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CONGRESSIONAL OVERSIGHT OF NATIONAL SECURITY ACTIVITIES: IMPROVING INFORMATION FUNNELS

*Heidi Kitrosser**

INTRODUCTION

In December of 2005, the *New York Times* broke the story that the U.S. government had, since shortly after September 11, 2001, spied without warrants on international phone calls in apparent contravention of the Foreign Intelligence Surveillance Act (FISA).¹ Since the story broke, commentary has abounded as to its implications for the Constitution's separation of powers. Most commentary has debated whether the Bush administration indeed violated FISA and, if so, whether it was constitutionally empowered to do so under Article II of the Constitution.² Also raised, though to a much lesser degree, is whether the administration was statutorily required to inform the congressional intelligence committees of its warrantless surveillance program, whether it violated any such requirement, and whether such a violation would be constitutional.³

* Associate Professor, University of Minnesota Law School. I am grateful to the organizers of the symposium for which this paper was written, particularly David Gans, Michael Herz, and Kevin Stack. I also owe many thanks to former Vice President Walter Mondale for a fascinating and inspiring discussion about congressional oversight of national security activities. Finally, I am very grateful to Professor Suzanne Thorpe of the University of Minnesota Law Library for her research assistance and to University of Minnesota co-deans Guy Charles and Fred Morrison for their continued support.

¹ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; see also JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 43-44 (2006); Eric Lichtblau & James Risen, *Eavesdropping Effort Began Soon After Sept. 11 Attacks*, N.Y. TIMES, Dec. 18, 2005, at A44; David E. Sanger, *In Address, Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005, at A1.

² See, e.g., David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355, 1357-58 (2005) (summarizing major documents and arguments); John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105, 126-35 (2006); Memorandum from Alberto R. Gonzales, Att'y Gen., to William H. Frist, Majority Leader, U.S. Senate (Jan. 19, 2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> [hereinafter DOJ WHITE PAPER], at 1-3, 6-36.

³ See, e.g., Heidi Kitrosser, *Macro-Transparency as Structural Directive: A Look at the NSA Surveillance Controversy*, 91 MINN. L. REV. 1163, 1203-05 (2007); Scott Shane & Eric Lichtblau,

Whether the President adequately informed Congress of his actions is a question as significant and complex as whether those actions violate the law. In matters of congressional oversight generally, it is difficult and important to balance the respective values of information flow to the public, information flow between Congress and the President, and presidential discretion to act swiftly and secretly. And matters are substantially more complicated where national security is at issue. Both executive branch secrecy needs and congressional information needs often are heightened in this context. Also at issue is what role, if any, information flow to the public should play.

A major statutory means to reconcile secrecy and openness needs in the context of inter-branch information-sharing—including in the statute governing information sharing about the warrantless surveillance program⁴—is what this Article calls an “information funnel” approach. Such an approach focuses on funneling information only to discrete groups of people. For example, statutory provisions generally require that intelligence programs be shared with the congressional intelligence committees.⁵ Other statutory provisions permit certain narrowly defined covert actions to be reported only to the congressional leadership.⁶ The intended benefits of funneling are intuitive. Funneling plainly is directed toward balancing secrecy needs and openness needs. It demands some inter-branch knowledge sharing without requiring full public or even full congressional access.

This Article agrees that funneling is a theoretically and practically important means of reconciling secrecy and openness needs but contends that funneling has not, in fact, been taken seriously enough. The purpose and utility of funneling have been under-explored, and funneling’s propriety and implications thus are poorly understood. Questions remain, for example, over whether funneling requirements infringe on the separation of powers and thus need not always be obeyed.⁷ And it is uncertain what if anything should follow from information funneling—whether, for example, those with whom information is shared should be able to take some action in response to what they learn.⁸

These uncertainties about funneling are manifest in the debate over whether the Bush Administration adequately informed Congress about

Full House Committee Gets Briefing on Eavesdropping, N.Y. TIMES, Feb. 9, 2006, at A22; Charles Babington, *White House Agrees to Brief Congress on NSA Surveillance*, WASH. POST, Feb. 9, 2006, at A6; Nancy Pelosi, *The Gap in Intelligence Oversight*, WASH. POST, Jan. 15, 2006, at B7.

⁴ See 50 U.S.C.S. §§ 413, 413a, 413b (2007). See also *infra* text accompanying notes 29-38.

⁵ *Id.* §§ 413, 413a.

⁶ *Id.* § 413b(c), (e).

⁷ See *infra* Part I.D.

⁸ See *id.*

the warrantless surveillance program in the years before the program was publicly revealed. A substantial theme in the administration's defense of its disclosures is that the President may, and indeed must, limit information sharing as national security requires.⁹ Important questions also have been raised as to whether congresspersons who were informed of the program could or should have taken some action in response to the information, or whether their rights and responsibilities ended with the receipt of the information.¹⁰

This Article uses the warrantless surveillance controversy as a jumping-off point to examine the theory and practice of information funnels. The hope is that information funnels, their constitutional significance and their potential uses may, through such inquiries, become better understood and utilized. Part I examines the warrantless surveillance controversy and its relationship to inter-branch information sharing. It concludes that two major problems that the controversy reflects are widespread uncertainty as to whether Congress constitutionally may force the President to disclose information and a lack of careful consideration as to how any information funneling requirements should work. Part II lays a theoretical foundation for improving governing statutes and congressional rules. Part II(A) explains that Congress has the constitutional authority to set information-sharing requirements between the executive branch and itself. Part II(B) discusses the complicated relationships between the respective benefits of secrecy and openness, an understanding of which should guide information sharing rules. Building on Part II's theoretical foundations, Part III suggests some answers to the questions raised in Part I as to how information funneling requirements should work.

I. INTER-BRANCH INFORMATION SHARING AND THE WARRANTLESS SURVEILLANCE PROGRAM

A. *The Warrantless Surveillance Program and the Debate Over its Legality*

Shortly after September 11, 2001, the National Security Agency began secretly to employ warrantless electronic surveillance of some calls between the United States and foreign nations.¹¹ In 2002, President Bush issued a secret executive order authorizing the warrantless surveillance program.¹² On December 19, 2005, an article

⁹ See *infra* text accompanying notes 42-44.

¹⁰ See *infra* Part I.B.2.

¹¹ See *supra* note 1.

¹² See Risen & Lichtblau, *supra* note 1; Memorandum from Elizabeth B. Bazan & Jennifer K.

in the *New York Times* revealed the program's existence to the public.¹³

After the story broke, commentators began to debate whether the program violates the law. Some considered whether the program oversteps Fourth Amendment limits on warrantless wiretapping.¹⁴ Many questioned whether the program violates FISA.¹⁵ Under FISA, warrantless surveillance is barred with respect to communications to or from a U.S. citizen or legal alien in the United States and communications to or from any "person in the United States, without the consent" of at least one party thereto.¹⁶ Warrant applications must be made to the Foreign Intelligence Surveillance Court under provisions that facilitate much secrecy. Under FISA, the pre-surveillance warrant requirement is lifted in two circumstances. First, where the Attorney General certifies "that emergency conditions make it impossible to obtain [a warrant] with due diligence" before surveillance begins. In such cases, a warrant application still must be made within 72 hours after the Attorney General authorizes surveillance. Second, electronic surveillance may be conducted "without a court order for fifteen calendar days following a declaration of war by Congress."¹⁷

The administration's arguments about FISA consist of two main parts. First, the administration contends that its actions are authorized by statute. It argues that FISA must be read together with the Authorization to Use Military Force [AUMF] passed by Congress in the days following September 11th.¹⁸ The AUMF authorized the President "to use all necessary and appropriate force" against those involved with the attacks of September 11th.¹⁹ The administration contends that the AUMF implicitly authorizes the NSA surveillance program to determine who was involved in the attacks and against whom force should be used.²⁰ Second, the administration "argues that, even if the AUMF does not directly authorize the NSA program, the Constitution inherently empowers the President to create such a program. And while the administration often avoids saying it definitively, it repeatedly indicates that any legislation that conflicts with such inherent power probably is unconstitutional."²¹ The administration bases its statutory

Elsea, Legislative Attorneys, Am. Law Div (Jan. 5, 2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf>.

¹³ See *supra* note 1.

¹⁴ See, e.g., Letter from Law Professors Curtis A. Bradley et al., to Members of Congress (Jan. 9, 2006), <http://www.fas.org/irp/agency/doj/fisa/doj-response.pdf> [hereinafter Law Professors Letter].

¹⁵ See *supra* note 2.

¹⁶ 50 U.S.C.S. § 1801(f) (2007).

¹⁷ See Kitrosser, *supra* note 3, at 1188-90 (citing FISA and secondary sources).

¹⁸ DOJ White Paper, *supra* note 2, at 17-18.

¹⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²⁰ DOJ White Paper, *supra* note 2, at 10-13.

²¹ Kitrosser, *supra* note 3, at 1196, 1198 nn.232-33 and accompanying text.

interpretation in large part on its constitutional arguments. That is, it asserts that its statutory interpretation should be adopted to avoid the constitutional conflict that otherwise would be raised between FISA and the President's powers under Article II of the Constitution.²²

Opponents of the warrantless surveillance program dispute the administration's statutory and constitutional points. On the statutory front, opponents argue that the general language of the AUMF does not override FISA's specific requirements for electronic surveillance.²³ They further note that FISA provides a fifteen-day exemption from its requirements following a congressional declaration of war and that FISA was amended several times after the AUMF's passage. Both the fifteen-day exemption and the post-AUMF amendments would be superfluous, opponents argue, had the AUMF implicitly overridden FISA.²⁴ On the constitutional points, opponents argue that Congress and the President share powers in both military and domestic affairs, that domestic surveillance falls well within Congress' legislative powers, and that the President thus must conduct any operations within FISA's parameters.²⁵

B. *Administration Disclosures to Congresspersons Prior to the Program's Public Revelation*

Also discussed in the wake of the program's public revelation, though much less so, is whether the administration adequately informed Congress about the program before it became public. Prior to the program's public revealing, the administration notified only members of the Congressional leadership, or "Gang of Eight," consisting of "the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate."²⁶ Opponents charge that the administration was obligated to inform the full intelligence committees.²⁷ Opponents also argue that notification occurred under such constrained conditions that informed members had no means to seek recourse in response to the information.²⁸

²² See DOJ White Paper, *supra* note 2, at 28-36.

²³ See, e.g., Law Professors Letter, *supra* note 14, at 3; Sims, *supra* note 2, at 128-30.

²⁴ See, e.g., Law Professors Letter, *supra* note 14, at 3-5; Sims, *supra* note 2, at 128-30.

²⁵ See, e.g., Law Professors Letter, *supra* note 14, at 6-7; Sims, *supra* note 2, at 131-32.

²⁶ Kitrosser, *supra* note 3, at 1204 nn.252-56 and accompanying text.

²⁷ See, e.g., *id.* at 1204-05; see also sources cited at *supra* note 3.

²⁸ See *infra* Part I.B.2; see also, e.g., Kitrosser, *supra* note 3, at 1204 nn.255-56.

1. Limiting Notice to the Gang of Eight

The legal dimensions of notification are shaped largely by the National Security Act of 1947, as amended. The intelligence community's current statutory disclosure responsibilities include requirements that the President "ensure that the congressional intelligence committees are kept fully and currently informed of . . . intelligence activities . . . including any significant anticipated intelligence activity"²⁹ and that the Director of National Intelligence [DNI] and the intelligence agency heads similarly "keep the congressional intelligence committees fully and currently informed of all intelligence activities," including through written reports on "significant anticipated intelligence activity."³⁰ In carrying out these duties, the DNI must show "due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters."³¹

A separate statutory provision requires "Presidential approval and reporting of covert actions."³² Covert actions are distinct from intelligence activities. The former is limited to "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."³³ Covert actions do not include "activities the primary purpose of which is to acquire intelligence."³⁴ While the intelligence committees generally must be notified of covert actions,³⁵ initial notice may be limited to the Gang of Eight³⁶ where the President deems such limitation "essential . . . to meet extraordinary circumstances affecting vital interests of the United States."³⁷ When initial notice is restricted to the Gang of Eight, "the President shall fully inform the congressional intelligence committees in a timely fashion and shall provide a statement of the reasons for not giving prior notice."³⁸

To justify having limited its disclosures about the NSA surveillance program to the Gang of Eight, the administration relies on statutory and constitutional arguments that parallel those which it makes

²⁹ 50 U.S.C.S. § 413(a)(1) (2007).

³⁰ *Id.* § 413a(a)(1), (b).

³¹ *Id.* § 413a(a).

³² *Id.* § 413b (2007).

³³ *Id.* § 413b(e).

³⁴ *Id.* § 413b(e)(1).

³⁵ *Id.* § 413b(b), (c)(1).

³⁶ *See supra* note 26 and accompanying text.

³⁷ 50 U.S.C. § 413b(c)(2).

³⁸ *Id.* § 413b(c)(3).

to justify the program's legality generally. First, the administration argues that its actions fall within a statutory exception to full committee disclosure requirements. Second, the administration's broader statements about its right to keep secrets—both about the program and generally—imply a view that it constitutionally may determine when to circumvent statutory notice requirements.

On the statutory issue, the administration points to the requirement that the DNI carry out its informing duties “[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.”³⁹ The administration argues that this language “gives the Executive Branch flexibility to brief only certain members of the intelligence committees where more widespread briefings would pose an unacceptable risk to the national security.”⁴⁰ The administration quotes the Congressional Research Service [CRS] to the effect that “the leaders of the intelligence committees ‘over time have accepted the 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.’”⁴¹

The debate over the adequacy of disclosures has been relatively limited and the administration's explicit explanations have not strayed far beyond its statutory argument. Yet one can infer a sub-textual argument that the Constitution demands leeway for the President to circumvent statutory disclosure requirements that he deems antithetical to national security. This point follows from the administration's support generally for a strong constitutional executive privilege to keep secrets.⁴² The point also seems implicit in the administration's many references to the need for secrecy regarding the warrantless surveillance program's existence. The administration makes such arguments with respect both to Congress as a whole⁴³ and to the full intelligence committees' memberships.⁴⁴ The arguments are relevant to the

³⁹ *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 136 (2006), available at http://fas.org/irp/congress/2006_hr/nsasurv.pdf [hereinafter *Gonzales Transcript*] (quoting 50 U.S.C. § 413a(a)).

⁴⁰ *Id.* at 137.

⁴¹ *Id.* at 138 (quoting Memorandum from Alfred Cumming, Specialist in Intelligence and Nat'l Sec., Foreign Affairs, Defense and Trade Division, Cong. Research Serv. Statutory Procedures Under Which Congress is to be Informed of U.S. Intelligence Activities, Including Covert Actions 10 (Jan. 18, 2004), available at <http://www.fas.org/sgp/crs/intel/m011806.pdf>).

⁴² See, e.g., Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491 n.3 and accompanying text, 492 nn.10-11 and accompanying text, 497-501 (2007).

⁴³ *Gonzales Transcript*, *supra* note 39, at 19, 41, 76-77, 80, 130-31.

⁴⁴ *Id.* at 83, 137-38.

administration's statutory disclosure obligations only if they either justify invoking a statutory exemption from disclosure or if the administration unilaterally may adjust its disclosure obligations as it deems necessary. Considering that the administration references the need for secrecy about the program regularly and generally—apart from its statutory interpretation point,—and considering the administration's support for executive privilege, its references seem at least partly to reflect the view that it constitutionally may circumvent disclosure obligations as it deems necessary.

The administration's statutory interpretation argument is weak. As noted above, the statutory provision on which the administration relies is the provision that the DNI must, in carrying out his or her informing duties, "show 'due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.'"⁴⁵ It is not clear, however, that this provision encompasses the power to limit notice to the Gang of Eight. The statute explicitly raises only the possibility of limiting *covert action* notice to the Gang of Eight,⁴⁶ and this option is carefully constrained by requirements of eventual written notice to the intelligence committees and an explanation for the delay.⁴⁷

Even if the provision encompasses the power to limit notice to the Gang of Eight, the administration cannot seriously contend it is applicable here. With respect to the "sources and methods" exception, I have noted elsewhere that "the only source or method arguably protected by non-disclosure to Congress is the 'method' of operating a program in contravention of [FISA]. Such an exception would not only swallow the rule, it would make an utter mockery of it."⁴⁸ A similar point can be made regarding the "exceptionally sensitive matters" exception. To this day, the administration has offered no explanation of the purported dangers of revealing the program's very existence beyond the vague assertion that, while terrorists surely already know that the United States can survey their conversations, knowing about the program would remind them of this fact⁴⁹ and might lead them to infer that surveillance is broader than they had assumed.⁵⁰ The weakness of the administration's rationale for secrecy substantially undermines its concerns about public revelations. And certainly, such weakness deeply undermines the administration's rationale for not disclosing information to the intelligence committees' memberships.⁵¹ More concretely, the

⁴⁵ See *id.* at 83, 136-38 (quoting 50 U.S.C. § 413a(a)).

⁴⁶ 50 U.S.C.S. § 413b(c)(2).

⁴⁷ *Id.* § 413b(c)(2), (3), (4).

⁴⁸ Kitrosser, *supra* note 3, at 1205 n.257.

⁴⁹ See *Gonzales Transcript*, *supra* note 39, at 107.

⁵⁰ *Id.*

⁵¹ The rationale is further undermined by the administration's willingness to disclose

rationale simply cannot justify invoking the statutory exception for “exceptionally sensitive matters” unless the exception were to overtake the rule.

As noted above, the administration also quotes the CRS to the effect that “the leaders of the intelligence committees ‘over time have accepted the 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.’”⁵² However, CRS only raises this point as an argument that the executive branch might make,⁵³ and its only support for the statement is a complaint made by then House Democratic Leader Nancy Pelosi to this effect.⁵⁴ This hardly establishes widespread congressional acceptance of the practice.⁵⁵ Furthermore, even if such practice is widely accepted, such acceptance by itself does not amend a statutory requirement. Additionally, the CRS Report does not indicate the circumstances under which this practice occurs. If this practice occurs with the case-by-case knowledge and agreement of the full intelligence committee memberships, then arguably it is consistent with the statutory requirements. If, on the other hand, the Gang of Eight and the administration alone have knowledge of these limited disclosures then such disclosures would fly in the face of the statutory requirements unless they meet one of the narrow statutory exceptions.

Given the weakness of its statutory arguments, the administration’s defense of its disclosures rises or falls on whether it constitutionally may circumvent statutory disclosure requirements in the name of national security. The argument for such executive branch discretion is addressed substantively in Part II. For now, it suffices to note that the argument and its refutation are fundamental to any reform of the inter-branch disclosure system. If the argument is widely accepted then it is only to be expected that administration withholding of information from Congress, and the acquiescence of congresspersons in constraints on their receiving information, will be commonplace. Indeed, belief in the argument or its political resonance seems implicit in the administration’s defense of its limited disclosures and in the Gang of

information to the committees upon being pressured politically—particularly on the eve of such politically charged events as Michael Hayden’s confirmation hearings to lead the CIA—after the initial press revelations had occurred. See, e.g., Sheryl Gay Stolberg, *Senators Left Out of Loop Make Their Pique Known*, N.Y. TIMES, May 19, 2006, at A20; DENIS McDONOUGH ET AL., CTR. FOR AM. PROGRESS, NO MERE OVERSIGHT: CONGRESSIONAL OVERSIGHT OF INTELLIGENCE IS BROKEN 22-23 (June 2006) [hereinafter CAP REPORT].

⁵² *Gonzales Transcript*, *supra* note 38, at 138.

⁵³ CUMMING, *supra* note 41, at 10.

⁵⁴ *Id.*

⁵⁵ The Center for American Progress concludes, in fact, that there is no well-established practice of bypassing the full Intelligence Committees in favor of the Gang of Eight. CAP REPORT, *supra* note 51, at 20.

Eight's acquiescence—however Gang of Eight members might lament that acquiescence⁵⁶—in the same.

2. Constraints on Information Recipients

Another point of contention is whether the administration's disclosures to the Gang of Eight were meaningful. The administration argues that the disclosures constituted a genuine check on its conduct.⁵⁷ The administration and its supporters say that informed congresspersons could have publicized the information or informed others in Congress had they been genuinely concerned.⁵⁸ White House counsel Dan Bartlett said that those briefed would have been "screaming from the mountaintops" had they thought that illegal activity was occurring.⁵⁹ And Senator Grassley argued at a Judiciary Committee hearing that briefed congresspersons who were genuinely concerned about the program "were . . . not doing their job of congressional oversight as they should have, informing the other Members of Congress that there is really something wrong that the President is doing here."⁶⁰ Attorney General Gonzales made a similar point at the same hearing, saying that "we are letting Members of Congress off the hook easily by saying that if they get briefed into a secret program and they believe it is against the law, that they can't do anything about it."⁶¹

Critics charge, however, that the briefings were meaningless due to the scant nature of the information conveyed and the conditions imposed on those briefed. Gang of Eight member Senator Rockefeller said, for example, that the information provided to the Gang of Eight "hardly amounted to briefings, particularly in contrast to details that Bush and top aides have publicly released in claiming its success at thwarting terrorist attacks."⁶² Furthermore, some briefed lawmakers expressed concern to the administration after their briefings and their

⁵⁶ See, e.g., Pelosi, *supra* note 3; Eric Lichtblau & David E. Sanger, *Administration Cites War Vote in Spying Case*, N.Y. TIMES, Dec. 20, 2005, at A1.

⁵⁷ See, e.g., *Gonzales Transcript*, *supra* note 39, at 27, 50, 57-58, 83-84; Suzanne E. Spaulding, *Power Play: Did Bush Roll Past the Legal Stop Signs?*, WASH. POST, Dec. 25, 2005, at B1; Dan Eggen & Walter Pincus, *Varied Rationales Muddle Issue of NSA Eavesdropping*, WASH. POST, Jan. 27, 2006, at A5. Indeed, the administration often notes simply that it disclosed the program "to Congress," without citing the very limited pool of congresspersons informed. *Id.*

⁵⁸ See, e.g., *Gonzales Transcript*, *supra* note 39, at 30, 116-17; Eggen & Pincus, *supra* note 57.

⁵⁹ Eggen & Pincus, *supra* note 57.

⁶⁰ *Gonzales Transcript*, *supra* note 39, at 30.

⁶¹ *Id.* at 116-17.

⁶² Spencer S. Hsu & Walter Pincus, *Goss Says Leaks Have Hurt CIA's Work, Urges Probe. NSA Eavesdropping Defended at Briefing*, WASH. POST, Feb. 3, 2006, at A3.

concerns apparently went unaddressed.⁶³ Most importantly, critics point out that Gang of Eight members were told that they could reveal none of the shared information as a condition of the briefing.⁶⁴ Lawmakers thus were not allowed to consult staff members for assistance in understanding the information or to conduct further research. Nor were they allowed to pass the information on to other congresspersons or the public.⁶⁵

One former congressional staff member says that such problems are typical of Gang of Eight briefings. The staffer writes:

As a former legal counsel for both Republican and Democratic leaders of the House and Senate intelligence committees, I'm well aware of the limitations of these "gang of eight" sessions. They are provided only to the leadership of the House and Senate and of the intelligence committees, with no staff present. The eight are prohibited from saying anything about the briefing to anyone, including other intelligence panel members. The leaders for whom I worked never discussed the content of these briefings with me.

It is virtually impossible for individual members of Congress, particularly members of the minority party, to take any effective action if they have concerns about what they have heard in one of these briefings. It is not realistic to expect them, working alone, to sort through complex legal issues, conduct the kind of factual investigation required for true oversight and develop an appropriate legislative response.⁶⁶

C. *Post-Revelation Hearings and Their Relationship to Information Funneling*

Congressional hearings held (and decisions not to hold others) since the program was publicly revealed also reflect information funneling issues. When a national security program is the topic of a congressional hearing, questions inevitably arise as to what should be revealed in a public hearing, what should be revealed in a closed (non-public) hearing and what should not be revealed at all. Such questions have been manifest since the program's public revelation in the following contexts: (1) challenges by the administration and by some in

⁶³ Dan Eggen, *Limiting NSA Spying is Inconsistent with Rationale, Critics Say*, WASH. POST, Feb. 8, 2006, at A5; Lichtblau & Sanger, *supra* note 56; David E. Sanger, *In Address, Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005, at A1.

⁶⁴ See, e.g., Pelosi, *supra* note 3; Spaulding, *supra* note 57; Lichtblau & Sanger, *supra* note 56.

⁶⁵ See, e.g., Pelosi, *supra* note 3; Spaulding, *supra* note 57; Lichtblau & Sanger, *supra* note 56.

⁶⁶ Spaulding, *supra* note 57.

Congress to the propriety of holding public hearings on the basis that such hearings will inform “the enemy”;⁶⁷ (2) refusals by the administration to permit some officials to testify before Congress;⁶⁸ (3) refusals by officials to answer some questions in public hearings;⁶⁹ and (4) refusals by the administration to reveal some information to the full Congress or the full intelligence committees at all.⁷⁰ These issues embody the same questions embodied in the debate over pre-public-revelation disclosures. That is, they encompass questions as to whether Congress constitutionally can require the executive branch to disclose information and what such requirements, including information funneling components, should look like.

D. *Conclusion to Part I: Some Major Problems in the Current System*

The warrantless surveillance controversy thus reflects at least two sets of problems with the existing system of information sharing. First, administrations do not necessarily comply with statutory directives to share information, and individual congresspersons may acquiesce in, even facilitate, such non-compliance. These phenomena appear grounded in the view that the Constitution gives the President discretion not to comply or at least in the view that this constitutional interpretation is politically acceptable, even popular, and that challenging it poses political dangers. Even where Congress attempts to balance secrecy’s dangers and benefits through funneling requirements, then, such requirements are unlikely to be consistently effective. A strong defense of Congress’ constitutional prerogative to impose information disclosure requirements thus is in order. Second, while there seems to be broad agreement that information funneling of some kind is a desirable tool, there has been relatively little care paid to the details of such funneling and to the principles that should underscore those details. This problem is manifest in disputes between the administration, which argues that its briefings to the Gang of Eight about the warrantless surveillance program were meaningful, and administration opponents who charge that such briefings were mere “check the box” exercises that offered no avenue for responsive congressional action. The problem similarly is manifest in disputes over the sufficiency of disclosures by the administration after the

⁶⁷ See, e.g., *Gonzales Transcript*, *supra* note 39, at 15; Eric Lichtblau & Sheryl Gay Stolberg, *Accord in House to Hold Inquiry on Surveillance*, N.Y. TIMES, Feb. 17, 2006, at A1.

⁶⁸ See, e.g., Lichtblau & Stolberg, *supra* note 67.

⁶⁹ See, e.g., *Gonzales Transcript*, *supra* note 39, at 17, 78, 84, 93, 95-96, 102-03, 120-21, 151-52, 160-61.

⁷⁰ See, e.g., *id.* at 149-50, 152-53, 158-59, 198; Shane & Lichtblau, *supra* note 3.

program came to the public's attention.

II. THEORETICAL FOUNDATIONS FOR AN IMPROVED APPROACH

Part II builds theoretical foundations to address the problems about information-funneling that the warrantless surveillance controversy reflects. Part II(A) makes the case for Congress' constitutional authority to impose information-sharing requirements on the executive branch. Part II(B) provides theoretical tools to consider what types of funneling requirements Congress, given its constitutional authority to impose them, should create.

A. *Congress' Constitutional Power to Impose Disclosure Requirements on the Executive Branch*

The White House has frequently voiced support for a constitutional "executive privilege" whereby the President has a constitutional prerogative to refuse to disclose information to Congress.⁷¹ The current administration, while perhaps unusually wedded to secrecy,⁷² is far from alone in its interpretation of a constitutional executive privilege. Similar interpretations have been embraced by previous administrations, some courts and some academics.⁷³

The argument for a constitutional executive privilege consists of two main points. First, although "executive privilege" or equivalent terms appear nowhere in the constitutional text, the privilege's supporters argue that it is implicit in the President's Article II duties.⁷⁴ Specifically, supporters argue that the President cannot faithfully fulfill his duties to execute the law and to serve as Commander-in-Chief unless he can control dissemination of his office's information to ensure candid discussions with his advisors and to protect national security.⁷⁵ Second, supporters argue that history demonstrates that those who framed and ratified the Constitution expected the President to have the prerogative to keep secrets from Congress. Supporters argue, first, that this is demonstrated by a series of post-ratification incidents in which Presidents refused to disclose requested information.⁷⁶ They also rely

⁷¹ See, e.g., Kitrosser, *supra* note 42, at 497-501.

⁷² See, e.g., *id.* at 491 n.3 and accompanying text.

⁷³ See, e.g., *id.* at 496-97, 500-06, 506 n.79; MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 19-71 (2002).

⁷⁴ See, e.g., Kitrosser, *supra* note 42, at 492.

⁷⁵ *Id.* at 492, 501-03, 505-06.

⁷⁶ See *id.* at 506, 511 n.105; ROZELL, *supra* note 73, at 28-37.

heavily on two Federalist Papers, one by Alexander Hamilton and one by John Jay. Each paper touts as a major advantage of the American presidency its relative capacity for secrecy as opposed to the diminished secret-keeping capacity of a multi-member body.⁷⁷

Elsewhere, I have explained in some detail why I believe that these arguments are incorrect and why statutorily based information requests cannot constitutionally be refused by the executive branch.⁷⁸ The following passage summarizes major aspects of the argument against a constitutional executive privilege and in favor of a congressional prerogative to demand information from the executive branch.⁷⁹

[I]t simply does not follow from the executive branch's institutional skill at secret-keeping that it has a legal prerogative to keep secrets in the face of checking mechanisms, including congressional requests. Saikrishna Prakash makes this point in his analysis of executive privilege doctrine. Prakash points out that historical references to Presidential secrecy "hardly demonstrate that the proposed executive would enjoy a constitutional right to an executive privilege.' The references instead serve only to describe 'one of the common attributes of a single executive In the ordinary course, the President would be able to keep some matters secret.' Whether the President has a constitutional right to keep secrets in the face of Congressional requests is another matter."⁸⁰

Constitutional structure, text and history not only fail to equate Presidential secret-keeping capacity with a secret-keeping right, they indicate that Presidential capacity necessitates robust structural checking. As I have explained elsewhere, the Constitution designs a system that seems to leave room only for political branch secrecy that itself can be checked through the political process.⁸¹ Thus, while the President has much capacity to engage in secret activities, secrecy's dangers are mitigated because Congress may pass legislation limiting such activities or permitting itself or others to obtain information under certain conditions.⁸² This constitutional design is evidenced by a number of factors. First, there is a negative correlation between the relative openness of each political branch and the relative control that each branch has over the other. Congress is a relatively transparent and dialogue-driven branch, and its core tasks are to pass laws that the executive branch executes and

⁷⁷ Kitrosser, *supra* note 42, at 506.

⁷⁸ See generally *id.* Cf. Kitrosser, *supra* note 3, at 1173-81.

⁷⁹ The long quotation that follows is from Heidi Kitrosser, *Classified Information Leaks and Free Speech*, ILLINOIS L. REV. (forthcoming 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958099. The internal citations are included but modified slightly for consistency.

⁸⁰ Kitrosser, *supra* note 42, at 508 (quoting Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1176 (1999)).

⁸¹ See Kitrosser, *supra* note 42, at 493-96; Kitrosser, *supra* note 3, at 1173-81.

⁸² See Kitrosser, *supra* note 42, at 493-96; Kitrosser, *supra* note 3, at 1173-81.

to oversee such execution. The executive branch, in contrast, is capable of much secrecy, but also is largely beholden to legislative directives in order to act. This creates a rather brilliant structure in which the executive branch can be given vast leeway to operate in secret, but remains subject to being overseen or otherwise restrained in its secrecy by the legislature.⁸³ Second, historical references to secrecy as an advantage of the unitary President—particularly two widely cited Federalist papers—also cite accountability and the ability of other branches and the people to uncover wrongdoing as a major advantage of the unitary President. This indicates, again, a balanced constitutional design whereby Presidential secrecy is expected but remains on a leash of political accountability.⁸⁴ Third, the only explicit textual reference to secrecy occurs in Article I, § 5, of the Constitution, which requires Congress to keep journals of its proceedings, but allows each chamber to exempt “such Parts as may in their Judgment require Secrecy.”⁸⁵ That fact by itself does not tell us very much, as one could argue that a secret-keeping prerogative is intrinsic in the President’s executive and commander-in-chief duties. What it does reflect, however, is a constitutional structure that permits secrecy only under conditions that will ensure some political awareness of and ability to check such secrecy. “The very framing of the congressional secrecy provision as an exception to an openness mandate, combined with [a logical and historical] expectation that a large and deliberative legislative body generally will operate in sunlight . . . suggest a framework wherein final decisions as to political secrecy are trusted only to bodies likely to face internal and external pressures against such secrecy.”⁸⁶ Finally, an executive branch that can keep secrets but that can be reigned in by Congress reflects the most logical reconciliation of competing constitutional values. On the one hand, the Constitution clearly values transparency as an operative norm. This is evidenced by myriad factors, including the necessities of self-government, the First Amendment, and Article I’s detailed requirements for a relatively open and dialogic legislative process.⁸⁷ On the other hand, the Constitution reflects an understanding that secrecy sometimes is a necessary evil, evidenced both by the congressional secrecy allowance and by the President’s structural secrecy capabilities.⁸⁸ Permitting executive branch secrecy, but requiring it to operate within legislative parameters themselves open and subject to revision, largely reconcile these two values.⁸⁹

⁸³ See Kitrosser, *supra* note 3, at 1167-81.

⁸⁴ See Kitrosser, *supra* note 42, at 511 n.105, 524-26.

⁸⁵ U.S. CONST. art. I, § 5, cl. 3.

⁸⁶ Kitrosser, *supra* note 42, at 523.

⁸⁷ *Id.* at 515-20.

⁸⁸ *Id.* at 520-22.

⁸⁹ *Id.* at 522.

B. *Theoretical Tools to Guide the Crafting of Information Funneling Rules*

That Congress constitutionally may impose disclosure requirements does not tell us what the requirements should look like. This subpart identifies major factors that should guide the crafting or review of such requirements. Specifically, this subpart assesses the respective costs and benefits offered by openness and secrecy in the realm of national security oversight. It also suggests some guidelines to maximize these benefits and minimize these costs in shaping information funneling rules.

1. *Secrecy's Costs and Benefits in the Context of Congressional Oversight of National Security Activities*

It is hardly news that secrecy has costs and benefits.⁹⁰ What is striking about these costs and benefits is that they often consist not only of competing values (e.g., democratic openness versus national security) but also of competing means of achieving the same value (e.g., national security through openness versus national security through secrecy).⁹¹ Additionally, inter-value and intra-value competition can exist and impact one another simultaneously. For example, openness paradoxically can be furthered by secrecy to the extent that candor may more likely emerge in a closed, confidential conversation than in a public one. At the same time, the degree to which confidentiality furthers candor may fluctuate with the extent to which those disclosing information believe (or credibly can argue) that wider disclosures would harm national security. This example also raises the question of whether the openness fostered by confidentiality serves related ends such as accountability or security, or whether the secretive nature of the disclosures stymies their ability to further ends beyond themselves.

The various values at stake—whether competing against one another or generating competition over the best means to achieve the same value—can be grouped into two rough categories. As indicated

⁹⁰ For discussion of secrecy's costs and benefits, see, e.g., SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 18-26, 102-115, 171-209, 249-64 (1982); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 *UCLA L. REV.* 909, 917-18, 922-23 (2006); Mark Fenster, *The Opacity of Transparency*, 91 *IOWA L. REV.* 885, 895-910 (2006); Seth Kreimer, *Sunlight, Secrets and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 *U. PA. L. REV.* 1, 6-12 (1991).

⁹¹ See, e.g., DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 7-40 (1998); BOK, *supra* note 90, at 194-96; Kitrosser, *supra* note 42, at 537-41.

by the immediately preceding examples, those categories are national security and democratic deliberation. Subsections (a) and (b) elaborate on the contents of each category and major arguments regarding how secrecy advances and inhibits each one.

a. National Security and Related Values

The protection of national security is a key value invoked in debates over the advisability of sharing information with Congress.⁹² The value encompasses the protection of national security and means toward that end. Such means might include, for example, ensuring efficiency and sound judgment in national security operations, facilitating the cooperation of allied nations and the support of the American people, and preventing enemies of the nation from learning information that could help them in their anti-U.S. operations.

i. Arguments against Disclosure

Throughout history, members of the executive branch have argued that national security would be harmed by their acquiescing to congressional requests for information.⁹³ The potential reach of such arguments is exemplified by claims that publicly debating wartime strategy with Congress threatens national security by undermining troop morale and popular support.⁹⁴

Another argument made against information disclosures is that disclosures hinder the efficacy of internal executive branch operations and deliberations and thus ultimately hurt national security.⁹⁵ This is a subset of more general executive branch concerns to the effect that candor and efficacy in intra-executive branch deliberations are impacted negatively by participants' awareness that they might be disclosed.⁹⁶

Of course, the most intuitive and ubiquitous argument for withholding information is that the information could help enemy nations, persons or organizations. It follows that the information must remain a closely guarded secret to prevent it from falling into enemies' hands. This argument pervades political discourse over the recent NSA surveillance controversies. As noted earlier, for example, the Bush

⁹² See, e.g., *supra* notes 67-70.

⁹³ See, e.g., ROZELL, *supra* note 73, at 43-46, 60, 68-69, 112-13.

⁹⁴ See, e.g., Michael Abramowitz, *War's Critics Abetting Terrorists, Cheney Says*, WASH. POST, Sept. 11, 2006, at A12; Liza Porteus, *Bush Fires Back Against Iraq War Critics*, FOX NEWS, Nov. 13, 2005, <http://www.foxnews.com/story/0,2933,175296,00.html>.

⁹⁵ See, e.g., *Gonzales Transcript*, *supra* note 39, at 149-50, 152-53, 158-59, 198.

⁹⁶ See ROZELL, *supra* note 73, at 46-48.

Administration argues that it could not have sought specific legislation to authorize the warrantless surveillance program without “inform[ing] our enemies about what we are doing and how we are doing it.”⁹⁷ And they claim that national security has been damaged by press reports on the program, as such reports “remind” the enemy that “we are involved in some kind of surveillance.”⁹⁸

ii. Arguments Favoring Disclosure

Arguments also can be advanced to the effect that secrecy often is at best unnecessary and at worst deeply harmful to national security. To begin with, there is good reason to question the conventional assumption that there are volumes of information of which it would be dangerous for enemies to learn. Players from across the political spectrum long have suggested that much of the information classified in the United States should not be classified.⁹⁹ In one striking example, Erwin N. Griswold, the former solicitor general of the United States who fought on behalf of the Nixon administration to restrain publication of the classified Pentagon Papers, acknowledged years after the litigation: “I have never seen any trace of a threat to the national security from the [Papers’] publication. Indeed, I have never seen it even suggested that there was such an actual threat.”¹⁰⁰ In the same discussion, Griswold deemed it “apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but rather with governmental embarrassment of one sort or another.”¹⁰¹

There are persuasive arguments not only that national security based secrecy needs are dramatically overstated, but that excessive secrecy hurts national security by encouraging poorly informed and under-vetted decision-making and diminishing the United States’ domestic and international credibility. As I have noted elsewhere:

[C]ountless scholars, journalists, legislators and executive branch officials have noted secrecy’s judgment-clouding and security-hindering effects in relation to historic and current events. For examples of such criticism, one needs to look no further than commentary on the 2003 invasion of Iraq. It has been argued repeatedly that the reticence of the press and of Congress to ask

⁹⁷ *Gonzales Transcript*, *supra* note 39, at 41.

⁹⁸ *Id.* at 107.

⁹⁹ See Kitrosser, *supra* note 79.

¹⁰⁰ Erwin N. Griswold, *Secrets Not Worth Keeping: The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

¹⁰¹ *Id.*

difficult questions prior to the invasion of Iraq combined with the Bush administration's penchant for secrecy created an insular White House environment in which debate was stifled, "groupthink" flourished, and questionable data on weapons of mass destruction were embraced while predictions of a peaceful, post-invasion Iraq similarly went unquestioned.

....

Similar concerns have been raised about the negative impact of secrecy on homeland security, both prior to, and in the wake of, 9-11.

....

Similar analyses about more distant historical events [including the Vietnam War and the Cold War] abound.

....

[There also is a risk] that secrecy not only will be misused by well-meaning yet overzealous officials, but that it will intentionally be misused by those set on manipulating public debate toward their own ends. Indeed, McCarthy's exploitation of government secrecy calls to mind Vice President Cheney's recent attempts to perpetuate the theory of a link between Al Qaeda and Saddam Hussein through vague public allusions to evidence in the administration's possession of which others, including the 9-11 Commission, supposedly were not aware. Similarly, concerns long have been raised about executive branch "spinning of information" through selective declassification or leakage of otherwise classified information.¹⁰²

Such points are manifest in responses to the administration's arguments for keeping the NSA surveillance program largely secret. For one thing, critics charge that no convincing explanation has been offered as to why it would have endangered national security to reveal the program's bare existence to the public, let alone to the congressional intelligence committees.¹⁰³ And while public details of the program remain too scarce as of mid-2007 to evaluate its effectiveness, efficacy concerns intrinsically are raised by the insular nature of the decision-making process that generated the program.¹⁰⁴ These efficacy concerns are exacerbated by post-revelation disclosures that raise questions about the program's reach, the adequacy of its oversight and mistakes that

¹⁰² Kitrosser, *supra* note 42, at 537-40 (internal citations omitted).

¹⁰³ See, e.g., Kitrosser, *supra* note 3, at 1200-02; George F. Will, *No Checks, Many Imbalances*, WASH. POST, Feb. 16, 2006, at A27; *Gonzales Transcript*, *supra* note 39, at 107.

¹⁰⁴ For example, Attorney General Gonzales, at various points in testimony before the Senate Judiciary Committee, made vague references to solely intra-executive branch checks on the program and also cited his own lack of knowledge or analysis on aspects of the program's make-up or legality. See, e.g., *Gonzales Transcript*, *supra* note 39, at 12, 33-36, 61, 94-95, 100-01, 109-10, 114-16. See also, e.g., RISEN, *supra* note 1, at 46 (discussing very insular, secretive nature of decision-making processes about the program).

might have occurred in administering it.¹⁰⁵

b. Democratic Deliberation and Related Values

The other major value invoked in debates about national security disclosures can be called democratic deliberation. This value encompasses at least three different types of deliberations: intra-executive branch deliberations, deliberations between Congress and the executive branch, and deliberations that include the public. Unlike national security, democratic deliberation is not necessarily an end in itself. On the one hand, one can draw upon political and constitutional theory for the view that public knowledge, dialogic participation and input through voting has intrinsic value.¹⁰⁶ Similarly, inter-branch dialogue—and to a lesser extent intra-branch dialogue—can contribute to intrinsically valuable public knowledge and participation by generating and spreading information and dialogue that might make its way to the public. Furthermore, to the extent that ours is not a direct democracy but a system in which voters are represented by deliberating government branches, deliberations within and among these branches may have intrinsic value. On the other hand, democratic deliberation of all three kinds can be instrumental means of reaching other values, including national security, by increasing the intellectual input that goes into decision-making. Democratic deliberation also can contribute to the rule of law by spreading knowledge of illegalities that might then be challenged politically or in courts.

i. Arguments Against Disclosures

A common deliberation-based argument against disclosures is the candor argument discussed earlier.¹⁰⁷ That is, disclosures and related discussions are less likely to be candid, robust and productive when participants know that their statements may be shared with others. This

¹⁰⁵ See, e.g., *Ever-Expanding Secret*, N.Y. TIMES, May 12, 2006, at A32; *Privileged Conversations Not Excluded From Spying*, N.Y. TIMES, Mar. 25, 2006, at A10; Charles Babington & Dan Eggen, *Gonzales Seeks to Clarify Testimony on Spying*, WASH. POST, Mar. 1, 2006, at A8; Barton Gellman, Dafna Linzer & Carol D. Leonnig, *Surveillance Net Yields Few Suspects: NSA's Hunt for Terrorists Scrutinizes Thousands of Americans, but Most Are Later Cleared*, WASH. POST, Feb. 5, 2006, at A1.

¹⁰⁶ Cf. Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593-95 (1982) (making the closely related argument that free speech ultimately serves the end of individual self-realization, with each individual's use of free speech, whether for political or for other purposes, constituting a means toward self-realization (whether their own or their listeners')).

¹⁰⁷ See *supra* notes 95-96 and accompanying text.

argument can take both instrumental and intrinsic forms that parallel those made about democratic deliberation generally. Instrumentally, the argument is that decision-making quality will be compromised by stunted deliberations. This can negatively impact national security or other ends toward which the decision-making is directed. One also might find intrinsic value, in an indirect democracy, in robust, candid exchanges within government branches.

The intrinsic and instrumental forms of the candor argument can be applied to intra-branch and inter-branch discussions alike. The arguments as applied to intra-executive branch discussions essentially mirror those made in the previous paragraph. As applied to discussions with Congress, the arguments are more complex. An absolute anti-disclosure stance toward Congress, of course, would make deliberations between the executive branch and Congress about non-public information impossible. On the other hand, more moderate disclosure limitations—for example, notifying only a small number of congresspersons and subjecting them to gag orders—might facilitate candid and robust deliberation between branches. The intrinsic and instrumental values of robust inter-branch deliberation might then be realized.

Anti-disclosure arguments are yet more complicated with respect to democratic deliberations that involve the public. Anti-disclosure measures, of course, shield much information from the public. Yet here, too, less than absolute disclosure limitations could be linked to enhanced democratic deliberation. One might argue that it sometimes may be appropriate for once non-public information to be made public, but that such disclosures must first be carefully considered by the executive branch or through a very contained inter-branch process. Information disclosed through such processes may reflect more candid and robust deliberations than those which would have followed from more immediate public access.

ii. Arguments Favoring Disclosures

Broad disclosure rules arguably advance the intrinsic and instrumental benefits of deliberation within the executive branch and between the executive and legislative branches. Instrumentally, such rules may foster more substantive, productive and forthright executive branch deliberations because executive branch actors know that they may be held accountable for their roles in the same. Similarly, disclosures can improve inter-branch deliberations by providing Congress with information to facilitate meaningful oversight of the executive branch. The enhancement of intra-branch and inter-branch

deliberations has intrinsic value as well, given the constitutional significance of these deliberations in our indirect democracy.

Deliberations involving the public also are advanced by broad disclosure requirements. First, to the extent that information is disclosed publicly, public information flow is directly enhanced, which in turn elevates the likelihood of informed public discourse. Second, to the extent that information initially is disclosed non-publicly (say, to members of Congress) under liberal disclosure rules that make eventual public disclosure likely, informed public deliberations again are enhanced. Increased public deliberation of course is associated with the intrinsic and instrumental benefits of the same.

2. Initial Reflections on Maximizing the Benefits and Minimizing the Costs of Secrecy and Openness Through Information Funneling Rules

Information funneling rules offer the possibility of compromise between secrecy's costs and benefits. The implicit goal of such compromise is meaningful oversight that serves democratic and pragmatic ends while avoiding the costs to those ends of excessive transparency. The theoretical connection between information funneling and this goal is evident. Yet problems and uncertainties about funneling remain, as the NSA surveillance controversy exemplifies. While fool-proof rules surely are unattainable, improvements may be achieved through better attention to the theoretical concerns and goals underlying funneling and the connection between those factors and funneling rules' details. This section suggests several considerations that ought generally to inform the creation and application of funneling rules.

a. Determining Who Should Receive Funneled Information

Directives regarding to whom information is funneled should be reassessed to determine whether they match funneling's underlying purposes. The need for such reassessment is illustrated by the NSA surveillance controversy. It is reflected in the conflict over the adequacy of notifying only the Gang of Eight, rather than the full intelligence committees, of the program.¹⁰⁸ It also is reflected indirectly in post-revelation conflicts over whether the Senate Intelligence Committee should, like the Senate Judiciary Committee, hold hearings

¹⁰⁸ See *supra* Part I.B.1.

on the program.¹⁰⁹ The latter suggests a related question over how to determine which committees should receive ongoing notice of intelligence activities.

Two sets of concerns must be balanced to answer these questions. On the one hand, restrictions on who receives notice must not substantially undermine the very purpose of oversight. One complaint about Gang of Eight notifications, for example, is that the Gang of Eight as a group lacks the power to take recourse in response to what they've been told.¹¹⁰ A closely related complaint is that the group's small size, combined with the absence of staffers in most briefings, makes meaningful deliberation and even adequate grasp of the issues unlikely.¹¹¹ On the other hand, requiring disclosure to broader groups could cause one of at least three negative impacts on oversight goals. First, it could cause leaking and thus endanger national security or discourage executive branch candor in the instant or future briefings. Second, it could enhance executive branch perceptions of the likelihood of leaks. Those perceptions, even if incorrect, might lead to a lack of executive branch candor or intransigence in providing witnesses or requested documents. Third, and most cynically, it could provide the executive branch with *ex ante* or *ex post* excuses for avoiding disclosures. In short, broader disclosure requirements might enable the administration more credibly to claim that it will not or did not share information with Congress in order to protect the American people.

This analysis suggests two basic guidelines to follow in determining to whom information should be funneled. First, the notified group should be sufficient numerically and in terms of their capacities and powers to have a real chance to influence the programs of which they are informed. Similarly, the group should be sufficient in size and capacity to understand the information conveyed and to meaningfully deliberate about the same. Among other things, these points suggest that the practice of excluding congressional staff members from many intelligence briefings should be reconsidered. Second, the group must be restricted sufficiently to minimize both the actual and perceived chances of leaks. Means toward this goal might include some reassessment of security clearance requirements. Such means might also include better publicizing of any clearance or related measures to enhance the political viability of congressional information requests and the political costs of defying the same.

¹⁰⁹ See, e.g., *The Death of the Intelligence Panel*, N.Y. TIMES, Mar. 9, 2006, at A22; Greg Miller & Maura Reynolds, *Spying Inquiry Blocked by GOP*, L.A. TIMES, Feb. 17, 2006, at A1 (main section).

¹¹⁰ See *supra* note 66 and accompanying text.

¹¹¹ *Id.*

b. Determining What Conditions to Impose on Those to Whom Information Is Funneled

As important as determining who to inform is deciding what restrictions should be imposed on information recipients. The same basic considerations apply in making this determination as in deciding who should receive information in the first place. That is, restrictions must not significantly undermine the capacity of the informed to assess and respond to the funneled information. At the same time, restrictions must sufficiently protect against national security risks, the perception of such risks and the overall likelihood of executive branch defiance. One method that can help to strike this balance is the use of successive information funnels. In other words, information might first be funneled to a small group that is not permitted indiscriminately to disclose information. That small group may, however, have the power through majority vote or some other constraining mechanism to determine that the information or parts thereof should be funneled on to a different group. Successive funneling is considered further in Part III.

c. Enhancing Public Accountability Regarding Information Disclosures

One problem reflected throughout this discussion is the near absence of public accountability for behavior in the information funneling process. This is an intrinsic difficulty with information funneling.¹¹² Non-public information sharing is, after all, non-public. While funneling serves valuable purposes, its non-public nature can cloak administration intransigence and a lack of engagement by information recipients. This is reflected in the discourse about the adequacy of administration disclosures to the Gang of Eight regarding the NSA surveillance program and of member responses to those disclosures.

Means to enhance public accountability in the information funneling process while preserving the benefits of the process' non-public nature should be considered. Successive information funneling is one method toward this end. Where groups to whom information is funneled have the capacity to vote on whether to release information further, some incentive exists for administration cooperation to avoid broader disclosure or to save face should such disclosure occur. Similarly, some incentive exists for congresspersons to engage actively

¹¹² See discussion and sources cited *infra* Part III.C.1.

with disclosed information, both because broader disclosures eventually could occur and because the very fact of funneling—if not the secret information funneled—might be discussed publicly.

Delayed public disclosure rules also are worth considering. For example, there might be a general rule making funneled disclosures and the discussion surrounding them fully or partly public after some number of years, with the disclosure time subject to case-by-case variations. Similarly, it is worth considering whether the benefits of limited record-keeping requirements in the funneling process—subject also to delayed disclosure rules—might outweigh the costs of the same.

III. APPLYING THEORY TO PRACTICE: IMPROVING INFORMATION FUNNELS

A. *To Whom Should National Security Information Be Funneled and under What, If Any, Clearance Requirements?*

1. Review of and Elaboration on Existing Requirements

The President and the intelligence agencies are statutorily required to keep the “congressional intelligence committees . . . fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity.”¹¹³ This is to be done with “due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.”¹¹⁴ There are separate and somewhat less stringent reporting requirements for covert actions.¹¹⁵ Covert actions are defined narrowly and do not include intelligence acquisition.¹¹⁶ Initial notice of covert actions may be limited to the “Gang of Eight” when the President deems it “essential to limit access to [his report] to meet extraordinary circumstances affecting vital interests of the United States.”¹¹⁷ Such reports must, however, be given to the “intelligence committees in a timely fashion” along with a “statement of the reasons for not giving prior notice.”¹¹⁸

The House and the Senate each are required to “establish, by rule or resolution . . . procedures to protect from unauthorized disclosure all classified information, and all information relating to intelligence

¹¹³ 50 U.S.C.S. § 413(a)(1) (2007); *see also id.* § 413a(a)(1).

¹¹⁴ *Id.* § 413a(a)(1).

¹¹⁵ *Id.* § 413b.

¹¹⁶ *Id.* § 413b(e).

¹¹⁷ *Id.* § 413b(c)(2).

¹¹⁸ *Id.* § 413 b(c)(3).

sources and methods, that is furnished to the intelligence committees or to Members of Congress.”¹¹⁹ Members are not subject to security clearance requirements in either congressional chamber.¹²⁰ Congressional employees are, however, subject to clearance requirements to access classified information.¹²¹ “The Senate Office of Security mandates such requirements for all Senate employees needing access to classified information.”¹²² No one without the “appropriate security clearances” may be employed by the Senate Intelligence Committee.¹²³ House employees receiving classified information are subject to office-specific clearance requirements.¹²⁴ House Intelligence Committee Rules specify that “[C]ommittee Staff must have the appropriate clearances prior to any access to compartmented information.”¹²⁵

Each chamber also subjects members and employees accessing classified information to non-disclosure requirements. The Senate Intelligence Committee Rules forbid Committee members and employees from disclosing non-public information except in accordance with Committee or Senate disclosure rules.¹²⁶ Breach of this prohibition is “grounds for referral to the Select Committee on Ethics.”¹²⁷ Committee employees must sign an agreement to this effect.¹²⁸ The House requires all Members, officers and employees of the chamber who access classified information to take a non-disclosure oath.¹²⁹ A committee-specific non-disclosure oath also is required of all Intelligence Committee members and staff to access classified information.¹³⁰ The House Intelligence Committee’s Rules also forbid the disclosure of classified information except pursuant to Committee or House procedures.¹³¹ Committee staff members must sign agreements

¹¹⁹ *Id.* § 413(d).

¹²⁰ FREDERICK M. KAISER, CONG. RESEARCH SERV., PROTECTION OF CLASSIFIED INFORMATION BY CONGRESS: PRACTICES AND PROPOSALS 5 (2006). Such requirements could raise difficult questions regarding separation of powers should the clearance be done by the executive branch. *Id.* Questions of political bias might arise if clearance were handled by a congressional office or committee. *Id.*

¹²¹ *Id.* at 3.

¹²² *Id.*

¹²³ 149 CONG. REC. S2689, S2690 (Rule 10.1) (2003). *See also id.* at S2690 (Rule 9.5, limiting classified information access to “staff members with appropriate security clearance and a need-to-know, as determined by the Committee, and, under the Committee’s direction, the Staff Director and Minority Staff Director”).

¹²⁴ Kaiser, *supra* note 120, at 3.

¹²⁵ 149 CONG. REC. H5350, H5352 (Rule 14(c)).

¹²⁶ 149 CONG. REC. S2689, S2690 (Rule 9.6).

¹²⁷ *Id.* (Rule 9.7.) *See also* S. Res. 400, 94th Cong., 2d Sess. 8(d)-(e).

¹²⁸ 149 CONG. REC. S2689, S2690 (Rule 10.6-10.8).

¹²⁹ Kaiser, *supra* note 120, at 3.

¹³⁰ 149 CONG. REC. H5350, H5352 (Rule 14(d)).

¹³¹ *Id.* (Rules 12-13).

indicating that they will comply with these terms.¹³²

Each Chamber also takes measures to secure classified information on its premises. The Senate centralizes such measures through its Office of Senate Security whereas House measures are largely committee and office generated.¹³³ In addition to any centralized Senate measures, the Senate Intelligence Committee Rules require that staff offices be secured with at least one security guard at all times¹³⁴ and that sensitive or classified documents be segregated in a secure storage area.¹³⁵ House Intelligence Committee Rules impose similar requirements. Committee offices are secured and must be patrolled by at least one U.S. Capitol Police officer at all times.¹³⁶ Classified documents must be segregated in secure locations.¹³⁷

2. Rethinking the Circumstances in Which the Gang of Eight Provisions Can Be Used

It is hard to justify limiting notice of intelligence activity to the Gang of Eight on the basis of reasonable fears of information leakage that could harm national security. Congress is considered to have a reliable track record for non-leakage¹³⁸ and it has a political incentive to avoid leaks in order to avoid blame by the executive branch for the same.¹³⁹ Furthermore, the intelligence committees have a variety of methods to protect classified information including staff clearance policies, non-disclosure policies for members and office security measures.¹⁴⁰ Executive branch claims of national security secrecy needs also must be taken with a grain of salt given historical indications that such claims are dramatically overused and that the executive branch itself routinely leaks classified information for political reasons.¹⁴¹

There may, however, be reasons related to democratic deliberation to permit Gang of Eight notice under very limited circumstances.

¹³² *Id.* (Rule 12(b)(1)).

¹³³ Kaiser, *supra* note 120, at 2.

¹³⁴ 149 CONG. REC. S2689, S2690 (Rule 9.1).

¹³⁵ *Id.* (Rule 9.2).

¹³⁶ 149 CONG. REC. H5350, H5352 (Rule 14(a)(1)-(3)).

¹³⁷ *Id.* (Rule 14(a)(4)-(7)).

¹³⁸ See, e.g., Frederick M. Kaiser, Cong. Research Serv. Congressional Oversight of Intelligence: Current Structure and Alternatives 13 (2007); L. BRITT SNIDER, SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE 5 (1997), available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/sharing-secrets-with-lawmakers-congress-as-a-user-of-intelligence/toc.htm>.

¹³⁹ See *infra* notes 201-203 and accompanying text.

¹⁴⁰ See *infra* Part III.A.1.

¹⁴¹ See *supra* notes 99-102 and accompanying text. See also, e.g., Note, *Keeping Secrets: Congress, the Courts and National Security Information*, 103 HARV. L. REV. 906, 910-14 (1990).

Whether reasonable or not, fears may arise that the more persons notified—even within the relatively secure realm of the intelligence committees—the greater the likelihood of leakage. More cynically, such fears may provide an easy and politically palatable excuse for avoiding—or later explaining the avoidance of—disclosures. If no alternative to full intelligence committee notice is provided, some disclosures thus may simply not be made at all.

There are at least two responses to this conundrum. The first is for Congress to eliminate the Gang of Eight exception to full committees notice and simultaneously to make public cases for Congress' constitutional prerogative to do so, for the relative safety of such a change from a national security perspective, and for the risks to democracy and national security of an under-informed Congress. Admittedly, the odds may be against many in Congress willingly and effectively spending political capital to argue these points, let alone to simultaneously amend the Gang of Eight provisions. But given the right political climate—which may exist now in light of the new Democratic majorities in Congress and increasing public criticisms of Bush Administration secrecy—and willing and able congresspersons and others in government, academia and elsewhere, this is not an inconceivable set of events.

Alternatively, a more moderate response might be offered. This response would retain a statutory option to notify the Gang of Eight but would resolve a statutory ambiguity to diminish the likelihood of that option's abuse. Presently, the statutory text leaves unclear whether the Gang of Eight option applies only to covert operations or to intelligence operations generally.¹⁴² The statute explicitly cites the option only with respect to covert operations.¹⁴³ The statute also refers to the executive branch's general responsibility to conduct its informing obligations with "due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters."¹⁴⁴ As the NSA surveillance controversy reflects, the latter provision—if interpreted to allow Gang of Eight notice in lieu of full committees notice—gives the executive branch substantially more leeway to justify limiting notice than does the covert operations exception. The impact of this heightened leeway is exacerbated by the fact that the due regard provision, which again makes no reference to the Gang of Eight, also makes no reference to an eventual requirement to notify the intelligence committee or to explain the reasons for initially notifying a smaller group.¹⁴⁵ Such requirements

¹⁴² See *supra* notes 45-47 and accompanying text.

¹⁴³ *Id.*

¹⁴⁴ 50 U.S.C.S § 413a(a) (2007).

¹⁴⁵ *Id.*

are outlined in the covert operations notice provisions.¹⁴⁶

One way to limit the Gang of Eight option would be to explicitly extend it to “due regard” situations, while also extending the accompanying requirements of eventual notice to the intelligence committees and explanation of the lesser initial notice. Another approach would be to clarify in the text that the “due regard” provision does not encompass the Gang of Eight option. Before making the latter change, though, consideration should be given to whether it would have the perverse effect of increasing the occasions on which the executive branch notifies no one at all. Such consideration should include assessing whether other measures—such as increased pressure by Congress to comply with notice requirements or the more formal accountability-enhancing measures raised below—might mitigate such effect.

3. When If Ever Should Staff Be Excluded?

Excluding staff from hearings seems no more reasonable from a security-based perspective than does excluding members. Staff employees work amidst the same physical security and under the same non-disclosure agreements as do members. Unlike members, they also are subject to pre-clearance requirements.¹⁴⁷

Furthermore, staff presence often is necessary to make information-sharing meaningful. Complex information about intelligence programs may be incomprehensible to members, or members may simply lack the time to sift through and make sense of the information, without staff assistance.¹⁴⁸

As with member access, however, insistence on staff inclusion poses the risk of heightened executive intransigence based on genuine or pre-textual concerns about security or intra-executive branch deliberative candor.¹⁴⁹ Means to balance this risk against the benefits of staff inclusion thus should be considered.

The balance might be struck through a statutory presumption in favor of staff access to statutorily required disclosures. The presumption may, however, be overcome by executive branch objection combined with a negotiated agreement as to terms between the executive and involved congresspersons. The objection and the terms of any negotiated agreement should be detailed in writing. As discussed

¹⁴⁶ *Id.* § 413b(c).

¹⁴⁷ *See supra* notes 121-137, 140-141 and accompanying text.

¹⁴⁸ *See supra* note 66 and accompanying text.

¹⁴⁹ *See supra* Part III.A.2.

below,¹⁵⁰ written documentation regarding disclosures can enhance political accountability in the realm of information funneling, particularly when the documentation is subject to the possibility of public disclosure at some future point.¹⁵¹ Thus, both the executive's reasons for excluding staff and congressional responses to executive objections might be documented, with such documentation subject to public disclosure after a specific term of years or otherwise.¹⁵² These conditions might deter the executive branch from frivolously objecting to staff inclusion and deter congresspersons from too readily acquiescing in frivolous objections. At the same time, these requirements would preserve the possibility of reasoned limitations on staff access.

4. Which Committees Should Have Access to Information?

The NSA surveillance controversy also exposed difficulties that arise when a committee with jurisdiction overlapping that of an intelligence committee wishes to hold hearings, but lacks background on or access to some of the complicated, classified matters involved. These difficulties arose, most notably, when the Senate Intelligence Committee declined to hold investigative hearings on the surveillance program,¹⁵³ while the Senate Judiciary Committee held several hearings to determine what had transpired and to consider responsive legislation.¹⁵⁴ The Senate Judiciary Committee does not receive statutorily required, ongoing notice as does (in theory) the Senate Intelligence Committee. Staff and member expertise and member clearance requirements also differ between the committees.¹⁵⁵

Detailed assessment of which committees, beyond the Intelligence Committees, should receive notice and on what basis they should receive it is beyond this Article's scope. It is, however, worth flagging the issue and suggesting two relevant factors that deserve consideration.

First, there is the question of whether any committees beyond the

¹⁵⁰ See *infra* Part III.C.2.a.

¹⁵¹ *Id.*

¹⁵² See *id.* for a more detailed discussion of the use of written documentation and possible public disclosures of the same.

¹⁵³ See Walter Pincus, *Senate Panel Blocks Eavesdropping Probe*, WASH. POST, Mar. 8, 2006, at A3.

¹⁵⁴ See, e.g., Hearing before the S. Judiciary Comm. on Wartime Executive Power and the National Security Agency's Surveillance Authority, 109th Cong.; Hearing before the S. Judiciary Comm. On Wartime Executive Power and the NSA's Surveillance Authority II, 109th Cong.; Hearing before the S. Judiciary Comm. on NSA III: Wartime Executive Powers and the FISA Court, 109th Cong, available at http://judiciary.senate.gov/schedule_all.cfm.

¹⁵⁵ See *supra* Part III.A.1; *infra* Part III.B.1 (citing rules specific to the intelligence committees).

intelligence committees should receive statutorily mandated, ongoing intelligence updates.¹⁵⁶ Broader regular disclosures are not novel. Between 1974 and 1981, the President was required by statute to notify “between six and eight congressional committees of covert intelligence actions.”¹⁵⁷ The statutory requirement was modified in 1981, “replacing the reporting requirement to as many as eight committees with a general requirement to keep the two intelligence committees fully and currently informed of intelligence activities.”¹⁵⁸ A potential cost of broader required disclosures is that the content and frequency of disclosures generally will become diluted. This might be caused by increased executive branch intransigence based on real or pre-textual concerns about national security or intra-executive branch deliberative candor. On the other hand, broader disclosures could spread information to more committees and enable these committees to better do their intelligence related work. Broader disclosures also might create healthy intra-chamber competition between committees, reducing the possibility of complacency or capture on the part of a single, information-monopolizing committee.¹⁵⁹

Second, apart from the question of ongoing disclosures, there is the question of what capacity committees other than the intelligence committees should have to request, demand and share classified information. Chambers-wide rules, combined with rules specific to each chambers’ intelligence agencies, offer a sound framework for handling, requesting and considering broader disclosures of classified information.¹⁶⁰ Some of these rules were elaborated on previously,¹⁶¹ and others are elaborated on below.¹⁶² There seems to be no good reason not to apply similar, perhaps uniform, rules regarding classified information across committees. To the extent that a committee rarely needs to deal with classified information, the rules generally will be irrelevant to that committee. But when classified information must be dealt with, the benefits of the current rules (along with those of potential amendments discussed herein)¹⁶³ should apply across committees.¹⁶⁴

¹⁵⁶ For detailed discussion of the costs and benefits of expanding the number of committees with jurisdiction to oversee the intelligence community see Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1691-99 (2006).

¹⁵⁷ CAP REPORT, *supra* note 51, at 11. See also Kaiser, *supra* note 138, at 12.

¹⁵⁸ CAP REPORT, *supra* note 51, at 32 n.31.

¹⁵⁹ For a similar discussion regarding the potential costs and benefits of reducing the two current Intelligence Committees to one Joint Committee, see Kaiser, *supra* note 138, at 9-13.

¹⁶⁰ See *supra* Part III.A.1; *infra* Part III.B.

¹⁶¹ See *supra* Part III.A.1.

¹⁶² See *infra* Part III.B.

¹⁶³ See *supra* Part III.A.3; *infra* Parts III.B.2, III.C.2.

¹⁶⁴ Cf. O’Connell, *supra* note 156 at 1672 (noting that “[i]n July 2006, Representatives Jeff Flake (R-AZ) and Adam Schiff (D-CA) introduced a bill that would require the House Intelligence Committee to disclose considerable classified information to at least eight other

B. *What Non-Disclosure Conditions Should Be Imposed on Recipients of Funneled Information?*

1. Existing Requirements

As explained above, the House and Senate Intelligence Committees impose non-disclosure rules on members and employees.¹⁶⁵ Disclosures may be made only pursuant to official procedures. These procedures are successive funneling rules. Under these procedures, for example, there are instances where non-committee members may access committee information. The procedures also provide means for committees or chambers to disclose classified information publicly.

a. Senate Rules

The Intelligence Committee may make classified information available to other Senate Committees or individual Senators. Such disclosures must be accompanied by a verbal or written notice instructing recipients not to divulge such information except in accordance with Committee or Chamber rules.¹⁶⁶ The Clerk of the Committee must ensure that such notice is provided and must make a written record of the information transmitted and the Committee or Senators receiving it.¹⁶⁷

There are a detailed set of procedures by which classified information in the Committee's possession may be disclosed publicly. If a committee member requests public disclosure, then the Committee must vote on whether to grant or deny the request.¹⁶⁸ If a majority of the Committee votes to grant the request, then the Committee must notify the Majority and Minority leaders of the Senate of this vote and then must notify the President of the United States.¹⁶⁹ If the President raises no objection to disclosure within five days, then the information may publicly be disclosed.¹⁷⁰ If the President personally and in writing objects to public disclosure, certifying that such disclosure so gravely threatens the United States as to outweigh any public interest in the

House committees").

¹⁶⁵ See *supra* Part III.A.1.

¹⁶⁶ 149 CONG. REC. S2689, S2690 (Rule 9.4).

¹⁶⁷ *Id.* See also S. Res 400, 94th Cong. § 8(c)(2) (1976).

¹⁶⁸ S. Res 400, 94th Cong. § 8(a) (1976).

¹⁶⁹ *Id.* at § 8(b)(1).

¹⁷⁰ *Id.* at § 8(b)(2).

same, then immediate public disclosure may not occur.¹⁷¹ Instead, the Majority and Minority leader jointly, or the Intelligence Committee by majority vote, may refer the question to the full Senate.¹⁷² If the question is referred to it, then the full Senate must deliberate on the matter in closed session.¹⁷³ Following the closed session, the Senate publicly shall vote “on the disposition of such matter in open session, without debate, and without divulging the information with respect to which the vote is being taken.”¹⁷⁴ Any Senator may request reconsideration of a vote for public disclosure.¹⁷⁵

Unauthorized disclosures are subject to punishment by the Senate Ethics Committee.¹⁷⁶ Penalties for Senators can include censure, removal from a committee or expulsion from the Senate.¹⁷⁷ Penalties for employees can include removal from employment or punishment for contempt.¹⁷⁸

The Congressional Research Service and the Center for American Progress both reported recently that the public disclosure provisions have never been used by the Intelligence Committee.¹⁷⁹

b. House Rules

The House has a more detailed set of rules than does the Senate for disclosures by Intelligence Committee Members. There is one set of rules for disclosure to specified categories of Senators and Representatives, one set of rules for disclosure to other Representatives and one set of rules for disclosure to the full House in closed session. There also is a separate set of rules for public disclosure.

Intelligence Committee Rules permit Committee members and staff to disclose non-public matters with designated members and staff of the Senate Intelligence Committee; the Chairpersons, ranking minority members and designated staff persons of the House and Senate Committees on Appropriations; and the chairperson, ranking minority member and designated staff persons on the Subcommittee on Defense of the House Committee on Appropriations.¹⁸⁰ Committee members and staff also may disclose limited types of non-public information with

¹⁷¹ *Id.* at § 8(b)(2), (3).

¹⁷² *Id.* at § 8(b)(3).

¹⁷³ *Id.* at § 8(b)(5).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at § 8(d).

¹⁷⁷ *Id.* at § 8(e).

¹⁷⁸ *Id.*

¹⁷⁹ Kaiser, *supra* note 138, at 8; CAP REPORT, *supra* note 51, at 27.

¹⁸⁰ 149 CONG. REC. H5350, H5353(Rule 12(a)(3)(A)).

the chairpersons, ranking minority members and designated staff of the House and Senate Committees on Armed Services¹⁸¹ and with the chairpersons, ranking minority members and designated staffs of certain subcommittees of the House Appropriations Committee.¹⁸²

Other non-committee-member Representatives may access non-public committee information upon written request to the Committee's Chief Clerk and upon approval by the Committee of the request.¹⁸³ The requesting Representative must be given a non-disclosure oath and must agree in writing not to disclose any classified information except in accordance with House or Committee rules.¹⁸⁴

When the Intelligence Committee discloses information to other Committees or to non-committee Representatives, the Committee's "Director of Security and Registry . . . [must] maintain a written record identifying the . . . material provided . . . , the reasons agreed upon by the Committee for approving such transmission, and the name of the committee or Member . . . receiving such document or material."¹⁸⁵

At the request of a Committee member, the Committee may determine that a matter involving non-public information "requires the attention of all Members of the House."¹⁸⁶ In making this decision, the Committee may consult other committees or executive branch officials.¹⁸⁷ If the committee determines that disclosure to the full House is warranted, it may request a closed session of the House for this purpose.¹⁸⁸

As an alternative to requesting a closed House session, the Committee may determine that the information should be made public.¹⁸⁹ The Committee first must vote on the matter.¹⁹⁰ If they vote for public disclosure, they must notify the President of the United States of this fact.¹⁹¹ If the President does not object within five days of notice, then public disclosure may occur.¹⁹² If the President objects personally and in writing within five days, then the Committee may determine, by majority vote, to refer the matter to the full House.¹⁹³ After such referral, the House must determine, in closed session,

¹⁸¹ *Id.* (Rule 12(a)(3)(B)).

¹⁸² *Id.* (Rule 12(a)(3)(C)).

¹⁸³ *Id.* (Rule 14(f)(1)-(3)).

¹⁸⁴ *Id.* (Rule 14(f)(4)).

¹⁸⁵ *Id.* (Rule 14(o)).

¹⁸⁶ *Id.* (Rule 14(g)(1), (2), (h)(i)).

¹⁸⁷ *Id.* (Rule 14(g)(3), (4)).

¹⁸⁸ *Id.* (Rule 14(j)(2)(A)).

¹⁸⁹ *Id.* (Rule 14(j)(2)(B)).

¹⁹⁰ *Id.* (Rule X, Clause 11(g)(1)).

¹⁹¹ *Id.* (Rule X, Clause 11(g)(2)).

¹⁹² *Id.* (Rule X, Clause 11(g)(2)(B)).

¹⁹³ *Id.* (Rule X, Clause 11(g)(2)(C)).

whether the information should be disclosed publicly.¹⁹⁴ The House then must vote on the question in open session, “but without divulging the information with respect to which the vote is taken.”¹⁹⁵

The Center for American Progress reports that the House Intelligence Committee, like its counterpart in the Senate, has never made use of its public disclosure provisions.¹⁹⁶

2. Commentary on Existing Requirements

On their faces, the existing requirements seem to soundly balance the costs and benefits of information disclosures. Information funneling to the intelligence community is made potentially more consequential, and hence more meaningful, by the opportunities for members successively to funnel information to other congresspersons and to the public. At the same time, the multiple stages of voting and consultation required for public disclosure and the limitations placed on informed congresspersons seem sufficient to allay reasonable concerns about national security or the integrity of intra-executive branch discussions.

What is less clear, however, is that the requirements work well in practice. We know from recent reports that neither chamber has used its public disclosure option.¹⁹⁷ I have yet to come across information on whether, how often, and to what effect the successive funneling rules are used to convey information within Congress. With respect to the latter, it is clear at least that any executive branch failures to deliver information to the full intelligence committees has the secondary consequence of keeping those committees from sharing information within Congress. It also stands to reason that the same political disincentives that discourage Committee members from pushing for initial disclosures may negatively impact their willingness to successively funnel whatever information they receive.

An initial question is whether there are formal changes that can be made to the rules dictating to whom disclosures must be made to enhance successive funneling’s effectiveness. One such change would involve clarifying the scope of the Gang of Eight exception. Disclosure to the full intelligence committees is, after all, a prerequisite to committees’ invoking their prerogative to disclose further. Requirements that regular disclosures be made to additional committees also are considered above.¹⁹⁸ Beyond that, it is not apparent that new

¹⁹⁴ *Id.* (Rule X, Clause 11(g)(2)(F)).

¹⁹⁵ *Id.* (Rule X, Clause 11(g)(2)(G)).

¹⁹⁶ CAP REPORT, *supra* note 51, at 27.

¹⁹⁷ See *supra* notes 179, 196 and accompanying text.

¹⁹⁸ See *supra* Part III.A.4.

rules would positively impact the factors—such as tendencies toward executive intransigence and congressional lack of will—that make current requirements less than fully effective. For example, were the public disclosure rules altered so that a committee could order public disclosure on its own, in the face of Presidential objections, democratic deliberation and its benefits might suffer rather than be helped. Such a change could upset the balance between openness' costs and benefits by making the executive branch even more reluctant than it already is to disclose information to the intelligence committees.

The most effective changes might be those that do not affect funneling requirements directly—that is, that do not directly alter rules as to who must be notified and when. Rather, the most effective changes might be those that increase Congress' political incentives to use existing requirements and the executive branch's incentives to comply with the same. The next subpart addresses the relative lack of political accountability and incentives in intelligence oversight. It considers formal and informal changes to improve the situation.

C. *The Public Accountability and Political Incentive Factors*

1. Existing Situation and Requirements

Logic suggests, and experience bolsters the notion, that there generally is low or even negative political incentive for Congress to push the executive branch to disclose national security information. The non-public nature of much information funneling means that “Congressional efforts here remain largely hidden” and thus politically unhelpful to its participants.¹⁹⁹ The complexity of much national security information also diminishes its political resonance.²⁰⁰ Furthermore, the charge that information disclosure will harm national security is easy to make and has substantial popular appeal, making it politically risky to push for disclosures.²⁰¹ Indeed, the current administration frequently makes the charge that congressional hearings on national security will provide “the enemy” with valuable

¹⁹⁹ Kaiser, *supra* note 138, at 22. See also CAP REPORT, *supra* note 51, at 28. This exacerbates the additional incentive problem that intelligence policy oversight “may have only marginal direct effects on Members' constituencies, districts, or states.” Kaiser, *supra* note 138, 22.

²⁰⁰ CAP REPORT, *supra* note 51, at 28.

²⁰¹ See, e.g., KATHRYN S. OLMSTED, CHALLENGING THE SECRET GOVERNMENT 6, 68, 71, 89, 140, 149-151, 160-61, 164-67, 170, 183-84, 186-87 (1996) (discussing public appeal of secrecy); Kitrosser, *supra* note 42, at 531 n.199 and accompanying text (citing polling that “suggests that when access debates are framed as matters of national security, public support for openness drops”).

information.²⁰² Fears that the executive branch will intentionally leak national security information and blame Congress for the leak also have been known to exist on Capitol Hill.²⁰³

Nonetheless, there are some formal and informal factors that may enhance Congress' political incentives to conduct meaningful oversight. One set of formal requirements are the successive funneling rules described above in Subpart B. The possibility that a Committee majority might at some point vote to make information more widely available, even public, creates some incentive to act responsibly lest one's intransigence become widely known. Of course, these successive funneling requirements themselves run into political accountability problems. Such problems likely account for the fact that neither intelligence committee has used its formal power to publicize classified information.²⁰⁴ Successive funneling rules might, however, contribute to a structure that facilitates political accountability overall. The impact of successive funneling rules, and the strength of an overall political accountability structure, might thus be heightened as other elements of the structure are enhanced.

Another relevant set of formal factors are requirements that some funneled information be in writing. Once information is in writing, it becomes harder for writers or recipients to distance themselves from it if it ever is revealed. The statutory funneling rules at present contain some in-writing requirements. For example, the intelligence agencies are required to "keep the congressional intelligence committees fully and currently informed of all . . . significant anticipated intelligence activity and any significant intelligence failure."²⁰⁵ Such reports must be in writing.²⁰⁶ Similarly, certain Presidential findings must be made to justify a covert action and such findings generally must be submitted in writing to the intelligence committees.²⁰⁷ While delays in notice or temporarily limited notice are permitted, such delays or limitations must eventually be explained in writing.²⁰⁸

Factors less formal than statutory and committee rules can also impact political accountability. The political climate, of course, can be very significant. Indeed, the mid to late 1970s has been called a high point for congressional oversight of national security. This characterization is attributed largely to the well-known executive branch abuses, often under the guise of national security, of the late 1960s and

²⁰² See, e.g., sources cited at *supra* note 67.

²⁰³ CAP REPORT, *supra* note 51, at 27. Cf. OLMSTED, *supra* note 201, at 156.

²⁰⁴ See *supra* notes 179, 196-197 and accompanying text.

²⁰⁵ 50 U.S.C.S § 413a(a)(1) (2007).

²⁰⁶ *Id.* § 413a(b).

²⁰⁷ *Id.* § 413b(a)(1) (2007).

²⁰⁸ *Id.* § 413b(a)(1), (c).

early 1970s.²⁰⁹ These events are thought to have generated an unusually high public tolerance, even appetite, for oversight of the executive branch.²¹⁰ Of course, the political climate cannot by itself ensure effective oversight. Other necessary factors include a Congress that is not paralyzed from acting by partisanship or by other political disincentives. As Walter Mondale, who as a senator contributed substantially to the intelligence oversight of the 1970s notes, no one can force Congress to have courage.²¹¹ Political and congressional cultures are crucial components of effective oversight. The relevant questions are what if anything might do done to improve oversight cultures and what role if any might formal rule changes play in such improvements.

2. Possible New Approaches

a. Some Additions to In-Writing Requirements and Public Disclosure Rules

Existing rules include some in-writing requirements and the possibility of eventual public disclosure. As noted, both devices have the potential to enhance accountability, although both have had limited impact thus far. There may be ways to build on these requirements to enhance their effectiveness without unduly risking increased executive branch intransigence.

Two changes to the existing devices come to mind—one building on in-writing requirements and one building on public disclosure rules. With respect to the former, the executive branch presently must put most of its obligatorily disclosed information—including its regular reports to the intelligence committees and its covert action reporting—in writing. It might be worth exploring a parallel in-writing requirement reflecting congresspersons' responses to the information. Any such requirement should be vague and undemanding so as not to be too onerous or to discourage compliance—something to the effect that: “[C]ongresspersons receiving information must, in writing, acknowledge receipt of the same. In the same document, receiving congresspersons may record any responses on their part to the information, including any responsive actions taken or follow-up discussions had.” Such requirements would be subject to the same confidentiality and security procedures to which written executive branch disclosures are subject.

²⁰⁹ See, e.g., OLMSTED, *supra* note 201, at 182-83; CAP REPORT, *supra* note 51, at 9-12.

²¹⁰ See sources cited *supra* note 209.

²¹¹ Interview with Walter Mondale, former U.S. Vice-President, at Dorsey and Whitney in Minneapolis, Minn. (Mar. 1, 2007) (subsequent e-mail confirmation of this statement dated June 17, 2007, on file with author).

The accountability-enhancing effect of in-writing requirements depends on the likelihood that others will, at some point, see the written information and draw from it views as to whether the executive branch complied with its obligations, whether congresspersons pushed for such compliance and whether individual congresspersons were engaged in the relevant debates. Existing successive funneling rules contribute to these ends. Serious consideration also should be given to creating presumptive public disclosure/de-classification dates for information funneled to the intelligence committees. This is analogous to the practice within the executive branch of placing presumptive de-classification dates on some information, with the presumption subject to reversal.²¹² Presumptive disclosure dates might make the possibility of eventual public disclosure much more real to participants and enhance the likelihood of compliance and engagement. At the same time, the possibility of rebutting the presumption combined with sufficiently distant dates—say, 5-10 years after initial disclosure—should alleviate reasonable concerns about national security or the integrity of executive branch discussions. Existing provisions for public disclosure upon special committee or chamber action can serve as a backup mechanism for cases where immediate public disclosure is warranted.

b. Broader Changes to Committees Structure and Stature

The Congressional Research Service reports that Congress recently “has pursued . . . initiatives for changing its intelligence oversight structure and capabilities.”²¹³ One category of changes would enhance committees’ influence over appropriation decisions. For example, “[a] recent change in the House places three members of the intelligence committee on a new Select Intelligence Oversight Panel on the Appropriations Committee. The new panel, which appears unprecedented in the history of Congress, is to study and make recommendations to relevant appropriations subcommittees.”²¹⁴ Another category of changes would combine the intelligence committees to create one Joint Committee with enhanced powers, influence and stature.²¹⁵ A third set of changes would “[g]rant the current select committees status as standing committees, along with

²¹² See, e.g., Information Security Oversight Office, 2005 Report to the President 14 (2006), available at www.fas.org/sgp/isoo/2005rpt.pdf (describing current presumption, under executive order, that certain materials should be declassified after 25 years).

²¹³ Kaiser, *supra* note 138, at summary page.

²¹⁴ *Id.* at 3.

²¹⁵ *Id.* at 6-13.

indefinite tenure for their membership, to reduce turnover; increase experience, stability, and continuity; and make membership on the panel more attractive.”²¹⁶ Another recommendation would expand committees’ “authority, giving them power to report appropriations as well as authorizations and to hold subpoena authority on their own.”²¹⁷

Detailed analysis of committee changes not directly related to information funneling is beyond this Article’s scope. It suffices to note, however, that changes that bolster the committees’ general powers, stature, influence and competence may positively impact information flow to and within the committees. By heightening committees’ prestige, visibility and abilities, such changes could increase the political incentives for committees to demand information and for the executive branch to comply with such demands.²¹⁸

c. Informal Changes: Speaking Out and Educating the Public

Formal changes are unlikely to be very effective without some change in public and politicians’ perceptions of the meaning and consequences of national security based arguments for secrecy. It would be refreshing to see congresspersons and others more vigorously tout Congress’ secret-protecting infrastructure and track record and more consistently remind the public about the dangers of too much secrecy as well as too much openness and historical and current tendencies toward massive over classification.

Polling and focus group data suggest that the public generally is very supportive of open government, even on issues relating to national security, but that “attitudes shift” “when the government claims the information could help terrorists.”²¹⁹ For example, “[o]ver 90% [of persons polled by Greenberg Quinlan Rosner Research in January 2002] stated that in the aftermath of 9/11 environmental right-to-know laws should be strengthened or left [sic] the same. Yet when the question was reframed as do you agree with Bush or EPA removing information from public access to protect homeland security, 67% said they agreed.”²²⁰

It is not remotely unreasonable, of course, for anyone to wish to block information that could assist terrorists. The problem is the ease

²¹⁶ *Id.* at 14.

²¹⁷ *Id.*

²¹⁸ For detailed analysis of proposed changes see O’Connell, *supra* note 156, at 1671-84, 1691-99, 1710-16, 1724-27.

²¹⁹ Gary D. Bass & Sean Moulton, *The Bush Administration’s Secrecy Policy: A Call to Action to Protect Democratic Values* 5-7, (OMB Watch, Working Paper, 2002), available at <http://www.ombwatch.org/rtk/secrecy.pdf>.

²²⁰ *Id.* at 6.

with which such claims are made, the evidence suggesting massive abuse of such claims, and the very real risks to national security and democracy posed by too much secrecy.

Existing rules and statutes provide a framework to balance secrecy's benefits and risks through inter-branch competition and discussion. As explained throughout this Article, these rules and statutes can be improved further. But neither the existing framework nor enhanced versions thereof will work so long as Congress fails to use it, to insist on executive branch compliance with it, and to refocus public debate by educating the public as to this framework and its safety and necessity.

CONCLUSION

It is crucial, perhaps now more than ever, to reconcile legitimate executive branch secrecy needs with the devastating political and practical consequences of an uninformed Congress and public. When national security information belongs exclusively to the executive branch, it becomes dangerously easy to persuade Congress and the public simply to "trust the President because only he [He?] knows the facts."²²¹ Indeed, there are substantial political incentives for Congress²²² and psychological incentives for the public²²³ to acquiesce in this view.

Because funneling rules plainly are directed at balancing the advantages of openness and secrecy, they may be uniquely equipped not only to achieve this substantive end, but to overcome the political and psychological barriers to so doing. With respect to the former, carefully crafted funneling rules might help to ensure necessary information-sharing while protecting national security and meaningful deliberation. With respect to the latter, openness rules can not be passed or enforced without sufficient political incentive on the part of the relevant players. By crafting improved funneling rules and vigorously championing them to the public, to others in Congress, and to executive branch officers, congresspersons can help to bolster and harness those incentives.

Indeed, it is important for congresspersons not only to engage the public in seeking to pass new funneling rules, but to engage them regularly on matters of government secrecy and executive branch information-sharing. Ideally, funneling rules might have a dynamic and ongoing relationship with the political process. Government secrecy must have a degree of political resonance for funneling rules to be

²²¹ ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 331 (1973).

²²² *See supra* at III.C.1.

²²³ *See id.*

crafted, improved and enforced in the first place. At the same time, their very existence and success may increase their political resonance and the political costs to politicians of violating them or acquiescing in their violation.

In short, well crafted and publicly debated funneling rules hold some promise to attack unwarranted secrecy on two fronts. First, the rules themselves may be conducive to meaningful information-sharing. Second, the rules may become foci for an ongoing public debate on the risks of excessive government secrecy and the means to balance secrecy and openness. Should funneling rules help to awaken the public to the dangers of unchecked government secrecy, that may prove their most important and enduring contribution.