



## **Memorandum**

January 18, 2006

**SUBJECT: Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions**

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This memorandum examines certain existing statutory procedures that govern how the executive branch is to keep Congress informed of U.S. intelligence activities, reviews pertinent legislative history underpinning the development of those procedures, and looks at the notification process that reportedly was followed in informing certain Members of Congress of the President's decision to authorize the National Security Agency (NSA) to collect signals intelligence within the United States. According to U.S. Attorney General Alberto Gonzales, the program involved "intercepts of contents of communications where...one party to the communication is outside the United States" and the government has "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda."<sup>1</sup>

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<sup>1</sup> Press Release, White House, Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at [<http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>].

## Statutory Obligations of the President to Ensure that Intelligence Committees Are Kept “Fully and Currently Informed”

Under current statute,<sup>2</sup> the President is to ensure that the congressional intelligence committees are kept “fully and currently informed”<sup>3</sup> of U.S. intelligence activities, including any “significant anticipated intelligence activity.”<sup>4</sup> According to legislative history, the term “fully and currently informed,” is intended to mean that complete and timely notice of actions and policies is provided, and that the committees will be informed of intelligence activities in such detail as the committees may require.<sup>5</sup> Further, the Senate in report language said it expected the executive

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<sup>2</sup> National Security Act of 1947, Secs. 501-503 [50 U.S.C. 413 - 413(b)]. In a change enacted as part of the fiscal year (FY) 1991 Intelligence Authorization Act (P.L. 102-88), Congress, for the first time, placed a statutory obligation upon the President to ensure that the congressional intelligence committees are kept fully and currently informed of United States intelligence activities, including any significant anticipated intelligence activity. Until 1991, the Director of Central Intelligence and the intelligence agency heads had been statutorily responsible for keeping the congressional intelligence committees fully and currently informed of such activities under changes enacted in 1980. See FY1981 Intelligence Authorization Act, Sec. 501(a) (P.L. 96-450). In enacting the FY 1981 Act, the Senate Select Committee on Intelligence (SSCI) asserted that one of its principal goals was to modify the Hughes-Ryan Amendment of 1974, which required reports on CIA covert operations to as many as eight congressional committees, and substituting in its place a general provision requiring prior notice of covert operations and full access by the two intelligence committees to information concerning all intelligence activities. See S.Rept. No. 96-730, 96<sup>th</sup> Congress, 2<sup>nd</sup> sess., pp. 2-3 (1980).

In reporting its version of the FY 1991 Intelligence Authorization Act, the SSCI asserted that overall responsibility for keeping the intelligence committees fully and currently informed should be vested in the President because of the importance and sensitivity of secret intelligence activities that may affect vital national interests, and because the President, who exercises authority over all departments, agencies and entities in the executive branch, may have unique knowledge of such activities. See S.Rept. No.102-85, 102<sup>nd</sup> Congress, 1<sup>st</sup> sess., p. 30 (1991).

<sup>3</sup> The phrase “fully and currently informed” originated in the requirement contained in Sec. 202 of the Atomic Energy Act of 1946. Identical wording also is contained in S.Res. 400, 94<sup>th</sup> Congress, which created the SSCI. See Sec. 11(a) of the resolution. Historic practice has been that in fully and currently informing the intelligence committees about intelligence activities, other than covert actions, the executive branch generally has communicated such information – almost always in classified form – to the Chairmen and Ranking Members of the intelligence committees, often in writing. Such communications then are made available to the rest of the committee membership.

<sup>4</sup> In Senate report language accompanying the FY1991 Intelligence Authorization Act (P.L. 102-88), the SSCI wrote, “The requirement to report significant anticipated activities means, in practice, that the committees should be advised of important new program initiatives and specific activities that have major foreign policy implications.” See S.Rept. No. 102-85, 102<sup>nd</sup> Congress, 1<sup>st</sup> sess., p. 32 (1991).

<sup>5</sup> In explaining its use of the phrase fully and currently informed in report language accompanying the FY1981 Intelligence Authorization Act (P.L. 96-450), the SSCI noted: “... For over thirty years this authority served the information needs of the Joint Committee on Atomic Energy well by assuring it complete and timely notice of actions and policies of the Federal government in the field

(continued...)

branch not to limit itself to providing full and complete information upon request from the committees, but to affirmatively keep the committees fully and currently informed.<sup>6</sup>

Although the President has a legal obligation to ensure that the congressional intelligence committees are fully and currently informed of all intelligence activities, the statute distinguishes between “intelligence activities”<sup>7</sup> and “covert action”<sup>8</sup> as a separate category of intelligence activities, and establishes different reporting mechanisms for each.

### ***Reporting Requirements For Intelligence Activities, Including Significant Anticipated Intelligence Activities***

For all intelligence activities, including any significant anticipated intelligence activity other than covert action, the statute requires that “the congressional intelligence committees” are to be kept

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<sup>5</sup> (...continued)

of atomic energy. The language is also contained in Senate Resolution 400, 94<sup>th</sup> Congress, and has served the Select Committee well by ensuring that the Committee is informed of intelligence activities in such detail as the committee may require... ” See S.Rept. No. 96-730, 96<sup>th</sup> Congress, 2<sup>nd</sup> sess., p. 7 (1980).

<sup>6</sup> Ibid.

<sup>7</sup> Although the term intelligence activities is defined in statute to include covert actions and financial intelligence activities, “intelligence activities” are not further defined in law. See National Security Act of 1947, Sec. 501 [50 U.S.C. 413] (f). In report language accompanying the FY1991 Intelligence Authorization Act (P.L. 102-88), however, the SSCI described intelligence activities as consisting of “... the gathering of information ...,” while characterizing covert action as “.... an instrument of foreign policy ... that goes beyond information gathering.” S.Rept. No. 102-85, 102<sup>nd</sup> Cong., 1<sup>st</sup> sess., pp. 33-34 (1991). More detailed definitions of intelligence activities and “intelligence-related activities” are contained in the Senate resolution and the House Rule which established the SSCI and the House Permanent Select Committee on Intelligence (HPSCI), respectively. See Sec. 14(a) of S.Res. 400, and Sec. 10(a) of House Rule XLVIII.

<sup>8</sup> The term covert action is defined in statute to mean “... an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly...” See the National Security Act of 1947, Sec. 503 [50 U.S.C. 413b] (e). In enacting the FY1991 Intelligence Authorization Act (P.L. 102-88), Congress, for the first time, statutorily defined the term covert action. The definition was intended to supersede the references to Central Intelligence Agency (CIA) “operations” abroad contained in the Hughes-Ryan Amendment, and to “special activities” as defined by Executive Order 12333, signed by President Ronald Reagan on Dec. 4, 1981. According to Senate report language accompanying the Senate’s version of the FY1991 Act, the statutory definition of covert action was intended to reflect current practice as it had developed under the Hughes–Ryan Amendment and the executive order definition of “special activities.” According to the SSCI, the statutory definition was meant to clarify the understanding of covert action activities that require presidential findings and reporting to Congress, not to relax or go beyond previous understandings. See S.Rept. No. 102-85, 102<sup>nd</sup> Congress, 1<sup>st</sup> sess., p. 42 (1991).

“fully and currently informed” of such activities;<sup>9</sup> with an exception possibly being because limiting such notification would be necessary to protect intelligence sources and methods.<sup>10</sup>

Another statutory provision specifically requires that the Director of National Intelligence (DNI) and the intelligence agency heads “keep the intelligence committees fully and currently informed of all intelligence activities...”<sup>11</sup> and “...furnish the congressional intelligence committees any information or material concerning intelligence activities, other than covert actions...”<sup>12</sup> which is within their control. The statute further requires that any report to the intelligence committees regarding a significant anticipated intelligence activity be submitted to the intelligence committees in writing, and that any such report contain a concise statement of any pertinent facts as well as an explanation of the significance of the intelligence activity in question.<sup>13</sup>

Other than there being a possible exception that would authorize a more limited notification in order to protect intelligence sources and methods, the law would appear to contain no other language authorizing the President, the DNI or the intelligence agency heads to determine the number of intelligence committee members that are informed of “all intelligence activities...”, other than covert action. Rather, the law requires that the “congressional intelligence committees” be kept fully and currently informed of all intelligence activities.<sup>14</sup>

In keeping the congressional intelligence committees fully and currently informed, the DNI is required to show “due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.”<sup>15</sup> According to Senate report language accompanying the FY1991 Intelligence Authorization Act, the “protection from unauthorized disclosure” language was “...intended to have the same meaning as the legislative history of the similar preambular clause in existing law.”<sup>16</sup> That underlying preambular clause states:

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

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<sup>9</sup> National Security Act of 1947, Sec. 501 [50 U.S.C. 413 (a)(1) and Sec. 502 [50 U.S.C. 413a] (a)(1). Common practice by the executive branch in informing the intelligence committees about intelligence activities, other than Gang of Eight notifications, has been to communicate such information to the chairmen and ranking members of the two committees, often in writing. Such communications then generally are made available to the rest of the committee membership, and follow-up briefings by the executive branch are scheduled when determined to be necessary.

<sup>10</sup> National Security Act of 1947, Sec. 502 [50 U.S.C. 413a] (a).

<sup>11</sup> Ibid, (1).

<sup>12</sup> Ibid, (2).

<sup>13</sup> Ibid, (b).

<sup>14</sup> National Security Act of 1947, Sec. 501 [50 U.S.C. 413 (a) (1) and Sec. 502 [50 U.S.C. 413a] (a)(1)

<sup>15</sup> Ibid, Sec. 502 [50 U.S.C. 413a] (a).

<sup>16</sup> S.Rept. No. 102-85, 102<sup>nd</sup> Congress, 2<sup>nd</sup> sess., p. 33 (1991).

programs to the oversight committees in order to protect extremely sensitive intelligence sources and methods.<sup>17</sup> [emphasis added]

### ***Covert Action Reporting Requirements***

By contrast, the President is legally authorized to limit congressional access to a covert action finding if he determines that it is essential to do so in order “to meet extraordinary circumstances affecting vital interests of the United States...”<sup>18</sup> If he makes such a determination, the President is authorized to limit reporting of such a covert action finding to the chairmen and ranking members of the congressional intelligence committees, the House and Senate majority and minority leaders, and any other member or members of the congressional leadership that the President may designate. This covert action finding notification procedure is sometimes referred to as a “Gang of Eight” notification, because such a notification usually involves the notification of eight Members of Congress.<sup>19</sup>

The statute does not define, nor does accompanying congressional report language indicate, what would constitute “extraordinary circumstances affecting vital interests.”<sup>20</sup> The President appears to have the sole discretion in making such a determination. In enacting the statutory language as part of the FY1991 Intelligence Authorization Act, conferees stated: “... that this provision be utilized 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.”<sup>21</sup>

If the President does not report to the intelligence committees as soon as possible after approving a covert action finding and before its initiation, or if he does not provide a more limited Gang of Eight notification, he must, in “a timely fashion,”<sup>22</sup> fully inform the committees of the covert

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<sup>17</sup> S.Rept. No. 96-730, 96<sup>th</sup> Congress, 2<sup>nd</sup> sess., p. 6 (1980).

<sup>18</sup> National Security Act of 1947, Sec. 503 [50 U.S.C. 413b] (c) (2). Although the President is required to provide the congressional intelligence committees prior notice before initiating a covert action, the statute does permit the President, in certain extraordinary circumstances to either withhold prior notice altogether, or to limit it to the “Gang of Eight.” In either case, the President is required to fully inform the committees of the particular covert action “in a timely fashion” and provide a statement of the reasons for not giving the committees prior notice.

<sup>19</sup> Even though the President is authorized to notify another member, or members, of the congressional leadership beyond those serving in the eight leadership positions designated in the statute, the reporting process remains known colloquially as a “Gang of Eight” notification.

<sup>20</sup> National Security Act of 1947, Sec. 503 [50 U.S.C. 413b] (c) (2).

<sup>21</sup> H.Conf.Rept. No. 102-166, 102<sup>nd</sup> Congress, 1<sup>st</sup> sess., p. 28 (1991).

<sup>22</sup> What constitutes “timely fashion” was the subject of intense debate between the congressional intelligence committees and the executive branch during the consideration of the FY1991 Intelligence Authorization Act. At that time, House and Senate intelligence committee conferees noted that the executive branch had asserted that the President’s constitutional authorities “...permit (continued...)

action and provide a statement of the reasons for not providing the intelligence committees prior notice.

## Congress Limits Use of “Gang of Eight” Notice to Covert Actions

In enacting the FY1991 Intelligence Authorization Act, Congress restricted the President’s authority to limit prior notice to only members of the Gang of Eight to findings involving covert actions, provided the President determined that doing so was “...essential...to meet extraordinary circumstances...” affecting U.S. vital interests.<sup>23</sup> The 1991 Act restricted the President’s authority to provide Congress the more limited Gang of Eight prior notices only in situations involving covert action, and not in those situations involving other non-covert action intelligence activities. With regard to intelligence activities, other than those involving covert action, the executive branch was legally obligated to inform “the congressional intelligence committees.”<sup>24</sup> Congress in 1991 signaled its view that the earlier 1980 congressional reporting requirements had been intended to apply primarily to covert actions, rather than to all intelligence activities.<sup>25</sup>

## NSA Domestic Surveillance

In a Dec. 17, 2005 radio address, President George W. Bush said that he had authorized NSA to intercept the international communications of people with known links to al Qaeda and related

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<sup>22</sup> (...continued)

the President to withhold notice of covert actions from the committees for as long as he deems necessary.” The conferees disputed the assertion, claiming that the appropriate meaning of “timely fashion” is “within a few days.” Specifically, conferees stated, “... While the conferees recognize that they cannot foreclose by statute the possibility that the President may assert a constitutional basis for withholding notice of covert actions for periods longer than “a few days,” they believe that the President’s stated intention to act under the “timely notice” requirement of existing law to make a notification “within a few days” is the appropriate manner to proceed under this provision, and is consistent with what the conferees believe is its meaning and intent.” The conference report includes the text of a letter sent to the House Intelligence Committee chairman, in which President George H.W. Bush stated: “... In those rare instances where prior notice is not provided, I anticipate that notice will be provided within a few days. Any withholding beyond this period will be based upon my assertion of authorities granted this office by the Constitution...” See H.Conf.Rept. No. 102-166, 102<sup>nd</sup> Congress, 1<sup>st</sup> sess., pp. 27-28 (1991).

<sup>23</sup> P.L. 96-450, Sec. 501(a) (1) (B). In addition to limiting Gang of Eight limited prior notice authority, P.L. 96-450 included several other covert action program reforms enacted by Congress, the stated intention of which was put in place a more coherent and comprehensive statutory oversight framework for covert action and other intelligence activities. The reforms included the requirements that covert action findings be in writing; a finding may not be retroactive; a finding may not authorize any action that would violate the Constitution or any statute of the United States; and, a finding must identify any third parties (third countries or private parties outside normal U.S. Government controls) who implement a covert action in any significant way.

<sup>24</sup> National Security Act, Sec. 501 [50 U.S.C. 413] (a) (1) and Sec. 502 [50 U.S.C. 413a] (a) (1).

<sup>25</sup> S.Rept. No. 102-85, 102<sup>nd</sup> Congress, 1<sup>st</sup> sess., p. 32 (1991).

terrorist organizations in the weeks following the September 11<sup>th</sup> terrorist attacks.<sup>26</sup> He said that executive branch representatives had since briefed congressional leaders more than a dozen times regarding the NSA program and its activities,<sup>27</sup> and that the Members who were briefed were given an opportunity to express their approval or disapproval of the program.<sup>28</sup> Two of the Members who were briefed, and who said they voiced concerns about the program, disputed that they were provided an opportunity to either approve or disapprove the NSA program.<sup>29</sup> Other Members who said they were informed about the program said they could not recall certain members objecting to or disagreeing with the program moving forward.<sup>30</sup>

### ***NSA Program Notification Limited to Gang Of Eight***

Some of the Members of Congress who were briefed about the program said that the executive branch had limited its briefings of the legislative branch to the Gang of Eight.<sup>31</sup> They further asserted that the executive branch had prohibited them from sharing any information about the program with congressional colleagues, including members of the two congressional intelligence committees.<sup>32</sup>

Based upon publicly reported descriptions of the program, the NSA surveillance program would appear to fall more closely under the definition of an intelligence collection program, rather than qualify as a covert action program as defined by statute.<sup>33</sup> The term covert action is defined in statute to mean "... an activity or activities of the United States Government to influence political,

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<sup>26</sup> For a legal analysis of the NSA program, see Congressional Research Service Memorandum, *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, by Elizabeth B. Bazan and Jennifer K. Elsea, Jan. 5, 2006.

<sup>27</sup> Radio Address, President George W. Bush, Dec. 17, 2005.

<sup>28</sup> Town Hall Meeting, President George W. Bush, Jan. 11, 2006.

<sup>29</sup> News release of Senator John D. (Jay) Rockefeller, *Vice Chairman Rockefeller Reacts to Reports of NSA Intercept Program in United States*, Dec. 19, 2005. See also, Nancy Pelosi, "The Gap in Intelligence Oversight," *Washington Post*, Jan. 15, 2006, p. B7. See also, news release of Representative Nancy Pelosi, *Pelosi Requests Declassification of Her Letter on NSA Activities*, Dec. 20, 2005.

<sup>30</sup> Press statement by Senator Pat Roberts, *Senator Roberts' Response to Media Reports About Senator Rockefeller's 2003 Letter*, Dec. 20, 2005. See also, transcript of a news conference with Representative Peter Hoekstra, Federal News Service, Dec. 21, 2005.

<sup>31</sup> Letter from Representative Jane Harman to President George W. Bush, Jan. 4, 2006.

<sup>32</sup> News release of Senator John D. (Jay) Rockefeller, *Vice Chairman Rockefeller Reacts to Reports of NSA Intercept Program in United States*, Dec. 19, 2005.

<sup>33</sup> National Security Act of 1947, Sec. 503(e)(1). According to this section of the law, the term covert action does not include, among other activities, those activities, the primary purpose of which is to acquire intelligence. Representative Jane Harman, Ranking Member of the HPSCI, made this point in a Jan. 4, 2006 letter to President Bush.

economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly...”<sup>34</sup>

If the NSA surveillance program were to be considered an intelligence collection program, limiting congressional notification of the NSA program to the Gang of Eight, which some Members who were briefed about the program contend, would appear to be inconsistent with the law, which requires that the “congressional intelligence committees be kept fully and currently informed of all intelligence activities,”<sup>35</sup> other than those involving covert actions.

It may be argued that there apparently is no provision in law restricting whether and how the leaders of the committees share with the membership information pertaining to intelligence activities that the executive branch has provided to the chairmen and ranking members. Nor apparently is there any legal provision which sets forth any procedures that would govern the access of appropriately cleared committee staff to such classified information.

Both committees have adopted rules that govern access by committee members to such matters, contained in hardcopy, e.g. “papers” and “material.” The House Permanent Select Committee on Intelligence (HPSCI) committee rules stipulate: “All Members of the Committee shall at all times have access to all classified papers and other material received by the Committee from any source.”<sup>36</sup> According to the Senate Select Committee (SSCI) on Intelligence committee rules, “Each member of the Committee shall at all times have access to all papers and other material received from any source.”<sup>37</sup> Both committees also reserve the right to determine committee staff access to information in the committees’ possession.<sup>38</sup>

Moreover, in an indication that both chambers have taken steps to affirmatively set out procedures to govern the handling of classified information in the possession of Congress, both chambers have made available to the committees a process under which each could disclose publicly any information in its possession – including classified material – if either committee determined that the public interest would be served by doing so.<sup>39</sup>

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<sup>34</sup> National Security Act of 1947, Sec. 503 [50 U.S.C. 413b] (e).

<sup>35</sup> Sec. 501 [50 U.S.C. 413] (a) (1) and Sec. 502 [50 U.S.C. 413a] (a) (1).

<sup>36</sup> Rules of Procedure For the Permanent Select Committee on Intelligence, United States House of Representatives, 108<sup>th</sup> Congress, Rule 14 (b).

<sup>37</sup> Rules of Procedure For the Select Committee on Intelligence, United States Senate (Amended Jan. 26, 2005), Rule 9.3.

<sup>38</sup> Rules of Procedure For the Permanent Select Committee on Intelligence, United States House of Representatives, 108<sup>th</sup> Congress, Rule 14 (b); and Rules of Procedure For the Select Committee on Intelligence, United States Senate (Amended Jan. 26, 2005), Rule 9.5.

<sup>39</sup> Rules of the 109<sup>th</sup> Congress, U.S. House of Representatives, Rule X; and S.Res. 400, 94<sup>th</sup> Congress, Sec. 8.

### ***Protection of Intelligence Sources and Methods***

The executive branch may argue that it limited its briefing of the NSA program to the Gang of Eight, and further instructed those Members not to share information about the program with other members of the intelligence committees, in order to protect intelligence sources and methods. Limiting the sharing of intelligence information so as to protect intelligence sources and methods is an accepted Intelligence Community practice. Such practice is based upon the theory that as more individuals are informed about certain intelligence information, the greater is the risk that sources and methods will be disclosed, inadvertently or otherwise. Although limiting its briefing of the NSA program to the Gang of Eight may or may not be inconsistent with the legal requirement that the intelligence committees be kept fully and currently informed of intelligence activities, other than those involving covert action, the executive branch could assert that it also is legally required to pay “... due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters...”<sup>40</sup>

Congress has recognized such a necessity and stated its intent that the executive branch, in extremely rare circumstances, may need “...to preserve essential secrecy..” and thus may decide “...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...”<sup>41</sup> In acknowledging this narrow need, however, Congress did not explicitly recognize, in statute or report language, the executive branch’s right to withhold from the intelligence committees information about the existence of *the intelligence operations and collection programs*, but rather only its authority to hold back information pertaining to certain sensitive aspects of such operations and programs. [emphasis added]

The executive branch may assert that the mere discussion of the NSA program generally could expose certain intelligence sources and methods to disclosure, thus making it necessary to limit the number of those knowledgeable of the program in order to reduce the risk of such disclosure occurring.

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<sup>40</sup> National Security Act of 1947, Sec. 502 [50 U.S.C. 413a] (a).

<sup>41</sup> S.Rept. No. 96-730, 96<sup>th</sup> Congress, 2<sup>nd</sup> sess., p. 6 (1980).

### ***Notification Precedent***

The executive branch could point out that despite the current statutory obligation of keeping the intelligence committees fully and currently informed of intelligence activities, other than those involving covert action, the leadership of these two committees over time have accepted executive branch practice of limiting notification of intelligence activities in some cases to either the Gang of Eight, or to the chairmen and ranking members of the intelligence committees.<sup>42</sup>

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<sup>42</sup> House of Representatives Democratic Leader Nancy Pelosi has argued that the executive branch employs “a-need-to-know” principle in deciding which Members of the congressional intelligence committees should be kept fully and currently informed of certain intelligence information, and thus, sometimes, limit the sharing of intelligence information to the chairmen and ranking members of the committees. She asserts that Congress should adopt a similar principle, and contends that the entire membership of the intelligence committees must be kept informed if Congress is to conduct effective oversight of the intelligence community. See Nancy Pelosi, “The Gap in Intelligence Oversight,” *Washington Post*, Jan. 15, 2006, p. B7.