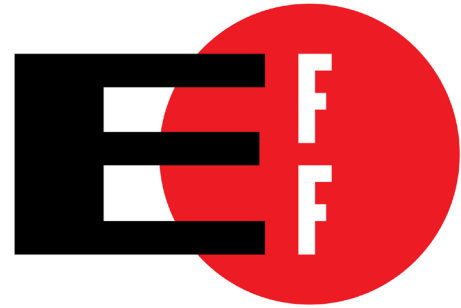




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## STRENGTHENING CONGRESSIONAL OVERSIGHT OF THE INTELLIGENCE COMMUNITY

Sept. 13, 2016

### EXECUTIVE SUMMARY

The U.S. House of Representatives created the House Permanent Select Committee on Intelligence (HPSCI) in 1977 to exert meaningful oversight over the intelligence community in the wake of revelations of wide-scale abuses and violations of law.<sup>1</sup> The House Intelligence Committee and its Senate counterpart were intended to consolidate review of intelligence matters, inform the entire Congress of intelligence activities, and hold public hearings to inform the broader public.

In recent years, experts and policymakers have expressed concern that congressional oversight efforts are falling short. Experts on Congress have put forth reform proposals, but no systematic evaluation has taken place on whether reforms heretofore adopted have met the mark.

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1. For examples of the abuses, see 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>; see also the Pike Committee Report, available in print format from the Library of Congress at <http://www.worldcat.org/title/cia-the-pike-report/oclc/3707054>.

Troublingly, current members of Congress, as well as some of the same members and staffers who originally established the intelligence committees, have said the committees and Congress no longer meet their charges.<sup>2</sup> Members again are unsettled by information obtained through leaks and in news reports.<sup>3</sup> The perception that Congress is not up to the task of intelligence oversight is damaging to the institution and undermines oversight. The reality of any such failings are perilous to our country, our security, and our liberties.

We believe Congress must reinvigorate its commitment to provide a meaningful check on executive-branch actions and must reform how it conducts oversight over intelligence matters.<sup>4</sup> When the House convenes for the 115th Congress in January, it should update its rules to enhance opportunities for oversight by HPSCI members, by members of other committees of jurisdiction and by all other representatives. The House also should establish a select committee to review how it engages in oversight.<sup>5</sup>

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2. See *Symposium on Surveillance and Foreign Intelligence Gathering in the U.S.*, Georgetown University (September 2013), available at <http://apps.law.georgetown.edu/webcasts/eventDetail.cfm?eventID=2104>; see also 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>.

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

4. 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."

5. The Senate also should update its rules, but that is beyond the scope of this white paper.

## SUMMARY OF RECOMMENDATIONS

### HPSCI modernization

- Provide staff designees for HPSCI members
- Improve HPSCI operations and transparency
  - HPSCI
  - House of Representatives
  - Public
- Improve responsiveness to House membership
- Make available annual unclassified intelligence reports
- Modernize HPSCI membership

### Empower all members of Congress

- Improve training for members and staff and establish an Office on Classified Information Access
  - Reaffirm member access to executive-branch communications to Congress
  - Clarify discussion of public information
  - Allow congressional publication of information in the public interest
  - Provide members with sufficient staff assistance
  - Strengthen Congress' capacity to engage with whistleblowers
- Review of intelligence community oversight
- Establish a broad-based review of the adequacy of the congressional oversight structures

## SECTION I: HPSCI MODERNIZATION

### I. Provide staff designees for HPSCI members

HPSCI members must have well-founded confidence in the advice they receive from staff. While members who serve on HPSCI may consult committee staff for advice, they do not have a staff person hired by them and personally responsible to them. By comparison, each member of the Senate Intelligence Committee has a staffer of his or her choice who serves on the committee and represents his or her interests.

Members who serve on HPSCI must be allowed to designate (i.e., have authority to hire and remove) one staffer to serve as his or her representative on HPSCI. The staffer would be paid out of the Intelligence Committee budget and would sit in HPSCI offices. The chair or ranking member would be allowed to terminate the employee or disallow the employee's hiring, but only for good cause. In essence, this is current practice of the Senate Intelligence Committee.<sup>6</sup>

Providing each member of HPSCI this authority would help ensure HPSCI members are afforded sufficient support to perform their duties. The importance of this assistance was illustrated by a March 2016 letter to appropriators from eight HPSCI members requesting funds to allow a staffer from each member's personal office to obtain sufficient clearance to assist with intelligence oversight.<sup>7</sup> It also would

6. 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>.

7. See *Letter to House Appropriators from Eight Members of the House Permanent Select Committee on Intelligence* (March 2016), available at [http://fas.org/irp/congress/2016\\_cr/hpsci-hac.pdf](http://fas.org/irp/congress/2016_cr/hpsci-hac.pdf).

allow HPSCI members to pursue matters they consider to be important to a greater degree than currently possible, allowing for more oversight and a greater diversity of viewpoints.

### 2. Improve HPSCI operations and transparency

When legislatures oversee issues related to intelligence gathering and use, a tension often arises between transparency and secrecy. For Congress to retain democratic legitimacy, it must be as open as possible, while holding close those information-gathering techniques and covert activities whose disclosure would be unduly harmful to legitimate intelligence activities. Members of Congress and staff who do not serve on the Intelligence Committee need to be appraised of developments and the public need to know about governmental activities. Secrecy for secrecy's sake breeds errors, cover-ups, and bad behavior. It also severely blunts our system of checks and balances, which must prioritize democratic norms.

The following are mechanisms to address the competing needs with respect to HPSCI, other members of the House and the public.

#### A) HPSCI

HPSCI should:

- Regularly review whether the committee is receiving all requested information and reports from the executive branch; and
- Retain an information specialist to keep track of all requests made by and reports received by HPSCI from the intelligence community, for the purpose of establishing a comprehensive institutional memory.

#### B) House of Representatives

HPSCI should:

- Abide by the same requirements placed on standing committees with respect to notice to Congress and the general public of markups and hearings, as well as access to draft legislative texts to be considered by the committee. Specifically—
  - Committee hearings*: The date, place, and subject matter of a hearing must not commence earlier than one week after public notice, unless the chair and ranking member agree there is good cause or the committee so determines by majority vote of members required to transact business;
  - Committee meetings*: The date, place, and subject matter of a committee meeting must not commence earlier than the third day after public

notice, unless the chair and ranking member agree there is good cause or the committee so determines by majority vote of members required to transact business;

- *Legislative text:* Legislative text should be made publicly available in electronic form at least 24 hours prior to the commencement of a meeting for the markup of legislation or at the time a determination is made that a meeting should be held, if that is less than 24 hours in advance of a meeting;
- Provide at least three calendar days' notice to all House members regarding the subject of and witnesses testifying before upcoming closed hearings as part of a policy of openness and transparency, with the exception that for witnesses (1) under official cover or (2) the disclosure of whose information would have an articulable, specific, deleterious effect on ongoing operational concerns, HPSCI may withhold information about the witnesses' identity to the extent appropriate, while still releasing descriptive information (title, role, agency, etc.) to the maximum extent possible;
- Provide all House members at least three calendar days' notice in advance of classified briefings while Congress is in session, and longer when out of session, except that fast-moving operational matters may be briefed in a shorter timeframe;
- Reaffirm that staff also may speak publicly about committee procedures to help promote understanding of whether the committee is operating efficiently and effectively;
- Permit members and staff to keep notes from briefings on classified matters in a secure but easily accessible location that is under the control of the House, but not any particular committee thereof;
- Permit members to discuss with any other member the substance of closed hearings;
- Permit cleared HPSCI staff to discuss with any member of Congress the substance of closed hearings, so long as HPSCI is notified when classified matters are discussed and it is within the scope of work authorized by their employer;
- Permit cleared HPSCI staff to discuss with any other properly cleared staff the substance of closed hearings, so long as HPSCI and the cleared staffer's employer are notified in advance of such discussion and it is within the scope of work authorized by each of their employers; and

- Provide clear guidance on its pre-publication review process and standard of review.<sup>8</sup>

### C) Public

HPSCI should:

- Provide the public with notice of (1) the broad areas that are the subject of closed hearings, with as much specific information as possible (a declaration of “an intelligence activity” as the topic is clearly insufficient) and (2) the list of witnesses expected to testify, unless it would cause significant, articulable harm<sup>9</sup> that outweighs the public's interest in knowing;
- Regularly—and no less frequently than every two years—oversee declassification reviews of closed-session transcripts and publish them;
- Establish a process to review and process historical records for declassification;
- After 25 years has elapsed, apply the procedures outlined in the Executive Order on Declassification<sup>10</sup> to the Congressional Record and classified legislative histories; and
- Publish current and historical reports on Committee activities online.

### 3. Improve responsiveness to House membership

The House should amend the rules governing how HPSCI provides access to classified information to other committees or members of Congress. Currently, HPSCI has discretion to grant such access.<sup>11</sup> The committee is required to hold a vote “at the earliest practicable opportunity” and weighs several factors when deciding to grant access. The factors do not include the constitutional obligation of members of Congress to perform their legislative duties faithfully. In practice, news stories recount how requests for information by members of Congress on pending legislative matters did not receive a committee response for more than six weeks, or

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8. For a discussion of problems with pre-publication review as relates to executive-branch employees, see *The Government's Pre-Publication Review Process is Broken*, Jack Goldsmith and Oona Hathaway (December 2015), available at [https://www.washingtonpost.com/opinions/the-governments-prepublication-review-process-is-broken/2015/12/25/edd943a8-a349-11e5-b53d-972e2751f433\\_story.html](https://www.washingtonpost.com/opinions/the-governments-prepublication-review-process-is-broken/2015/12/25/edd943a8-a349-11e5-b53d-972e2751f433_story.html).

9. 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?

10. Executive Order 13526, section 1.5, “This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism,” available at <https://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information>.

11. See House Intelligence Committee rule 14, available at: <http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/HPSCI%20Rules%20of%20Procedure%20-%2011th%20Congress.pdf>.

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>12</sup>

As a constitutional matter, members of Congress have the right to access these documents, subject to the rules each chamber establishes for itself. Article I, Section 5 of the Constitution vests Congress with the duty to maintain its own records of its proceedings, including those requiring secrecy. Historically speaking, reforms in the 1970s provided greatly expanded access to intelligence-related information to members of the House.<sup>13</sup> Unless the information in question involves covert actions covered under existing statutory authorities that restrict said information to the House leadership, information in the custody of HPSCI should be made available to any House member (or appropriately cleared staff) upon request.

To facilitate compliance when HPSCI has not taken action, HPSCI should be required to report to the clerk of the House each request for information that is pending for 45 calendar days, and every seven days thereafter. The report must explain why the information was withheld from the member and indicate whether the requested information has been made available to members in the other chamber. A copy of the report shall be available to the public. If the reason for the withholding is classified, the public report shall indicate “classified” as the reason for withholding, but the nonpublic version shall state the reason. Should the committee fail to report, the member should be privileged to raise that matter publicly on the floor of the House.

For access to information requested by a member that pertains to upcoming consideration of legislation by the chamber or one of its committees, should the committee fail to consider the request in a timely way, HPSCI must make a public report to the clerk of its failure to hold a vote on access no fewer than three calendar days prior to the vote or hearing. Failure to release the report would constitute an unwaivable point of order against consideration of the measure.

#### 4. Make available annual unclassified intelligence reports

House rules require “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” to submit annual unclassified reports on intelligence and intelligence-related activities

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

13. 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), p. 526.

to HPSCI.<sup>14</sup> Current rules grant the committee discretion on whether to release each report to the public. These reports can be requested under the Freedom of Information Act from the submitting agency, but often are subject to significant delay. The rules should be changed to make that release of unclassified information by HPSCI mandatory.

#### 5. Modernize HPSCI membership

Intelligence matters are of concern to all members of Congress and fall under the purview of many committees. The House Intelligence Committee was created in the 1970s to provide a central, coordinated point for oversight of intelligence matters, but HPSCI neither reflects nor encompasses all the interests of the House.<sup>15</sup> An old adage says “personnel is policy,” and we believe it is time to revisit who serves on HPSCI. Recently, the Republican Conference addressed concerns regarding how standing congressional committee leaders and members are chosen when it voted unanimously to reorganize and broaden the membership of its Steering Committee;<sup>16</sup> however, the change did not extend to HPSCI because it is a “select committee.” We believe this omission on how members of HPSCI are chosen should be addressed.

In light of HPSCI’s mission, we recommend a hybrid model.

- The Intelligence Committee chair and ranking member are nominated by their respective party steering committees and confirmed by members of their conference/caucus.
- 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. Under current rules, members of Appropriations, Armed Service, Foreign Affairs, and Judiciary are appointed to the committee by the speaker or minority leader, although even this minimal requirement sometimes is waived.<sup>17</sup> As the 9/11 Commission noted in its final report, the Sept. 11, 2001 terrorist attacks occurred, in part, because a culture of “need to know” predominated over the more

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14. House Rule XI (c)(2), available at <http://clerk.house.gov/legislative/house-rules.pdf>.

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

16. See *House GOP Approves Overhaul of Powerful Steering Committee*, Roll Call (November 2015), available at <http://thehill.com/homenews/house/260749-house-gop-approves-overhaul-of-powerful-steering-panel>.

17. See *Is the Intelligence Committee Out of Balance?* Daniel Schuman (July 7, 2016), available at <https://medium.com/demand-progress/is-the-house-intelligence-committee-out-of-balance-5ea5ce3ff05e#.fwi8kh2qv>.



appropriate culture of “need to share.”<sup>18</sup> For House members to fulfill their constitutional oversight responsibilities, the House and HPSCI must adopt the “need to share” model. That includes bringing in other committees of jurisdiction and aligning their interests with committee leadership.

- To reflect the diverse perspectives of the caucus, each party must choose members of the Intelligence Committee (four for the majority, three for the minority) as follows: any member may nominate him or herself or a colleague to serve on the committee, with a secret-ballot vote whose results are tabulated under a ranked-choice voting system.

Altogether, this will ensure HPSCI includes more congressional stakeholders and better reflects the diverse view of the caucus/conference.

## SECTION II: EMPOWER ALL MEMBERS OF CONGRESS

While representatives specialize on issues through their roles on committees, each member is responsible for the actions of the whole House. Consequently, all members must have the information and resources they need to perform their duties, including oversight over intelligence matters.

### I. Improve training for members and staff and establish an Office on Classified Information Access

While Congress provides training on how to handle classified information, as well as general information on congressional oversight,<sup>19</sup> current training should be augmented for the highly complex and sensitive responsibilities attached to intelligence oversight. The House should educate all relevant policy staff on the inherent constitutional rights and statutory powers of members of Congress to review intelligence-related information and the tools available to elected officials and congressional staff to effectuate that right. Such training should be provided by a unit within the legislative branch, such as the American Law Division of the Congressional Research Service. In addition, the House should create a new office on classified information access to provide training and assistance for the handling of classified information. The new office should work in concert with the whistleblower ombudsman, described below.

18. See *The 9/11 Commission Report*, p. 417, available at <http://www.9-11commission.gov/report/911Report.pdf>

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

## 2. Reaffirm 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>20</sup> Instead of circulating this critical document, HPSCI held a briefing that some members described as an inadequate substitute.<sup>21</sup> Withholding this key information impaired members’ ability to fulfill their constitutional oversight responsibilities.<sup>22</sup> HPSCI should facilitate access to executive-branch communications to Congress and similar materials. The House should reaffirm that its rules require HPSCI to distribute or make available at a secure location communications sent by the executive branch and directed to all members of Congress, and HPSCI rules should be clarified accordingly.<sup>23</sup> In addition, regular notice of the receipt of materials should be provided to all members of Congress.

## 3. Clarify discussion of public information

Members of Congress and their staff are allowed to read information available on the internet or in news publications that the executive branch has deemed classified, although some staff have been given directives to the contrary.<sup>24</sup> In addition, HPSCI has warned members of Congress that they may be subject to reprimand for sharing information already

20. *House panel withheld document on NSA surveillance program from members*, by Peter Wallstein, *The Washington Post* (Aug. 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-e2aafe5a5f84\\_story.html](http://www.washingtonpost.com/politics/house-panel-withheld-document-on-nsa-surveillance-program-from-members/2013/08/16/944e728e-0672-11e3-9259-e2aafe5a5f84_story.html).

21. 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>

22. Indeed, House Intelligence Committee rules 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 received on a nonexclusive basis, “the Chair, in consultation with the Ranking Member, may grant non-Committee members access to such material in accordance with ...” (emphasis added).

23. The amendment likely should be made to House Rule XI g(3) (A) and (B).

24. 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/>.

in the public domain.<sup>25</sup> These restrictions are inappropriate and not supported under House rules. The House should reaffirm the right of members and their staff to read and comment publicly on documents in the public domain. Members of Congress and their staff must 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 be encouraged to 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.

#### 4. Allow congressional publication of information in the public interest

Congress has the inherent right to release information it concludes should be available to the public. There are notable examples of this occurring at the initiative of a single member, such as former Sen. Mike Gravel's submission of the Pentagon Papers into the record of his Subcommittee on Public Buildings and Grounds in 1971.<sup>26</sup> However, current procedures to release information classified by the executive branch are so burdensome that they never have been completed.<sup>27</sup> To summarize the current publication process: (1) A member of the Intelligence Committee must request a vote to declassify information, after which the committee must vote on it within five days. (2) If the committee approves declassification, the president is notified. (3) If the president objects within five days, the committee must vote again with a majority supporting referring the matter to the full House for a vote. (4) Should a member continue to pursue the matter on the House floor, a vote will be called.

Under these rules, the majority party has a veto over release of information the executive branch deems classified. Members of Congress outside the Intelligence Committee have no say in starting the publication process. Multiple votes are required, with a high threshold before consideration by the chamber.

Congress is a coequal branch of government and each chamber should have rules that allow its members a reasonable path to inform the public of matters it concludes should be available. The current rules are anomalous by historical standards and should be moderated.

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25. 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>.

26. See [http://www.democracynow.org/2007/7/2/how\\_the\\_pentagon\\_papers\\_came\\_to](http://www.democracynow.org/2007/7/2/how_the_pentagon_papers_came_to).

27. See Rule X, Clause 11(g) of the Rules of the House of Representatives, available at <http://rules.house.gov/sites/republicans.rules.house.gov/files/114/PDF/House-Rules-114.pdf>, *Executive Branch Classified National Security Information and Congress*, Information Security Oversight Office, National Archives (2007), available at <https://www.archives.gov/declassification/pidb/meetings/06-22-07-carpenier.pdf>.

We recommend the following.

Referrals to the full chamber for a vote. The chair or ranking member of the Intelligence Committee should be able, of his or her own accord, to refer a matter to the full chamber for a vote, after consulting with the chamber's leadership. In addition, a vote by HPSCI members should refer a matter to the full chamber unless two-thirds of the committee's members vote in opposition to a referral. Furthermore, a vote by members of a committee with jurisdiction over a matter should refer a matter to the full chamber unless two-thirds of the members of that committee vote in opposition to a referral.

*Presidential review.* At the time of referral, the president shall be afforded 30 calendar days to explain to the members pursuing the matter why they should withdraw it; however the option to proceed or withdraw is up to those members. In circumstances that are time sensitive, the time allotted for review may be reduced to five calendar days upon request by the measure's sponsor, or waived in emergency situations.

*Chamber debate.* The full chamber will debate the issue in *camera* (that is, in private), with the material to be released subsequent to a vote unless two-thirds of the members vote in opposition. Debate time will be split equally between proponents and opponents of the measure. The motion is subject to amendment, and the material can be released in part, in full or the matter can be referred back to the committee for further consideration.

This process will ensure determined members of Congress have an opportunity to raise issues of publication to the full chamber, where they can be debated fully. The threshold for *in camera* debate is sufficiently high to ensure information becomes available only when it is appropriate, but sufficiently low that it can be met. The public-release threshold means that a significant number of members of Congress must believe that information should be released before it is possible to do so, but it cannot be denied on partisan grounds.

#### 5. 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>28</sup> Members can only cope with their crushing workloads by relying on expert staff, just as do senior

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28. *Congressional Access to Intelligence Information: The Appearance of a Check on Executive Power*, Kathleen Clarke (June 2012), available at <http://ssrn.com/abstract=2112081>.

members of the executive branch.<sup>29</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>30</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>31</sup> Additional training for staff on handling TS/SCI level clearance also should be provided.

(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 at least one staff person upon the request of a member, so long as a staffer has been vetted for clearance. More than 620,000 executive-branch employees already are cleared at TS/SCI, as are nearly 430,000 contractors; adding up to 435 staffers in congressional offices will help empower oversight without creating significant additional risks.

(3) All members should be allowed to consult technical experts who have appropriate clearance to provide advice on matters of interest to Congress.

## 6. Strengthen Congress' capacity to engage with whistleblowers

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 without fear of reprisal.<sup>32</sup> Despite assertions to the contrary, such communications need not be routed through HPSCI, and House Rules should reaffirm that point.

Any committee should be able to receive any whistleblower complaint containing classified information from anyone, so

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29. While there may be some concern about providing approximately 500 additional security clearances, it is merely a drop in the bucket. According to the *2015 Annual Report on Security Clearance Determinations*, available at <http://www.fas.org/sgp/othergov/intel/clear-2015.pdf>, in October 2015, 1,070,205 government employees held confidential/secret clearance; 622,509 employees held top-secret (collateral and TS/SCI) clearance; plus an additional 433,359 contractors had confidential/secret clearance and 428,069 contractors had top-secret clearance.

30. 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.

31. 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.

32. 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>.

long as the matter is under the jurisdiction of the committee; if not, it should be referred to a committee with jurisdiction. Committees with jurisdiction over classified matters should create classified, secure intake systems for whistleblowers to reach Congress directly and confidentially with their concerns.

Congressional staff should receive mandatory training on how to handle whistleblowing, coordinated by a new office, a whistleblower ombudsman, which also would provide advice and assistance to offices. The ombudsman should also coordinate efforts by the committees to prepare and release an annual unclassified report of what the House has done with whistleblower complaints.<sup>33</sup> As the topics of many of these complaints are sensitive, the committees include only the total number of complaints, the number the committee found merited further action, and the number of retaliation complaints that the committee received. The ombudsman should work in concert with the Office of Classified Information Access.

## SECTION III: REVIEW OF INTELLIGENCE COMMUNITY OVERSIGHT

Nearly 40 years have elapsed since the House created the Intelligence Committee. Over the last two decades, an increasing number of experts and policymakers have expressed concerns that congressional oversight efforts are falling short. The criticisms generally are not aimed at the diligence of the overseers, but rather the functionality of the intelligence-oversight structure, the capacity of Congress to do its work, institutional incentives, and the complex nature of intelligence oversight.

Experts on Congress have put forth reform proposals, such as those contained in the 9/11 Commission report, but no systematic evaluation has taken place on whether reforms heretofore adopted by Congress have met the mark or what else might be necessary. Troublingly, current members of Congress, as well as some of the same members and staffers who established the intelligence committees, have said the committees and Congress are falling short in meeting their charge.<sup>34</sup> The perception alone that Congress is not up to the task of intelligence oversight is damaging to the institution and undermines oversight. The reality of any such failings are perilous to our country and our liberties. Congress is a coequal branch of government and must fulfill its constitutional duties.

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33. See *Protect Intelligence Whistleblowers*, Mieke Eoyang, *Democracy: A Journal of Ideas* (Winter 2016), available at <http://democracyjournal.org/magazine/39/protect-intelligence-whistleblowers/>.

34. See <http://apps.law.georgetown.edu/webcasts/eventDetail.cfm?eventID=2104>; see also *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>

When questions were raised in the 1970s about the activities of the intelligence community, Congress reacted by forming two special committees. The reports by the Church<sup>35</sup> and Pike<sup>36</sup> committees preceded wholesale reforms of the intelligence community, including improving congressional oversight mechanisms. The outcome improved congressional oversight and the perception of its efficacy.

We believe the House must establish a distinct, broad-based review of the adequacy of the congressional oversight structures with respect to Congress' ability to supervise activities of the intelligence community.<sup>37</sup> This requires insight into congressional operations and an understanding of the intelligence community that Congress oversees. While HPSCI and its Senate counterpart have important roles to play, for these purposes, they are inadequate instruments to conduct an investigation that necessarily is broader than their jurisdiction. HPSCI may be hard-pressed to be impartial – for instance, it may possess a conflict of interest, as its own actions may come under review. In addition, it would be hard for HPSCI to conduct this review while performing its ongoing duties. A separate pair of eyes is required.

We do not believe an executive-branch-led investigation can be relied upon by Congress as a substitute for its own inquiry. For example, the Ford administration established the Rockefeller Commission to investigate the abuses reviewed by the Church and Pike committees. Recent documents have shown the administration tampered with the Rockefeller Commission report, removed crucial sections, and worked to deaden its impact and undermine its independence.<sup>38</sup>

The House should establish a committee modeled after the Church Committee, provide it adequate staffing and financial support, and give it a broad mandate to review practices and institutions associated with congressional oversight of intelligence matters. The committee should engage in public reporting wherever possible. It should issue recommendations to (1) reform how the House conducts oversight, (2) identify intelligence-community activities that should be subject to subsequent review, and (3) highlight other matters where further investigation by a select committee would

be appropriate. Reports by the Brennan Center for Justice<sup>39</sup> and the Berkeley Law School<sup>40</sup> support this goal and their recommendations for how to bring it to life are worthy of consideration. We believe following the successful model of the prior committees is the best way to conduct what is likely to be a multiyear review.

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

36. See the *Pike Committee Report*, available in print format from the Library of Congress at <http://www.worldcat.org/title/cia-the-pike-report/oclc/3707054>.

37. Some members of Congress have introduced resolutions to make this a reality. See, for example, H. Res 383 (111<sup>th</sup> Congress), "Establishing a select committee to review national security laws, policies, and practices," introduced by Reps. Robert Wexler, John Conyers, and Barbara Lee, available at <https://www.congress.gov/bill/111th-congress/house-resolution/383>.

38. See *Gerald Ford White House Altered Rockefeller Commission Report* in 1975, the National Security Archive (February 2016), available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB543-Ford-White-House-Altered-Rockefeller-Commission-Report/>.

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39. See *Strengthening Intelligence Oversight*, the Brennan Center (2015), available at [https://www.brennancenter.org/sites/default/files/publications/Church\\_Committee\\_Report.pdf](https://www.brennancenter.org/sites/default/files/publications/Church_Committee_Report.pdf).

40. See *A Church Committee for the 21<sup>st</sup> Century*, Electronic Frontier Foundation (December 2015), available at [https://www.eff.org/files/2015/12/14/a\\_new\\_church\\_committee\\_final.pdf](https://www.eff.org/files/2015/12/14/a_new_church_committee_final.pdf).