crime, and fear because the Bureau's massive covert intelligence gathering reached politicians too. Although the CIA had neither the FBI's reputation, nor its trove of embarrassing evidence, it too escaped congressional scrutiny. Senate and House Committees charged with oversight made no written records, asked no tough questions, and often indicated a preference *not* to know what was done. Indeed, as Senator Mike Mansfield put it in supporting the Resolution establishing the Church Committee:

> "It used to be fashionable … for members of Congress to say that insofar as the intelligence agencies were concerned, the less they knew about such questions, the better. Well, in my judgment, it is about time that attitude

went out of fashion. It is time for the Senate to take the trouble and, yes, the risks, of knowing more rather than less."[1]

As was said by Lawrence Houston, a long-time (and highly respected) CIA General Counsel, the lack of Congressional oversight caused problems for the CIA because "we became a little cocky about what we could do."[2]

While both the FBI and the CIA have done, and do, important and valuable work, the Church Committee revealed that the FBI had also undermined our democracy. And that the CIA had also undermined American's reputation in the world.[3] And every President from Roosevelt through Nixon had secretly seized greater power and then used their secret power to undermine the Constitution's checks and balances.

All this improper conduct and overreaching was directly enabled by lack of congressional notification and oversight.

Indeed, in secretly widening the scope of the FBI's power in the 1930s, and the CIA's power in the 1940s, presidents made a conscious decision to hide these expansions from the American public, and from Congress.

Thus, leading up to World War II, Franklin Roosevelt authorized the FBI to go beyond investigating "conduct forbidden by the laws of the United States", and to pursue

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[1] For the Mansfield quote, see Cong. Rec., 1/23/75, p. 1434. For general information on pre-Church Congressional Oversight, see (1) Frederick A. O. Schwarz, Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (The New Press, 2007; paperback 2008), pp 19-20; and (2) Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community*, 1947-1989 (University of Tennessee Press, 1990), pp 4-9.

[2] See Smist, n.1, at p. 9.

[3] For more details, see *Unchecked and Unbalanced*, at Chap. 2, pp. 21-49, "Revelations of the Church Committee"; and Loch K. Johnson, *A Season of Inquiry: The Senate Intelligence Investigation* (University Press of Kentucky, 1985).

a wide range of lawful domestic activity by casually throwing in the amorphous term "subversion" to the list of things the FBI was ordered to investigate. In ordering the Bureau to expand its domestic security role, Roosevelt agreed with Bureau Director J. Edgar Hoover that it was "imperative" to proceed "with the utmost degree of secrecy . . . to avoid criticism or objections." Therefore, the expansion was kept from Congress, and the public.

As the Church Committee later revealed, over the following decades the vague term "subversion" opened the door to many secret FBI misdeeds. But because the expansion was blessed in secret, neither Congress nor the public had a chance to debate the issues. Nor was Congress alerted to the importance of watching how such an open-ended, amorphous grant of authority to the Bureau was, in fact, exercised.

The story is similar for the CIA.

In creating the CIA, the 1947 National Security Act emphasized coordination and evaluation of intelligence. It did not even mention covert action. However, a year later, the National Security Council secretly authorized the CIA to engage in covert action. Neither Congress, nor the public, had any chance to debate this transformative change, or to consider what covert tactics might be consistent with the nation's character. Again, as the Church Committee explained, this meant that the harm done from, for example, overthrowing the democratically elected governments in Iran and Chile could not be checked by Congress. In general, as the Church Committee found, the executive branch did not adequately consider the potential consequences of covert activity. Nor were covert tactics like assassination plots adequately reviewed.

The Church Committee and the permanent Senate and House Committees established in 1976 and 1977 have had exemplary records in protecting sensitive information. In the case of the Church Committee, the only leak of information was that the gender of a mutual "friend" of a woman closely associated with President Kennedy and with the head of the Chicago Mafia -- who had been retained by the CIA to help in efforts to assassinate Fidel Castro -- was revealed to be female. While I do not have personal knowledge of the subsequent Committees records on keeping secrets, (i) I understand it has been exemplary and (ii) I am certain it has been better than the executive branch.

2. Principles That *Should* Govern "The Law on Congressional Notification." Apart from statutory construction or legislative history of the notification rules, Congress' requirement that the Executive keep [the Intelligence Committees] "fully and currently" informed should be construed broadly in favor of meaningful notification to Congress. As CIA Director Leon Panetta testified at his confirmation hearing, the "Gang of Eight" provisions should be read as limited to covert action. The Gang of Eight should not be used, for example, for intelligence programs such as torture or warrantless wiretapping.[4]

It is too easy to forget that it is Congress to whom the Constitution gives the lion's share of power. Thus, it is Congress, not the President, that is described in Article I of the Constitution.

[4] With respect to covert action itself, moreover, the law should be clarified to make clear that Gang of Eight notifications do not cover an on-going covert action program, but rather should be limited to notification of immediate, emergency action, particularly where lives are at risk.

Indeed, as Yale scholar Charles Black explained:

> "a complete, ongoing government, with all the necessary organs, could have been formed, and could have functioned down to now, if the Constitution had ended at the end of Article I."[5]

Congress is constitutionally assigned ample power over "national security" matters. It is given the power to declare war. And it has power, for example, to "define and punish…offenses against the Law of Nations," as well as power to "make rules for the government and regulation of the land and naval forces."

Too often in recent history, when claimed executive perogatives have come into perceived conflict with congressional authority, the executive branch has persuaded Congress that executive interests—whether national security related or otherwise—trump those of the legislature. Yet there is no constitutional basis for this notion. It anything, the opposite is the case. According to Justice Jackson's eloquent opinion in *Youngstown*, when executive authorities conflict with those of Congress, the President's powers are reduced by whatever powers Congress has over the subject—not the other way around. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter*.") (emphasis added).

In order to exercise its constitutional authorities and obligations, Congress must be entitled to information. Congress has chosen to channel certain intelligence

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[5] Charles L. Black, Jr., "The Presidency and Congress," *Washington and Lee Law Review*, 32 (1975), 841, 843.

information to the Intelligence Committees. Doing so was part of an appropriate inter-branch discussion that cut back on the cumbersome process of notification of, for example, covert action, to as many as eight committees. Nonetheless, that accommodation should not be interpreted as a concession that jurisdiction over intelligence matters is limited within Congress to the intelligence committees. To state the obvious, laws touching on intelligence activities—such as the National Security Act itself—must be voted on by all members of Congress. In addition, intelligence activities often involve aspects that implicate the jurisdiction of other committees, particularly the Judiciary Committees. It is an often overlooked fact that, while the National Security Act requires the provision of certain minimum information to the intelligence committees, a variety of other statutes require the reporting of particular intelligence-related matters to the Judiciary Committees as well.[6]

Moreover, Congress, having accommodated concerns of the Executive Branch, by streamlining the process for regular updates on intelligence information (other than information that, by statute must be more broadly reported), should not be seen to have authorized notifications that undermine the ability of the two Intelligence Committees to

[6] See, e.g., 50 U.S.C. 1803(f)(2) (FISA Court rules and procedures); 50 U.S.C. 1846(a) (uses of pen registers and tap and trace devices); 50 U.S.C. 1871(a)(4) (summary of any significant legal interpretations of FISA); 50 U.S.C. 1871(a)(5) (copies of all decisions and opinions issued by the FISA Court "that include significant construction or interpretation of" FISA); 18 U.S.C. 3511 note (any reports submitted to other committees about national security letters); 15 U.S.C. 1681v(f) (agency requests to consumer reporting agencies in connection with government intelligence/counterintelligence/ terrorism investigations); Section 106A of the Patriot Act reauthorization (Pub. L. 109-177) (DOJ Inspector General audit of the FBI's use of Section 215 authorities); Section 119 of the Patriot Act reauthorization (DOJ Inspector General audit of the FBI's use of national security letters); Section 126(a)(7) (any DOJ initiative that uses or intended to develop data-mining technology).

do their jobs consistent with the role assigned to Congress under the Constitution. And to do that job, the Committee needs information "fully and currently."

C. Harms Caused by Insufficient Congressional Oversight. If Congress is provided insufficient information, using a stinted process, a number of harms ensue. The likelihood of unwise decisions increases. So does the likelihood of abuse and illegality. For both reasons, the reputation of the Nation is more likely to suffer. And so too is the reputation of the Executive Branch, the Intelligence Community—and the Congress. Even proper actions that do go ahead after a stinted Congressional notification are at risk of seeming less legitimate. And, finally, an inadequate, stinted notification process like the Gang of Eight is bound to cause serious inter-branch controversy and hostility when a project becomes known and has gone badly.[7]

Let's illustrate these points by using the recent Administration's decision to descend to torture—doing so in violation of both statutory law and treaty obligation.

Even before the Gang of Eight is said to have been informed in some fashion, the closed nature of the Administration's own internal decision-making itself increased the risk of an unwise decision by reducing thoughtful consideration. And clearly the Gang was not informed of any of this.

We now know a lot about the flawed way in which this decision was reached. The opinion of John Yoo was kept secret within the Justice Department, bypassing its

[7] See the prescient prediction in Nicholas deB Katzenbach, "Foreign Policy, Public Opinion and Secrecy," *Foreign Affairs*, Vol. 52, No. 1, October, 1973, at p. 15 [If the policy in question fails, the fact of this kind of congressional consultation may create as many problems as it solves. Rarely will the members of Congress feel a truly shared responsibility. And the effort to put them in this position may easily result in recriminations about the nature and quality of the information provided."]

normal review process. The Gang was not told this. Nor was it given the highly flawed opinion of Mr. Yoo.

Moreover, the White House decided to open the door to torture without listening to, or even telling, key government officials in the Department of State and the military. The Gang was also not told this.

Those who were shut out both within the Administration and in Congress could have made the case that adopting torture would weaken America with our allies, strengthen our enemies, and increase risks of harm to our soldiers or CIA agents when they were captured. Those who were shut out could have reminded both branches that starting with George Washington's orders during the Revolution, America had led the world on restricting coercion of prisoners of war. Those who were shut out could have protested our Nation's use of waterboarding by pointing out that after World War II, America had prosecuted Japanese soldiers as war criminals for using waterboarding on American prisoners. And those who were shut out could have shown that many other techniques authorized by the Bush/Cheney Administration had been copied from techniques used against American prisoners in the Korean War. But certainly none of this information was provided to the Gang of Eight. And the stinted process did not allow for exploration of any of these vital details.

Most importantly, the cramped secret process within the Executive Branch and with Congress shut out any debate about American values and the descent to torture.

However members of the Gang of Eight were told whatever they were told, they, and the Committee, had no opportunity to explore how the decision had been reached, the

true nature of what was being proposed,[8] or the risk of harm to the Nation, or American values.

All public figures have an obligation to consider the consistency of their actions with America's values. Those values have been a major part of America's reputation. They are a core part of our strength.

But crises have often tempted leaders to depart from America's values and to ignore the wise restraints that keep us free.[9]

Thus, as just one example, abandoning those values was explicitly recommended in 1954 by a top-secret report of a high level presidential task force. In the Cold War, the task force argued, "hitherto acceptable norms of human conduct do not apply." Tactics "more ruthless than [those] employed by the enemy" should be adopted.

Based upon its investigation, and exposure, of many secret, "ruthless" Cold War tactics deployed both at home and abroad, the Church Committee concluded that:

> "The United States must not adopt the tactics of the enemy. Means are as important as ends. Crises make it tempting to ignore the wise restraints that make [us] free. But each time we do so, each

[8] As is chillingly shown in a recent *Atlantic* article by conservative pundit Andrew Sullivan, practices covered up by relatively innocuous sounding words like "sleep deprivation" or "stress position" are intended to, and do, cause excruciating physical and mental suffering without leaving tell tale signs. See, Andrew Sullivan, "Dear President Bush," *The Atlantic Magazine*, Vol. 304, No. 3, October, 2009, at pp. 78-88. When known, the details, such as no sleep for [180] hours, shock the conscience in a way blander labels cannot possibly do. But surely such blander labels were used with the Gang.

[9] Congress is not free from these temptations. But its more deliberative nature is designed to moderate or prevent excesses.

> time the means we use are wrong, our inner strength, the strength which makes us free, is lessened."[10]

Apt three decades ago, those words are even more apt today. For to combat the unspeakable acts of Bin Laden and his ilk, the prior Administration secretly resorted, for example, to torture—using techniques copied from our Korean War and World War II enemies.

And because they abandoned America's values, the secret policies of the recent Administration made us less safe. Less safe because our allies became less willing to cooperate. And less safe because they handed our mortal enemies a powerful recruiting tool.

Given the Gang of Eight process, Congress was foreclosed from playing its constitutional role in identifying those harms, and in determining the wisest long-term policies for America.

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[10] See, Church Committee, *Alleged Assassination Plots Involving Foreign Leaders*, Epilogue, p. 285. (Though this passage was in the Committee's Interim Report, it permeated all the Committee's work.)