YALE LAW & POLICY REVIEW

Turf Wars: Arming Congress's Gang (of Eight)

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This Note explores how Congress can respond to a president who withholds non-covert intelligence operations from the congressional intelligence committees in violation of the National Security Act. This Note proposes a novel solution for Congress: the elevation of the Gang of Eight into a joint permanent select committee that is authorized to file suit on behalf of Congress. Congressional lawsuits are likely to be challenged on the basis of standing. Gang of Eight lawsuits could empower congressional leaders to meet a court's standing analysis, allowing Congress to reassert its role in overseeing the intelligence community.

* Yale Law School, J.D. 2021. Thank you to Oona Hathaway for her mentorship and encouragement. Additional thanks to Joshua Schenk, Gavin Jackson, Cara Newlon, Shana Hurley, and Charlie Crosby for their assistance and thoughtful editing. I am particularly grateful to Sarah Baldinger for her impeccable editing and support. All errors and omissions are my own.

Of all our recommendations, strengthening congressional oversight may be among the most difficult and important. So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want and need.[1]

– The 9/11 Commission Report

INTRODUCTION

In 2002, the Central Intelligence Agency (CIA) authorized its "enhanced interrogation techniques" program. Under this program, the CIA, Defense Intelligence Agency, and other components of the military tortured detainees at black sites around the world.[2] Although the National Security Act requires the president to keep the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI) "fully and currently informed of . . . intelligence activities,"[3] neither committee was informed about the CIA's program. Instead, the White House

1. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 419 (2004).

2. *See, e.g.*, Vicki Divoll, Opinion, *Congress's Torture Bubble*, N.Y. TIMES (May 12, 2009), https://www.nytimes.com/2009/05/13/opinion/13divoll.html [https://perma.cc/73CR-BRRU] [hereinafter Divoll, *Congress's Torture Bubble*].

3. 50 U.S.C. § 3091(a)(1) (2018).

briefed just four congressional leaders, "and it was understood that they were not to speak about the program with anyone, including their colleagues on the [intelligence] committees."[4]

This Note explores how congressional leaders can respond to a president who refuses to inform the congressional intelligence committees about an intelligence community (IC) program in accordance with the National Security Act. Specifically, this Note investigates whether eight congressional leaders, known as the Gang of Eight, could seek redress in the judiciary. Such suits would invariably present the courts "with some very difficult jurisdictional questions."[5] Congressional leaders may be interested in filing suit against a president who unlawfully refuses to inform the intelligence committees about an IC program. Yet under the status quo, individual congressional leaders are unlikely to have standing to sue the executive.[6]

This Note proposes a novel solution for Congress: the elevation of the Gang of Eight into a joint permanent select committee ("Gang of Eight Committee") that is explicitly authorized by Congress to issue subpoenas and sue the executive. This structure would conform with recent case law regarding legislative standing and increase the likelihood that congressional leaders could seek redress in the judiciary. Congressional lawsuits against the executive on national security issues are not novel,[7] and Congress, as an institution, has expressed interest in suing the executive.[8]

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4. Divoll, *Congress's Torture Bubble*, *supra* note 2.

5. R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote Is This, Anyway?*, 62 NOTRE DAME L. REV. 1, 1 (1986) (quoting Reuss v. Balles, 584 F.2d 461, 465 n.14 (D.C. Cir. 1978)).

6. *See, e.g.*, Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020) (holding that 215 members of Congress did not have standing to assert the institutional interests of Congress); United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1382 (D.C. Cir. 1984) (finding a member of Congress lacked standing to challenge an executive order); Harrington v. Bush, 553 F.2d 190, 199 (D.C. Cir. 1977) (holding that a member of Congress lacked standing to enjoin the CIA from engaging in allegedly unlawful activities).

7. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979) (challenging President Carter's termination of the Sino-American Mutual Defense Treaty); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973) (challenging President Nixon's Cambodian Campaign); Kucinich v. Obama, 821 F. Supp. 2d 110 (D.D.C. 2011) (challenging President Obama's authorization of military force in Libya).

8. *See, e.g.*, Zivotofsky *ex rel.* Zivotofsky v. Kerry, 576 U.S. 1, 45 (2015) (noting the Senate as amicus); United States v. Windsor, 570 U.S. 744 (2013) (allowing Bipartisan Legal Advisory Group of the House of Representatives to defend

Particularly in light of the Trump administration's resistance to congressional oversight,[9] the elevation of the Gang of Eight would be a natural response for a Congress interested in protecting its oversight capacity.

Other scholars have previously examined how Congress might improve its oversight over the IC. Many have argued that structural changes to HPSCI and SSCI, such as reforming the intelligence budget process and improving the expertise of committee members and staff, are key to improving congressional oversight.[10] Others have advanced innovative legal arguments, such as the idea that Congress has a constitutional right to obtain any information it needs to oversee the IC.[11] And at least one author

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the constitutionality of the Defense of Marriage Act); INS v. Chadha, 462 U.S. 919, 922 (1983) (recognizing the appearance of the Senate and House of Representatives).

9. *See* Kerry W. Kircher, *Trump's Unprecedented Fight to Withhold Information*, ATLANTIC (Aug. 27, 2019), https://www.theatlantic.com/ideas/archive/2019/08/house-needs-its-subpoena-power-against-trump/596857 [https://perma.cc/ME6L-CX4T] ("The Trump administration . . . has set itself apart . . . in the unprecedented degree to which it has resisted congressional oversight.").

10. *See, e.g.*, Christopher Estep, *For House, Senate National Security Committees, Stopgaps for Term Limits*, JUST SECURITY (Feb. 24, 2020), https://www.justsecurity.org/68735/for-house-senate-national-security-committees-stopgaps-for-term-limits [https://perma.cc/A2KR-D4JX] (arguing that intelligence committee term limits should be eliminated); Katina Slavkova, *In Search of Good Intelligence Oversight*, GOV'T AFFAIRS INST. (Jan. 9, 2019), https://gai.georgetown.edu/in-search-of-good-intelligence-oversight [https://perma.cc/3NX4-J8RV] (suggesting that Congress increase staff resources for the intelligence committees, eliminate term limits for members, and adopt a dedicated intelligence spending panel); Amy B. Zegart, *The Roots of Weak Congressional Intelligence Oversight*, HOOVER INST., https://www.hoover.org/sites/default/files/research/docs/future-challenges-zegart.pdf [https://perma.cc/BQ5K-X3W8] (noting that much of Congress's oversight troubles are a result of limited expertise and weak budgetary power over the intelligence community).

11. *See* Vicki Divoll, *The Full Access Doctrine: Congress's Constitutional Entitlement to National Security Information from the Executive*, 34 HARV. J.L. & PUB. POL'Y 493, 497 (2011) (arguing that "Congress is entitled to seek and receive any information from the executive branch that it needs to carry out its core responsibilities to make laws, appropriate funds, and investigate all matters" and that this power is "at its zenith in the areas of intelligence policies and the

recognized that, among other "potential areas for future research," Congress might review the role of the Gang of Eight.[12] This Note is the first examination of whether Congress could formalize the Gang of Eight to improve Congress's oversight over the IC. Although most proposed structural changes have focused on the existing congressional intelligence committees, this Note argues that the creation of the Gang of Eight Committee could uniquely improve the effectiveness of the existing intelligence committees.

Part I of this Note will explore the current landscape of congressional oversight over the IC. Part II will expound on this Note's novel proposal: the elevation of the Gang of Eight to a joint permanent select committee. This Part will explain how Congress would create the Gang of Eight Committee and explain why providing congressional leaders with the subpoena power would effectively promote congressional oversight of the IC. Furthermore, Part II will briefly survey legislative standing and argue that recent case law may require Congress to undertake structural changes to successfully file suit against the president. Part III will address a number of legitimate criticisms of the Gang of Eight Committee, arguing that the Gang of Eight Committee is politically feasible and would effectively improve congressional oversight of the IC. Because the modern Congress has demonstrated an interest in suing the executive, the effectiveness of Gang of Eight lawsuits may be instructive for the role of the judiciary in settling disputes between Congress and the president.

PART I: CONGRESS'S OVERSIGHT OF THE INTELLIGENCE COMMUNITY

This Part examines the president's statutory authority to withhold IC programs from Congress. The legal requirements for congressional notification of IC activity are largely set by the National Security Act of 1947, as amended. This Act requires the president to "ensure that the congressional intelligence committees are kept fully and currently informed of . . . intelligence activities."[13] Nonetheless, until the 1970s, Congress "did

activities of the President and the agencies of the intelligence community") [hereinafter Divoll, *Full Access Doctrine*].

12. *See* Carrie Cordero, *Enhancing Congressional Intelligence Committee Effectiveness*, CTR. NEW AM. SEC. (Aug. 5, 2019), https://www.cnas.org/publications/reports/enhancing-congressional-intelligence-committee-effectiveness [https://perma.cc/FGD7-THZS].

13. 50 U.S.C. § 3091(a)(1) (2018).

not take much interest in conducting oversight of the Intelligence Community."[14]

In 1974, the *New York Times* revealed that the CIA had "conducted a massive, illegal domestic intelligence operation" against the antiwar movement.[15] In response, the Senate initiated an investigation led by Senator Frank Church. As the CIA itself acknowledges, the Church Commission found that "the CIA had breached legal boundaries and violated the rights of U.S. citizens, particularly when it kept files on members of the antiwar movement."[16] In response to these revelations,[17] Congress established the Senate Select Committee on Intelligence (SSCI)[18] and the House Permanent Select Committee on Intelligence (HPSCI).[19]

The President is statutorily obligated to inform HPSCI and SSCI of all non-covert IC operations.[20] Nonetheless, the executive branch has withheld both covert and non-covert IC programs from Congress. The Church Commission investigation demonstrated that congressional oversight may be necessary to ensure that the IC operates lawfully—a concern that exists today. For example, President Bush did not inform HPSCI and SSCI when he authorized the CIA's enhanced interrogation techniques program. When Congress eventually learned of this program's existence, SSCI conducted a full-scale investigation. In 2014, SSCI released its *Committee Study of the*

14. MICHAEL E. DEVINE, CONG. RESEARCH SERV., R45421, CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: BACKGROUND AND SELECTED OPTIONS FOR FURTHER REFORM, at ii (2018).

15. Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES (Dec. 22, 1974), https://www.nytimes.com/1974/12/22/archives/huge-cia-operation-reported-in-u-s-against-antiwar-forces-other.html [https://perma.cc/YC8Y-8UUJ] ("The Central Intelligence Agency, directly violating its charter, conducted a massive, illegal domestic intelligence operation during the Nixon Administration against the antiwar movement and other dissident groups in the United States . . . . At least one avowedly antiwar member of Congress was among those placed under surveillance by the C.I.A.").

16. *The CIA and Congress: Creation of the SSCI*, CENTRAL INTELLIGENCE AGENCY (Dec. 8, 2011), https://www.cia.gov/news-information/featured-story-archive/2011-featured-story-archive/the-cia-and-congress-creation-of-the-ssci.html [https://perma.cc/8EBY-ZAMD].

17. Devine, *supra* note 14 at 3-4.

18. S. Res. 400, 94th Cong. (1976) (enacted).

19. H.R. Res. 658, 95th Cong. (1977) (enacted).

20. *See supra* Section I.B.

Central Intelligence Agency's Detention and Interrogation Program.[21] The six-thousand page report, which took four years and cost forty-million dollars to complete,[22] acknowledges that "[t]he use of the CIA's enhanced interrogation techniques was not an effective means of obtaining accurate information or gaining detainee cooperation" and "[t]he interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers and others."[23] Like the CIA's operations in the 1970s, a lack of congressional oversight empowered the IC to act unlawfully. This Part will examine the president's statutory requirements to inform Congress of IC programs and evaluate how the president's decision to unlawfully withhold IC operations undermines congressional oversight.

A. The President Can Withhold Covert Operations from Congress

In the Intelligence Authorization Act for Fiscal Year 1981, Congress required the Director of Central Intelligence to:

> keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States . . . .[24]

At first glance, this language appears expansive. However, the Act creates a significant carveout. When the president deems it "essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the

21. SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, S. REP. NO. 113-288 (2014), https://fas.org/irp/congress/2014_rpt/ssci-rdi.pdf [https://perma.cc/P5TX-UHLQ].

22. *See* Spencer Ackerman et al., *Senate Report on CIA Torture Claims Spy Agency Lied About 'Ineffective' Program*, GUARDIAN (Dec. 9, 2014, 5:15 PM), https://www.theguardian.com/us-news/2014/dec/09/cia-torture-report-released [https://perma.cc/2JGK-XKYA].

23. *CIA Torture Report Fast Facts*, CNN (Sep. 26, 2018, 8:24 AM), https://www.cnn.com/2015/01/29/us/cia-torture-report-fast-facts/index.html [https://perma.cc/3SDK-R9HT].

24. Pub. L. No. 96-450, § 501(a)(1), 94 Stat. 1975, 1981 (codified as amended at 50 U.S.C. § 3091 (2018)).

United States,"[25] he may withhold a sensitive *covert* operation from the congressional intelligence committees.

Covert operations are defined in 50 U.S.C. § 3093(e) as "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."[26] Non-covert operations, regulated under section 3092, are defined as any IC program that does not fall under section 3093(e). Critically, covert operations do not cover activities for which the primary purpose is to acquire intelligence, such as the CIA's torture program.[27]

If the president decides to withhold a covert operation from the intelligence committees, he has two choices. First, he may choose to inform the Gang of Eight. Second, he may fully withhold the operation from Congress so long as he "fully inform[s]" the intelligence committees "in a timely fashion" and "provide[s] a statement of the reasons for not giving prior notice."[28] The Gang of Eight consists of the chairman and ranking minority members of the House and Senate intelligence committees, the majority and minority leaders of the Senate, and the Speaker and minority leader of the House.[29] The intent of this carveout "appeared to some to be to provide the President, on a short-term basis, a greater degree of operational security as long as sensitive operations were underway."[30]

Under 50 U.S.C. § 3093, the president must personally authorize covert operations through a presidential finding.[31] Generally, the president must inform the congressional committees of such a finding "as soon as possible after such approval" but "before the initiation of the covert action" authorized by it.[32] Yet, as aforementioned, the president retains statutory

25. *Id.*

26. 50 U.S.C. § 3093 (2018).

27. *Id*; *see* Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1054 (2008).

28. 50 U.S.C. § 3093(c)(3) (2018)

29. *See* 50 U.S.C. § 3093(c)(2) (2018).

30. MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., R40691, SENSITIVE COVERT ACTION NOTIFICATIONS: OVERSIGHT OPTIONS FOR CONGRESS, at ii (2013).

31. "The goal of the [presidential] finding is to specify and reduce to writing the objectives of the proposed action and to detail the government agencies and any third parties that will be involved." Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633, 706-07 (2016).

32. 50 U.S.C. § 3093(c)(1) (2018).

authority to inform only the Gang of Eight,[33] to whom he must provide justification for withholding the presidential finding from the intelligence committees.[34] Furthermore, within 180 days of submitting such justification, the president must either inform the intelligence committees of his presidential finding or submit an additional statement of reasons to the Gang of Eight explaining why it is "essential to continue to limit access to such finding or such notification to meet extraordinary circumstances affecting vital interests of the United States."[35]

However, Congress has no statutory authority to force the president to comport with the requirements of the National Security Act. Furthermore, the Gang of Eight cannot effectively oversee IC programs on its own. Its members "do not have the time or resources to personally review large volumes of information in the course of an investigation."[36] Under the status quo, congressional leaders have limited bargaining power to counter the decisions of the executive over sensitive IC programs.

B. Non-covert IC Operations Must Be Briefed to Congress

The president is not statutorily authorized to withhold non-covert operations from Congress. Section 3092, which covers intelligence activities other than covert actions, is remarkably different from section 3093. Section 3092 establishes that the Director of National Intelligence *shall* "keep the congressional intelligence committees fully and currently informed of all intelligence activities, other than a covert action which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government."[37] Section 3092 provides no statutory authority for the president to withhold non-covert operations from the intelligence committees.

Nonetheless, historical practice and congressional acquiescence have enabled the president to withhold non-covert IC operations from HPSCI and SSCI. Sometimes, the White House will brief the "Gang of Four" rather than

33. 50 U.S.C. § 3093(c)(2) (2018).

34. *See* 50 U.S.C. § 3093(c)(5)(A) (2018).

35. 50 U.S.C. § 3093(c)(5)(B)(ii) (2018).

36. Susan Hennessey & Helen Klein Murillo, *The Rules of Congressional Investigations and Trump's Growing Russia Problem*, LAWFARE (Mar. 2, 2017, 5:09 PM), https://www.lawfareblog.com/rules-congressional-nvestigations-and-trumps-growing-russia-problem [https://perma.cc/XAV5-6TU2].

37. 50 U.S.C. § 3092(a)(1) (2018).

the intelligence committees. Gang of Four briefings are typically informal, oral briefings provided to the chairman and ranking members of HPSCI and SSCI regarding particularly sensitive non-covert intelligence activities.[38] Although Gang of Four notifications are not statutorily authorized, they generally are accepted by congressional leadership and the White House.[39] And while these briefings "give the executive branch a scapegoat if a controversial program becomes public," they "provide[] absolutely nothing to assist Congress in the performance of its lawmaking, appropriations, and oversight duties."[40] Because Gang of Four notifications are not statutorily permitted, there are no statutory requirements governing when the president must subsequently inform the intelligence committees about the particular non-covert operation.

C. The Impact of Congressional Leadership Notifications

Briefings to the Gang of Eight and the Gang of Four (hereinafter "congressional leadership notifications") allow the president to inform only a select group of congressional leaders. When an IC program is briefed to congressional leaders, but not to the intelligence committees, Congress's capacity to conduct oversight of the IC is naturally diminished.

Congressional leadership notifications do not ask Congress to approve particular IC programs—their goal is simply to inform congressional leaders about the program's existence. As Speaker of the House Nancy Pelosi explained, "[W]hen the administration notifies Congress in this manner, it is not seeking approval. There is a clear expectation that the information will be shared with no one, including other members of the intelligence committees."[41]

It is currently unclear whether congressional leaders have any means of regulating an IC program that is unlawfully withheld from the intelligence committees. Presidents Bush, Obama, and Trump have all used congressional leadership notifications to undermine congressional oversight.

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38. *See* MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., R40698, "GANG OF FOUR" CONGRESSIONAL INTELLIGENCE NOTIFICATIONS (2013).

39. *Id*.

40. *See* Divoll, *Full Access Doctrine*, *supra* note 11, at 535.

41. Nancy Pelosi, Opinion, *The Gap in Intelligence Oversight*, WASH. POST (Jan. 15, 2006), https://www.washingtonpost.com/archive/2006/01/15/the-gap-in-intelligence-oversight/217d7899-c9f3-45a0-a2e9-d93150359e37 [https://perma.cc/AND4-K74G].

President George W. Bush used congressional leadership notifications to prevent Congress from regulating highly sensitive IC programs. On October 4, 2001, President Bush issued a Top Secret Presidential Authorization to Secretary of Defense Donald Rumsfeld, directing the National Security Agency (NSA) to use its signals intelligence capabilities to prevent further terrorist attacks on American soil.[42] In brief, the president was permitting the NSA to collect large amounts of metadata on American citizens. At the time of issuance, it was unclear whether this Presidential Authorization complied with the Foreign Intelligence Surveillance Act (FISA).[43]

On October 25, 2001, White House officials briefed the Gang of Four on the President's Surveillance Program (PSP).[44] This non-covert IC program would remain secret from the public and most members of Congress for over four years. During that period, at least one senator (the Vice-Chairman of SSCI, no less) expressed concern that the program may be illegal.[45] In 2005, the PSP was leaked by the *New York Times*.[46] In the aftermath, some members of the intelligence committees expressed anger at not being informed about the program while congressional leaders argued that they were powerless to stop it.[47]

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42. OFFICES OF THE INSPECTORS GEN. OF THE DEP'T OF DEF. ET AL., UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM, REP. NO. 2009-0013-A (2009), https://fas.org/irp/eprint/psp.pdf [https://perma.cc/7AHT-KULK].

43. *Id.* at 10-12. The Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, et seq., was enacted in 1978 to "provide legislative authorization and regulation for all electronic surveillance conducted within the United States for foreign intelligence purposes." S. REP. NO. 95-701, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3977.

44. OFFICES OF THE INSPECTORS GEN. OF THE DEP'T OF DEF. ET AL., *supra* note 42.

45. Letter from U.S. Senator John Rockefeller to Vice President Dick Cheney (July 17, 2013), https://fas.org/irp/news/2005/12/rock121905.pdf [https://perma.cc/6VZQ-T4R7].

46. James Risen & Eric Lichtblau, *Bush Let U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16 2005), https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html [https://perma.cc/FR3J-W3VJ].

47. Pelosi, *supra* note 41 (defending her failure to object to warrantless surveillance); Glenn Thrush & John Bresnahan, *Pelosi Defense: Couldn't Object in '03*, POLITICO (May 11, 2009) http://www.politico.com/news/stories/0509/22401.html [https://perma.cc/B5B9-LGGQ] (providing Pelosi's defense for her failure to object to torture). *But see* Mike Soraghan, *Reyes Backs Pelosi on Intel Briefings*, HILL (May 1, 2009),

In a separate instance in 2002, only the Gang of Four was notified when the CIA authorized its "enhanced interrogation techniques" program.[48] Each member received an oral briefing, and "it was understood that they were not to speak about the program with anyone, including their colleagues on the committees."[49]

Although President Obama claimed that his administration was "the most transparent administration in history,"[50] he too used the president's authority to withhold IC programs from the intelligence committees. For example, prior to the raid to kill Osama Bin Laden, only the Gang of Eight was notified, "although not all were briefed at the same time."[51]

Gang of Eight notifications have continued under the Trump administration. In May 2017, the FBI opened a counterintelligence probe into "whether [President] Trump was being used as a Russian asset."[52] The FBI initially informed only the Gang of Eight that it was investigating the president.[53]

If congressional leadership wanted to object to any of these programs or activities, what could they have done? The short answer is very little.

> For the Gang of Four to have waved their arms and yelled at mid-level C.I.A. briefers, or written harsh letters to the president and

https://thehill.com/homenews/news/19462-reyes-backs-pelosi-on-intel-briefings [https://perma.cc/XZ9P-LR4Q] (Rep. Pete Hoekstra, the then Ranking Member of HPSCI, argued alternatively that the notion that the president doesn't listen to the requests of congressional leaders "is nuts" as "he at least once complained to then-President Bush and got a policy changed.").

48. *See* Divoll, *Full Access Doctrine*, *supra* note 11, at 535.

49. *See* Divoll, *Congress's Torture Bubble*, *supra* note 2.

50. Jonathan Easley, *Obama Says His Is 'Most Transparent Administration' Ever*, HILL (Feb. 14, 2013), https://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history [https://perma.cc/N4QU-324Q].

51. JOHN ROLLINS, CONG. RESEARCH SERV., R41809, OSAMA BIN LADEN'S DEATH: IMPLICATIONS AND CONSIDERATIONS 1 (2011).

52. Caitlin Oprysko, *McCabe: Congressional Leaders Didn't Object to Counterintelligence Investigation of Trump*, POLITICO (Feb. 19, 2019), https://www.politico.com/story/2019/02/19/mccabe-gang-of-eight-counterintelligence-investigation-trump-1173821 [https://perma.cc/YFX6-PRPE].

53. *Id.*

> vice president, would have been useless. Four members do not have the ability, on their own, to bring the great weight of the constitutional authority of Congress to bear.[54]

Congressional leaders have argued that congressional leadership notifications prevent Congress from conducting effective oversight. Speaking about President Bush's surveillance program, Senator Jay Rockefeller argued that the Bush administration's secrecy "prevented members of Congress from conducting meaningful oversight of the legal and operational aspects of the program."[55] Meanwhile, Representative Jane Harman claimed that that some congressional leadership notifications violate "the specific requirements of the National Security Act of 1947."[56]

The president's ability to withhold information from the intelligence committees upsets the balance of power between Congress and the president. In *Zivotofsky ex rel. Zivotofsky v. Kerry*, the Supreme Court held that, even within areas of traditional executive control such as foreign affairs, some decisions may still "require congressional action."[57] The president's power over national security matters is not absolute—Congress ought to be able to seek judicial enforcement of the notification requirements of the National Security Act.

D. Elimination of the Gang of Eight Carve-out Is Unlikely

There is tension between the president's capacity to withhold information from the intelligence committees and Congress's ability to effectively oversee the IC. One obvious solution would be for Congress to eliminate the Gang of Eight provision contained in 50 U.S.C. § 3093(c)(2). Alternatively, Congress might consider amending sections 3091-3093 in a variety of ways, such as establishing automatic consequences if the president fails to report an IC program to Congress. Perhaps unsurprisingly, both President George W. Bush and President Obama strongly opposed efforts by Congress to amend the Gang of Eight provision.

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54. *See* Divoll, *Congress's Torture Bubble*, *supra* note 2.

55. Michael German, ed., *Strengthening Intelligence Oversight*, BRENNAN CTR. FOR JUSTICE 10 (2015), https://www.brennancenter.org/sites/default/files/analysis/Church_Committee_Web.pdf [https://perma.cc/9HBE-DQYG] (quoting Press Release, Senator John D. (Jay) Rockefeller (Dec. 19, 2005) (commenting on the Terrorist Surveillance Program)).

56. *Id.*

57. 576 U.S. 1, 45 (2015).

The FY 2007 Intelligence Authorization Act would have required the president to inform the intelligence committees of all covert actions, or at a minimum, inform the committees of instances in which they were not being fully informed of a program (and the reasons behind the refusal).[58] Additionally, the bill would have conditioned the use of intelligence funds on congressional notification.[59] The Bush administration objected to this bill. In a Statement of Administration Policy (SAP), the White House argued that an "all-or-nothing approach" to executive notification to congressional intelligence committees "would discourage, rather than encourage, the sharing of extraordinarily sensitive information."[60] The administration also warned that, if the bill were presented to the president, "senior advisors would recommend that he veto [it]."[61]

The Obama White House also opposed eliminating congressional leadership notifications. During HPSCI's mark-up of the Intelligence Authorization Act for Fiscal Year 2010,[62] the committee eliminated the section 3093(c)(2) Gang of Eight provision.[63] The White House swiftly resisted. On July 8, 2009, the Obama administration released an SAP stating that "[i]f the final bill presented to the President contains [the revised notification procedure], the President's senior advisors would recommend a veto."[64] Ultimately, this provision was abandoned. Although the Gang of Eight carve-out remains in place, it is unsurprising that the executive branch would resist statutory changes increasing Congress's oversight capabilities at the cost of executive independence.

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58. Kathleen Clark, *"A New Era of Openness?": Disclosing Intelligence to Congress Under Obama*, 26 CONST. COMMENT. 313, 323 (2010).

59. S. 372, 110th Cong. § 307 (2007), https://www.congress.gov/bill/110th-congress/senate-bill/372/text [https://perma.cc/9JYZ-467E].

60. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 372 – INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2007 (Apr. 12, 2007), https://www.hsdl.org/?view&did=472505 [https://perma.cc/L67C-FE39].

61. *Id.*

62. H.R. REP. NO. 111-186 § 321, at 10 (HPSCI committee report on Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, 111th Congr. (2010)).

63. Erwin, *supra* note 30, at ii.

64. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 2701 - INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010 (July 8, 2009) https://obamawhitehouse.archives.gov/sites/default/files/omb/legislative/sap/111/saphr2701r_20090708.pdf [https://perma.cc/M989-VMFC].

Under both the Bush and Obama administrations, Congress was unable to muster the political wherewithal to overcome the president's threatened veto. An obvious criticism of Gang of Eight lawsuits is that, if they are not politically feasible, they are practically unimportant. In Part III, this Note will argue that the Gang of Eight Committee is a viable concept. This Note's proposal can be enacted by a simple majority of Congress and will provide Congress with an effective tool to increase oversight of the IC.

PART II: THE FORMATION OF THE GANG OF EIGHT COMMITTEE

Congress possesses the authority to enact the Gang of Eight Committee and empower it with the subpoena power. This structure could enable congressional leaders to file suit against the executive when the president unlawfully withholds IC programs from Congress. Congress has historically used the judiciary to protect its investigatory powers, and the Gang of Eight Committee is situated amongst this long-established precedent.

A. Congress Can Unilaterally Create the Gang of Eight Committee

The 1946 Legislative Reorganization Act created the current framework for congressional committees.[65] Select committees are often established to focus on issues that do not cleanly fit within any existing committee's jurisdiction.[66] They can be either temporary or permanent (e.g., HPSCI). Joint committees consist of both senators and representatives.

65. VALERIE HEITSHUSEN, CONG. RESEARCH SERV., 98-241, COMMITTEE TYPES AND ROLES 1 (2017).

66. For example, the House Permanent Select Committee on Intelligence was established in the 95th Congress (H.R. Res. 658, 95th Cong. (1977)) and the House Permanent Select Committee on Aging was created in the 93rd Congress (H.R. Res. 988, 93d Cong. (1974)).

While joint committees often exist for housekeeping purposes,[67] they are also used to conduct research[68] and even to consider legislative proposals.[69]

The Constitution empowers each chamber of Congress with plenary power over its own rules.[70] To create a committee, the House and Senate must each pass a separate resolution amending each chamber's standing rules. These resolutions require a simple majority vote. However, in the Senate, "cloture can be invoked only by vote of two-thirds of Senators voting, with a quorum present."[71] In other words, a filibuster can hold up the creation of any committee. Part III of this Note will address why the Gang of Eight Committee is politically feasible, even in the current politicized era.

After creating the Gang of Eight Committee, congressional leaders must establish its structure and internal procedures. The Committee should be led, like other joint committees,[72] by a rotating chairperson, such as the chairmen of HPSCI and SSCI. Typically, each Congress is divided into two annual sessions.[73] During the first Session, the House would have the chair and the Senate would retain the vice-chair. The roles could reverse during the second Session. Because the Committee would serve both the House and Senate equally, its leadership structure should represent both chambers.

67. For example, the Joint Committee on Printing is responsible for managing the Government Printing Office while the Joint Committee on the Library administers the Library of Congress. *See* HEITSHUSEN, *supra* note 65, at 2.

68. The Joint Economic Committee researches the current economic situation within the United States and for proposing improvements. Joint Econ. Comm., *About Joint Economic Committee*, U.S. CONGRESS, https://www.jec.senate.gov/public/index.cfm/about [https://perma.cc/573E-HADE].

69. The Joint Select Committee on Deficit Reduction was created in 2011 to develop a deficit reduction plan. Robert Pear & Catherine Rampell, *Lawmakers in Both Parties Fear that New Budget Panel Will Erode Authority*, N.Y. TIMES (Aug. 1, 2011), https://www.nytimes.com/2011/08/02/us/politics/02panel.html [https://perma.cc/DQ29-JH8F].

70. *See* U.S. CONST. art. 1, § 5.

71. RICHARD S. BETH, CONG. RESEARCH SERV., R42929, PROCEDURES FOR CONSIDERING CHANGES IN SENATE RULES 4 (2013).

72. For example, the Joint Committee on Taxation has a rotating chairperson. *See* Joint Comm. on Taxation, *Overview*, U.S. CONGRESS, https://www.jct.gov/about-us/overview.html [https://perma.cc/425B-TSRZ].

73. *Sessions of the Senate*, U.S. SENATE, https://www.senate.gov/general/Features/Sessions.htm [https://perma.cc/L67G-4W68].

Congressional leaders must also determine how the Gang of Eight Committee will authorize subpoenas and/or legal action by the committee. The procedure a congressional committee utilizes to issue subpoenas is specific to each committee.[74] Here, the Committee should issue subpoenas only when both the chair and vice-chair vote in favor of doing so.[75] This structure would only allow the Committee to subpoena individuals when both houses of Congress act in unison. The same structure could be used to authorize legal action. By requiring the consent of both the House and Senate to subpoena witnesses or take legal action, the Committee will only act when it does so on behalf of Congress as an institution.

Finally, Congress must amend the House and Senate Standing Rules to ensure the Gang of Eight Committee can operate effectively. First, congressional leaders must ensure that the Committee can protect sensitive national security secrets. While House and Senate rules require most congressional committees to keep extensive records of committee deliberations, they also provide HPSCI and SSCI with exemptions.[76] These exemptions must be explicitly extended to the Gang of Eight. Additionally, Congress should amend the House and Senate Standing Rules to explicitly authorize the Committee to file suit on behalf of Congress. As Section II.C of this Note will argue, a congressional committee is far more likely to meet a court's standing analysis when both the House and Senate have authorized the committee to file suit on behalf of Congress.

Congress is capable of unilaterally creating the Gang of Eight Committee. But in doing so, Congress must ensure that the House and Senate rules permit the Committee to conduct its work in an effective and secret manner. Structuring the Committee with a rotating chair and vice-chair will promote its ultimate goal: acting on behalf of Congress as an institution.

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74. Margaret Taylor, *Congressional Subpoena Power and Executive Privilege: The Coming Showdown Between the Branches*, LAWFARE (Jan. 30, 2019, 7:00 AM), https://www.lawfareblog.com/congressional-subpoena-power-and-executive-privilege-coming-showdown-between-branches [https://perma.cc/TC7Y-8H5G].

75. Many Senate Committees require the chair and ranking member to vote in favor of the subpoena. MICHAEL L. KOEMPEL, CONG. RESEARCH SERV., R44247, A SURVEY OF HOUSE AND SENATE COMMITTEE RULES ON SUBPOENAS (2018).

76. FREDERICK M. KAISER, CONG. RESEARCH SERV., RS20748, PROTECTION OF CLASSIFIED INFORMATION BY CONGRESS: PRACTICES AND PROPOSALS 5 (2011).

B. The Subpoena Power Will Be an Effective Tool for Congressional Leaders

The Gang of Eight Committee could enhance the power of congressional leaders vis-à-vis the executive by enabling them to subpoena executive branch officials when IC programs are unlawfully withheld from Congress. As detailed in Section I.C, under the status quo, the Gang of Eight cannot effectively oversee or investigate IC programs withheld from the congressional intelligence committees. With the subpoena power, congressional leaders could investigate *any* instance in which the president unlawfully withholds IC programs from Congress. This Section will provide an overview of Congress's subpoena power and then evaluate whether the Gang of Eight could subpoena the president in light of the Supreme Court's recent decision in *Trump v. Mazars*.[77]

Courts have consistently upheld Congress's authority to issue and enforce congressional subpoenas.[78] At the same time, although "[t]he congressional power to obtain information is 'broad' and 'indispensable,'" the scope of Congress's subpoena power is limited.[79] Because the Constitution does not expressly authorize congressional committees to conduct investigations, the "[subpoena] power is 'justified solely as an adjunct to the legislative process.'"[80] As a result, "a congressional subpoena

77. Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

78. *See* Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 84 (D.D.C. 2008) ("In short, there can be no question that Congress has a right—derived from its Article I legislative function—to issue and enforce subpoenas, and a corresponding right to the information that is the subject of such subpoenas. Several Supreme Court decisions have confirmed that fact."); *see also* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975) (finding that when a congressional subpoena falls within the sphere of legitimate legislative activity, the Constitution's Speech and Debate Clause provides congressional members immunity from judicial questioning); Barenblatt v. United States, 360 U.S. 109 (1959) (upholding a contempt of Congress conviction for failure to testify pursuant to a congressional subpoena). *But see* Watkins v. United States, 354 U.S. 178, 188, 198 (1957) (recognizing that while individuals must respond to congressional subpoenas "within the province of proper investigation," subpoenas cannot be enforced if "unrelated to any legislative purpose").

79. *Mazars*, 140 S. Ct. at 2031 (quoting *Watkins*, 354 U.S. at 187).

80. *Id*. (quoting *Watkins*, 354 U.S. at 197).

is valid only if it is 'related to, and in furtherance of, a legitimate task of the Congress.'"[81]

Congress may not issue subpoenas that are wholly unrelated to the legislative process. For example, "Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'"[82] Furthermore, "there is no congressional power to expose for the sake of exposure"[83] and "[i]nvestigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible."[84]

The Gang of Eight Committee could issue subpoenas, as part of the legislative process, if it learns that the president has unlawfully withheld an IC program from Congress. Congressional subpoenas must "concern[ ] a subject on which legislation 'could be had.'"[85] Congress has a vested interest in ensuring that the National Security Act functions as designed. A Gang of Eight Committee subpoena could buttress Congress's ability to determine whether to implement new statutory reporting requirements. Such a subpoena would accord with the legislative purpose of Congress's subpoena power.

The Gang of Eight Committee could use both political pressure and the judiciary to enforce its subpoenas.[86] The mere issuance of a subpoena can exert considerable political pressure on the president to comply.

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81. *Id*. (quoting *Watkins*, 354 U.S. at 187).

82. *Id*. at 2032 (quoting Quinn v. United States, 349 U.S. 155, 161 (1955)).

83. *Watkins*, 354 U.S. at 200.

84. *Id.* at 187.

85. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 506 (1975) (quoting McGrain v. Daugherty, 273 U.S. 135, 177 (1927)).

86. The Gang of Eight could theoretically invoke other means to enforce their subpoenas. The long-dormant inherent contempt power allows Congress to detain and imprison a contemnor until the person complies with the subpoena. *See* TODD GARVEY, CONG. RESEARCH SERV., RL34097, CONGRESS'S CONTEMPT POWER AND THE ENFORCEMENT OF CONGRESSIONAL SUBPOENAS: LAW, HISTORY, PRACTICE, AND PROCEDURE 10 (2017). The criminal contempt statute allows "Congress to certify a contempt citation to the executive branch," thereby permitting the executive to pursue criminal charges against the contemnor. *Id*. at 1. Though the Gang of Eight Committee would be a joint committee, either house of Congress could vote to hold in contempt a witness "who refuses to testify before [the committee] or provide documents sought by the committee" after being served with the congressional subpoena. *Id.* at 4.

A recent HPSCI subpoena demonstrates how public subpoenas, related to classified matters, can effectively exert political pressure on the president. In September 2019, HPSCI Chairman Adam Schiff publicly subpoenaed the Acting Director of National Intelligence as an IC whistleblower complaint was unlawfully withheld from Congress.[87] The subpoena power enabled HPSCI to publicly exert political pressure on the president, even though the underlying matter was classified. In the subpoena's aftermath, Speaker of the House Nancy Pelosi announced a formal impeachment inquiry of the president.[88] While the HPSCI subpoena was not the sole cause of Speaker Pelosi's impeachment inquiry, "[t]he decisive event [leading to impeachment] had proved to be a whistle-blower complaint from a member of the intelligence community, the existence of which was made public on September 13, when Schiff issued a subpoena to acting Director of National Intelligence Joseph Maguire."[89] Ultimately, the House used a public subpoena about a classified matter to effectively exert political pressure on the president.

The effectiveness of political pressure on the president explains why, historically, judicial intervention was rare in congressional subpoenas of the executive branch. These disputes, "better understood as political battles with legal underpinnings," were typically adjudicated in negotiations

87. Press Release, Permanent Select Comm. on Intelligence, House of Representatives, Chairman Schiff Issues Subpoena for Whistleblower Complaint Being Unlawfully Withheld by Acting DNI from Intelligence Committees, (Sept. 13, 2019), https://intelligence.house.gov/news/documentsingle.aspx?DocumentID=688 [https://perma.cc/C4LL-DXGU].

88. Nicholas Fandos, *Nancy Pelosi Announces Formal Impeachment Inquiry of Trump*, N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/us/politics/democrats-impeachment-trump.html [https://perma.cc/GM7A-DKL4].

89. Jason Zengerle, *Inside Adam Schiff's Impeachment Game Plan*, N.Y. TIMES. MAG. (Nov. 5, 2019), https://www.nytimes.com/2019/11/05/magazine/adam-schiff-impeachment.html [https://perma.cc/DZ2F-5TSE]; *see also* Andrew Desiderio & Kyle Cheney, *Trump Nemesis Adam Schiff Holds the Keys to His Impeachment*, POLITICO (Sept. 24, 2019), https://www.politico.com/story/2019/09/24/adam-schiff-trump-impeachment-1509833 [https://perma.cc/E3GP-BZCH] ("Rep. Adam Schiff . . . is driving a narrative that could lead to Trump's impeachment . . . . It was Schiff who issued a subpoena and secured testimony from the intelligence community's top watchdog, who confirmed he had been blocked from providing details to Congress, in apparent violation of the law.").

between Congress and the president "with each side making political calculations about what fights are worth having."[90]

On the other hand, the modern Congress has sought judicial enforcement of congressional subpoenas. President Trump "vow[ed] to fight every [congressional] subpoena," departing from previous presidents "confront[ing] congressional oversight investigations run by their adversaries."[91] As a result, the House of Representatives began "going to court [against the president] at a tempo never seen before."[92] The Court recognized the shift in enforcement strategy, noting that *Mazars* "represents a significant departure from historical practice" as previously, the Supreme Court had "never considered a dispute over a congressional subpoena for the President's records."[93]

If Congress and the president cannot maintain their "tradition of negotiation and compromise" regarding congressional subpoenas, the Gang of Eight Committee may seek judicial enforcement of its subpoena.[94] The target of the subpoena will affect the legal analysis applied by a court. Because of the "'unique position' of the President," a court will only enforce a congressional subpoena against the president if it comports with the Supreme Court's four-part balancing test established in *Mazars*.[95] Courts evaluating congressional subpoenas of the president must assess the following factors.

1. The "asserted legislative purpose" should "warrant[] the significant step of involving the President and his papers."[96] Critically, the Court noted that "Congress may not rely on the President's

90. Taylor, *supra* note 74.

91. Charlie Savage, *Trump Vows Stonewall of 'All' House Subpoenas, Setting Up Fight over Powers*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/us/politics/donald-trump-subpoenas.html [https://perma.cc/HX86-BVZ8].

92. Charlie Savage & Nicholas Fandos, *The House v. Trump: Stymied Lawmakers Increasingly Battle in the Courts*, N.Y. TIMES (Aug. 13, 2019), https://www.nytimes.com/2019/08/13/us/politics/trump-house-lawsuits.html [https://perma.cc/VLV6-VLW5].

93. Trump v. Mazars USA, LLP, 140 S. Ct. 2019, 2031 (2020).

94. *Id.*

95. *Id.* at 2035 (quoting Clinton v. Jones, 520 U.S. 681, 698 (1997)).

96. *Id.*

information if other sources could reasonably provide Congress the information it needs in light of its particular legislative objective."[97]

2. The subpoena must be "no broader than reasonably necessary to support Congress's legislative objective."[98]

3. Congress should have strong evidence "to establish that a subpoena advances a valid legislative purpose."[99]

4. Finally, courts "should be careful to assess the burdens imposed on the President by a subpoena."[100]

This Note cannot predict precisely how lower courts will implement the *Mazars* balancing test—there is simply no case law yet. Nevertheless, *Mazars* reaffirms Congress's ability to subpoena executive branch officials and the president himself.

Although the judiciary provides Congress with a powerful enforcement mechanism, judicial enforcement can be a lengthy process. For example, in 2012, Attorney General Eric Holder failed to comply with a House Oversight and Government Reform Committee subpoena.[101] President Obama invoked executive privilege and ordered the Attorney General not to turn over the subpoenaed documents. The committee filed suit, authorized by a House resolution, seeking judicial enforcement of the subpoena.[102] Not until 2016, after a new Congress and a new Attorney General, did the D.C. District Court issue its opinion in *Committee on Oversight and Government Reform v. Lynch*[103] requiring the *new* Attorney General to comply with the 2012 subpoena.

Critics of the Gang of Eight Committee may argue that the efficacy of congressional subpoenas against the executive branch is stymied by the

97. *Id.* at 2035-36.

98. *Id.* at 2036.

99. *Id.*

100. *Id.*

101. *See* Jonathan Weisman & Charlie Savage, *House Finds Holder in Contempt Over Inquiry on Guns*, N.Y. TIMES (June 28, 2012) https://www.nytimes.com/2012/06/29/us/politics/fast-and-furious-holder-contempt-citation-battle.html [https://perma.cc/HK34-43U2].

102. Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013).

103. 156 F. Supp. 3d 101, 115 (D.D.C. 2016).

slow pace of judicial enforcement.[104] However, critics should not dismiss the importance of the subpoena power simply because judicial enforcement is slow. Congress has historically been successful in using political pressure, rather than the judiciary, to enforce its subpoenas. Furthermore, the modern Congress appears to be exploring creative ways to enforce Congress's subpoena power. For example, HPSCI Chairman Adam Schiff has considered reviving the inherent contempt power to fine executive branch officials who refuse to comply with congressional subpoenas.[105] Congress has demonstrated that it is unwilling to rely solely on the judiciary for subpoena enforcement. Congressional leaders can similarly seek aggressive enforcement of their subpoenas.

Congress will greatly increase its oversight of the IC by empowering the Gang of Eight to issue subpoenas. Congressional leaders are currently powerless to oversee IC programs that the president withholds from Congress. With the subpoena power, congressional leaders will finally be empowered to exert political pressure on a president who withholds IC programs from Congress.

C. Gang of Eight Lawsuits Will Meet a Court's Standing Analysis

Under this Note's proposed structure, the Gang of Eight may file suit on behalf of Congress either to enforce a subpoena or to require the president to disclose a non-covert intelligence program to the intelligence committees. Courts have consistently upheld Congress's ability to enforce congressional subpoenas through the judiciary.[106] However, it remains an

104. *See generally* Charlie Savage, *The Subpoena and Contempt Fight Between Trump and Congress, Explained*, N.Y. TIMES (May 2, 2019) ("The strategy of unabashedly stonewalling Democrats' oversight investigations raises the question of what lawmakers can do about it — and whether, even if they ultimately prevail, the court fight will take so long that the Trump team will run out the clock before the next election."), https://www.nytimes.com/2019/05/02/us/politics/subpoenas-trump-congress.html [https://perma.cc/HSD2-E8F8].

105. Morgan Chalfant, *Schiff Says Congress Weighing Hefty Fines for Trump Officials Who Evade Subpoenas*, HILL (May 10, 2019), https://thehill.com/policy/national-security/443081-schiff-says-congress-contemplating-hefty-fines-for-trump-officials [https://perma.cc/R7WQ-C8EK].

106. *See supra* Section II.B; *see also* Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 56 (D.D.C. 2008) (holding that

open question whether Congress could successfully file suit against a president who unlawfully withholds a non-covert IC program from Congress. Such a suit would likely be challenged on the basis of standing.

Whether Congress has standing to sue the president is a live and ongoing debate. Many articles already provide an effective survey of congressional standing jurisprudence.[107] This Section argues that when the president unlawfully withholds an IC program from Congress, Congress suffers an institutional injury which can be litigated through a lawsuit filed on behalf of *both* houses of Congress.

1. A Brief Overview of Congressional Standing

Article III of the Constitution provides federal courts with jurisdiction only when a dispute is a "case" or "controversy."[108] As the Supreme Court has noted, "This is a 'bedrock requirement.'"[109] Failure to meet it is fatal to litigation.[110] The Court clearly explained its current standing doctrine in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[111] There, the court held:

> [T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely

Congress's subpoena power "involves a basic judicial task—subpoena enforcement—with which federal courts are very familiar").

107. *See, e.g.*, ALISSA M. DOLAN, CONG. RESEARCH SERV., R43712, ARTICLE III STANDING AND CONGRESSIONAL SUITS AGAINST THE EXECUTIVE BRANCH (2014); Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Democracy*, 93 IND. L.J. 845 (2018).

108. U.S. CONST. art. III, § 2.

109. Raines v. Byrd, 521 U.S. 811, 818 (1997) (citation omitted).

110. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014) ("The Art. III doctrine that requires a litigant to have 'standing' to invoke the power of a federal court is perhaps the most important of these doctrines [limiting the federal judicial power].").

111. 528 U.S. 167 (2000).

> speculative, that the injury will be redressed by a favorable decision.[112]

As applied to congressional litigants, "the doctrine of standing has generally been invoked only in cases challenging executive branch actions or acts of Congress and has focused on the injury prong of standing."[113] Cases involving congressional plaintiffs can be broken down into two broad categories: (1) cases in which individual members of Congress file suit and (2) cases in which Congress as an institution (either as a house or committee) files suit.[114]

Individual congressional members can only sue the executive under narrow circumstances because "individual members lack standing to assert the institutional interests of a legislature."[115] Claims by individual members of Congress of injuries that affect "all members of Congress in the same broad and undifferentiated manner" have been held insufficiently "'personal' or 'particularized'" to meet Article III's concreteness requirement.[116] Such injuries are "institutional" and require that Congress, or an appropriately authorized agent, files suit.[117]

The Supreme Court has recently emphasized that, when a bicameral legislature suffers an institutional injury, both houses of the legislature must file suit together to meet a court's standing analysis. In 2015, the Supreme Court found that the Arizona legislature had standing to sue over a ballot initiative that gave redistricting authority to an independent commission. Important to the Court's standing analysis was the fact that the Arizona Legislature was "an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes *in both of its chambers*."[118]

The Court reinforced this point in *Virginia House of Delegates v. Bethune-Hill*.[119] It held that the Virginia House of Delegates did not have standing in

112. *Laidlaw*, 528 U.S. at 180-81 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

113. DOLAN, *supra* note 107, at 2.

114. *Id*. at 1.

115. Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945, 1953-54 (2019).

116. Kucinich v. Bush, 236 F. Supp. 2d 1, 7 (D.D.C. 2002).

117. *Id.*

118. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2664 (2015) (emphasis added).

119. *Bethune-Hill*, 139 S. Ct. at 1953-54.

part because "a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole."[120] *Bethune-Hill* makes it highly unlikely that, under the status quo, either HPSCI or SSCI can sue the president for withholding an IC program from Congress, as neither is authorized to speak on behalf of Congress.

2. When the President Withholds an IC Program, Congress Suffers an Institutional Injury that Cannot Be Remedied Through the Legislative Process

Congress suffers an institutional injury when the president unlawfully withholds an IC program from Congress. This is true even when only members of HPSCI and SSCI, but not every member of Congress, were entitled to the information.

In *Cummings v. Murphy*,[121] seventeen members of the House Oversight Committee alleged that the General Services Administration (GSA) had unlawfully withheld information regarding GSA's lease agreement with Trump Old Post Office LLC. The court held that the injury suffered by committee members was "institutional" because it was "rooted in a right granted to them as Members of Congress."[122] Even though the deprivation of the right to information was "not necessarily shared 'equally' by 'every member of the Committee, let alone every [M]ember,'"[123] the injury could not be considered personal because the plaintiffs had not "been deprived of something to which [they] personally are entitled."[124] Similarly, when the president withholds an IC program from the congressional intelligence committees, Congress suffers an institutional injury.

Congress can only file suit to remedy an institutional injury if it cannot remedy the alleged harm through the legislative process.[125] Critics of this Note's proposal may argue that either the Constitution's Speech and Debate

120. *Id.*

121. Cummings v. Murphy, 321 F. Supp. 3d 92, 97-99 (D.D.C. 2018).

122. *Id*. at 108.

123. *Id.*

124. *Id.* at 109.

125. Blumenthal v. Trump, 335 F. Supp. 3d 45, 61 (D.D.C. 2018), *rev'd on other grounds*, 949 F.3d 14 (D.C. Cir. 2020) ("D.C. Circuit precedent teaches that individual Members of Congress do not have standing to sue the Executive Branch when their institutional injury is such that they can obtain their remedy in Congress.").

Clause[126] or the appropriations process could provide Congress with a legislative remedy. Neither of these processes are adequate. Therefore, Congress should be permitted to seek judicial redress.

Some have argued that the Speech and Debate Clause permits any member of Congress to disclose classified information on the floor of the House or Senate.[127] In theory, this could allow congressional leaders to disclose unlawfully withheld IC programs to Congress. However, while members of Congress may be protected from legal consequences, "they can definitely be punished by Congress if they violate a rule."[128] The House (under House Rule X(11)(g)) and the Senate (under Senate Resolution 400) have explicit rules regarding how classified information can be released over the president's objection. The Constitution permits the House and the Senate to "determine the Rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."[129] Congressional leaders could face punishment if they were to invoke the Speech and Debate Clause. Therefore, they are unable to disclose IC programs unlawfully withheld from the intelligence committees without fear of reprimand. The Speech and Debate Clause does not provide a remedy through the legislative process.

Alternatively, critics may argue that Congress's appropriations power always provides it with a legislative means of controlling the executive. This argument is unpersuasive. HPSCI and SSCI cannot regulate the IC through the intelligence appropriations process if they are wholly unaware of an IC program. Even if the Gang of Eight is briefed on a program, its members cannot effectively argue for changes in IC appropriations without unlawfully disclosing the IC program itself. Permitting congressional leaders to seek vague limits within an appropriations bill does not amount to a legislative remedy.

When the president withholds an IC program from the congressional intelligence committees, Congress suffers an institutional injury that cannot

126. U.S. CONST. art I, § 6, cl. 6.

127. *See, e.g.*, Bruce Ackerman, *Breach or Debate*, FOREIGN POL'Y (Aug. 1, 2013), https://foreignpolicy.com/2013/08/01/breach-or-debate [https://perma.cc/WC3B-Z7FS].

128. Kel McClanahan, *Trump's Ability to Classify Mueller Report Is Greater Threat Than Executive Privilege*, JUST SECURITY (Sept. 17, 2018), https://www.justsecurity.org/60751/trump-claiming-executive-privilege-hide-mueller-report-real-threat-classification-is [https://perma.cc/R5N3-V4CG].

129. U.S. CONST. art. I, § 5.

be remedied through the legislative process. Under the status quo, neither HPSCI, SSCI, nor the Gang of Eight can file suit on behalf of Congress. The Gang of Eight Committee would empower congressional leaders to successfully file suit when the president withholds an IC program from Congress.

3. The Gang of Eight Committee Is the Vehicle Most Likely to Meet a Court's Standing Analysis

Gang of Eight lawsuits could reassert Congress's role in overseeing the IC. To succeed, these lawsuits must prove they are constitutionally supported, prudentially practical, and effectuate actual change. Many cases support the notion that when legislatures file suit as "institutional plaintiff[s] asserting an institutional injury," they meet Article III's injury-in-fact requirement.[130] In *United States v. AT&T*,[131] the D.C. Circuit permitted the chairman of a congressional committee, who was authorized to file suit on behalf of Congress, to file suit as "the House *as a whole* has standing to assert its investigatory power."[132] Courts have frequently applied the reasoning underlying *AT&T* to permit congressional lawsuits made on behalf of Congress against the executive.[133]

Beyond the requirements of constitutional standing, courts consider "the 'prudential' concern of unnecessarily intruding on an inter-branch political dispute."[134] This further limitation is "founded in concern about the proper—and properly limited—role of the courts in a democratic

130. *See, e.g.*, Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2664 (2015).

131. 551 F.2d 384 (D.C. Cir. 1976).

132. *Id.* at 391 (emphasis added).

133. *See, e.g.*, Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 21 (D.D.C. 2013) (holding that a House committee had standing to enforce a subpoena because the action was "a suit specifically authorized by a legislative body to redress a clearly delineated, concrete injury to the institution"); Comm. on the Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 70 (D.D.C. 2008) (holding that a committee duly authorized by the House had standing to enforce a subpoena and that "the Court has never held that an institution, such as the House of Representatives, cannot file suit to address an institutional harm").

134. Adam L. Blank, Raines v. Byrd: *A Death Knell for the Congressional Suit*, 49 MERCER L. REV. 609, 613 (1998).

society."[135] As the Court has noted, "the law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers."[136] In determining whether Gang of Eight lawsuits are prudentially supported, courts will likely consider whether the actions were authorized by Congress, Congress retains other legislative tools to rectify the claimed injury, and the lawsuits are historically supported. Gang of Eight lawsuits will not be barred based on any of these analyses.

In amending the House and Senate's standing rules to create the Gang of Eight Committee, it is critical that both houses of Congress explicitly authorize the Gang of Eight to file suit on behalf of Congress. "[C]ourts have found congressional authorization to be the 'key' distinguishing factor" moving a case "to the permissible category of an institutional plaintiff asserting an institutional injury."[137] By explicitly authorizing the Committee to file suit, Congress will assuage courts' concern that eight members are embroiling all of Congress in an inter-branch dispute without authorization.

Courts may be hesitant to permit lawsuits when Congress retains other legislative tools to address the claimed injury. D.C. Circuit precedent indicates that members of Congress "do not have standing to sue the Executive Branch when their institutional injury is such that they can obtain their remedy in Congress."[138] Congress exerts most of its influence over the IC through the intelligence appropriations process. Both HPSCI and SSCI

135. Bennett v. Spear, 520 U.S. 154, 162 (1997) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)); *see also* Blank, *supra* note 134, at 617 ("In cases involving a departure from mandatory procedure, the plaintiff might have constitutional standing per se but still fail for 'prudential' reasons if the reviewing court determined that adjudication would unnecessarily encroach upon an inter-branch political dispute.").

136. Allen v. Wright, 468 U.S. 737, 752 (1984).

137. Cummings v. Murphy, 321 F. Supp. 3d 92, 106 (D.D.C. 2018) (quoting *Miers*, 558 F. Supp. 2d at 71); *see also* Raines v. Byrd, 521 U.S. 811, 829 (1997) (dismissing a congressional suit and noting that "[w]e attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action").

138. Blumenthal v. Trump, 335 F. Supp. 3d 45, 61 (D.D.C. 2018) *rev'd on other grounds*, 949 F.3d 14 (D.C. Cir. 2020). The District Court for the District of Columbia recently dismissed a congressional lawsuit against the Trump administration in which the court found importance in the fact that "the House retains the institutional tools necessary to remedy any harm caused to this power by the Administration's actions." U.S. House of Representatives v. Mnuchin, 379 F. Supp. 3d 8, 20 (D.D.C. 2019).

"use their fiscal control to obtain the intelligence agencies' compliance when necessary,"[139] and Congress still "views the appropriations process as one of its most important forms of oversight."[140] This right is completely abrogated when the president withholds IC programs from the intelligence committees. If Congress lacks any ability to exert influence over the IC through the appropriations process, "litigation may provide the only means for Congress to vindicate its constitutional role."[141]

Courts have also frequently looked at historical practice to determine whether to permit a congressional lawsuit. In other words, if Congress typically resolves an issue through the political process, courts may be hesitant to permit a congressional lawsuit.[142] Gang of Eight lawsuits protect Congress's investigatory powers. Though Gang of Eight lawsuits are, naturally, a novel invention, Congress's ability to protect its investigatory powers through the judiciary is historically supported.

The Founding Generation understood that Congress's investigatory powers were important. President Washington and his cabinet knew that "the House could conduct an inquest, institute inquiries, and call for papers."[143] In 1927, the Supreme Court found that a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."[144] Decades later, the Court asserted that Congress's investigatory power is "inherent in

139. James S. Van Wagenen, *A Review of Congressional Oversight: Critics and Defenders*, CIA (Apr. 14, 2007), https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol40no5/pdf/v40i5a11p.pdf [https://perma.cc/DVN6-8QSP].

140. Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 MARQ. L. REV. 881, 938 (2014).

141. McKaye Neumeister, Note, *Reviving the Power of the Purse: Appropriations Clause Litigation and National Security Law*, 127 YALE L.J. 2512, 2549 (2018).

142. In *Mnuchin*, the District Court for the District of Columbia dismissed a lawsuit brought by the House of Representatives alleging that President Trump was misappropriating funds for a border wall. In its dismissal, the court found "the lack of historical examples telling . . . . The House thus 'lack[s] support from precedent,' and 'historical practice appears to cut against [it] as well.'" *Mnuchin*, 379 F. Supp. 3d at 19 (quoting Raines v. Byrd, 521 U.S. 811, 826 (1997)).

143. Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 598-99 (2014).

144. McGrain v. Daugherty, 273 U.S. 135, 175 (1927).

the legislative process" and is "broad."[145] As the District Court for the District of Columbia recently noted, "the House's power to investigate has been enforced with periodic help from federal courts."[146] In litigating Gang of Eight lawsuits, Congress should be mindful to reinforce their historical basis.

Gang of Eight lawsuits do not seek to declare intelligence programs unlawful—they simply ask courts to require the president to keep Congress informed so that it can conduct its investigatory and oversight roles. These lawsuits are likely to meet a court's standing analysis as they will permit congressional leaders to file suit on behalf of both houses of Congress when Congress suffers an institutional injury. Gang of Eight lawsuits are historically supported and comport with the Court's modern legislative standing jurisprudence.

PART III: COUNTERARGUMENTS & RESPONSES

Congressional lawsuits against the executive are no panacea for improving congressional oversight. This Part acknowledges and addresses many of the counterarguments that this Note's proposal must address. Before enacting any structural changes to the Gang of Eight, Congress must consider the practicality of the committee and evaluate how the president will respond to its creation.

A. The Gang of Eight Committee Is Politically Feasible

This Note cannot guarantee that the Gang of Eight Committee will be enacted by Congress. Nearly any proposed reformation of Congress's oversight of the IC will face political pushback. As Professor Alan Abramowitz explains, "it's very hard to get past [the partisan divide] because Democrats and Republicans have such different perspectives" on congressional oversight.[147] Nevertheless, Congress should pursue this Note's proposal. Security experts have observed that the election of President Biden, who hails from a different political party than the outgoing administration, offers "an opportunity for systematic reevaluation of

145. Watkins v. United States, 354 U.S. 178, 187 (1957).

146. *Mnuchin*, 379 F. Supp. 3d at 17.

147. Susan Milligan, *Drowning in Bitter Partisanship*, U.S. NEWS & WORLD REP. (June 23, 2017), https://www.usnews.com/news/the-report/articles/2017-06-23/partisanship-drowns-out-bipartisan-oversight [https://perma.cc/DXV8-68TL].

national security matters."[148] The Gang of Eight Committee would be less politically costly to legislators than previous efforts to reform the National Security Act. Furthermore, in the wake of the Trump administration and in a new era of divided government, the Gang of Eight Committee may find support from both Democrat and Republican lawmakers. Congress may adopt the Gang of Eight Committee as a response to President Trump's quest to impede congressional oversight and limit legislative standing. Additionally, the Gang of Eight Committee will improve congressional oversight of the Biden administration's handling of the IC.

Individual members of Congress are incentivized to act in whatever manner will support their reelection.[149] Unfortunately, electoral incentives discourage members of Congress from expending significant political capital on intelligence issues. Congressional members' focus on reelection steers them to "focus on domestic policy issues, which offer greater political benefits and lower political costs" than intelligence oversight.[150]

Compared to other reforms, such as amending the statutory language of the National Security Act, the Gang of Eight Committee is less politically costly because it does not require Congress to navigate the president's veto power. Presidential vetoes are a powerful deterrent against congressional action because Congress overturns presidential vetoes less than five percent of the time.[151] In Section I.D, this Note demonstrated how Presidents Bush and Obama successfully used the threat of the veto power to prevent amendments to the National Security Act. But Congress retains

148. David Kris, *What Hard National Security Choices Would a Biden Administration Face?*, LAWFARE (May 27, 2020, 9:31 AM), https://www.lawfareblog.com/what-hard-national-security-choices-would-biden-administration-face [https://perma.cc/V5MX-WGXZ].

149. David Mayhew argues that members of Congress are "single-minded seekers of reelection." DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (2d ed. 2004).

150. Amy B. Zegart, *The Roots of Weak Congressional Intelligence Oversight*, HOOVER INST. 6 (2011), https://www.hoover.org/sites/default/files/research/docs/future-challenges-zegart.pdf [https://perma.cc/LW3N-5YSJ].

151. *See* Andrew Glass, *For the First Time, Congress Overrides a Presidential Veto, March 3, 1845*, POLITICO (Mar. 3, 2019), https://www.politico.com/story/2019/03/03/this-day-in-politics-march-3-1845-1196996 [https://perma.cc/NF79-4G6C]; *see also* Rebecca E. Deen & Laura W. Arnold, *Veto Threats as a Policy Tool: When to Threaten?*, 32 PRESIDENTIAL STUD. Q. 30, 30 (2002) ("One of the most powerful tools of the President in the policy-making process is the veto.").

plenary power over its standing rules, so the president cannot veto the Gang of Eight Committee. This makes the Committee a particularly attractive option for members of Congress who are uninterested in expending significant time and political capital on IC oversight.

President Trump's efforts to impair congressional oversight and limit legislative standing may increase congressional support of the Gang of Eight Committee. President Trump filed suit to block a House Oversight and Reform Committee Subpoena,[152] filed suit to prevent HPSCI and the House Financial Services Committee from subpoenaing Deutsche Bank and Capital One,[153] and filed suit against the House Ways and Means Committee to block disclosure of his tax returns.[154] In response, House Democrats introduced legislation that would, among other reforms, require courts to expedite litigation when the president refuses to comport with a congressional subpoena.[155] Congress has responded to the Trump Administration's attempts to impair congressional oversight by developing innovative methods to protect Congress's investigatory power. The Gang of Eight committee is yet another viable alternative for a Congress eager to protect its oversight power.

Furthermore, through enacting the Gang of Eight Committee, Congress can respond to the Trump administration's attempts to narrow legislative standing. In *Virginia House of Delegates v. Bethune-Hill*,[156] the United States filed an amicus brief arguing that a legislature asserts "a cognizable

152. Andrew Desiderio, *Trump Sues to Block House Subpoena of Financial Records*, POLITICO (Apr. 22, 2019), https://www.politico.com/story/2019/04/22/trump-sues-oversight-committee-chairman-finance-records-1284995 [https://perma.cc/NB5R-D7S7].

153. Maggie Haberman, William K. Rashbaum & David Enrich, *Trump Sues Deutsche Bank and Capital One to Block Compliance with Subpoenas*, N.Y. TIMES (Apr. 29, 2019), https://www.nytimes.com/2019/04/29/us/politics/trump-lawsuit-deutsche-bank.html [https://perma.cc/E32B-5VL3].

154. Hadley Baker, *Trump Files Suit Against House Ways and Means Committee and New York State Officials*, LAWFARE (July 23, 2019, 4:13 PM), https://www.lawfareblog.com/trump-files-suit-against-house-ways-and-means-committee-and-new-york-state-officials [https://perma.cc/2AU9-GJXP].

155. *See* Nicholas Fandos, *With Proposal to Curb Presidential Power, Democrats Eye an Era After Trump*, N.Y. TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/us/politics/democrats-government-overhaul-trump.html [https://perma.cc/X98H-28VZ].

156. 139 S. Ct. 1945 (2019).

institutional injury only in rare circumstances."[157] In its brief, the Trump administration acknowledged that it was concerned that, if the Court were to find the Virginia House had standing, it "would open the door to any number of lawsuits by state legislative bodies and the Houses of Congress." The Trump administration's willingness to involve itself in *state* legislative standing issues is symptomatic of the administration's general concern about legislative standing. Gang of Eight lawsuits are a natural and effective response to a president who seeks to limit legislative standing.

Some Republican lawmakers may be unlikely to support a proposal that is seen as merely a response to President Trump. President Trump has historically retained significant popularity within the Republican Party[158] and Republican members of Congress may be concerned that they will face a primary challenger if they are seen as disloyal to him.[159] But after supporters of President Trump stormed the U.S. Capitol,[160] Republican politicians have begun to distance themselves from President Trump.[161]

157. Brief for the United States as Amicus Curiae in Support of Neither Party at 8, Va. House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019) (No. 18-281), 2019 WL 130276.

158. *See, e.g.*, Amina Dunn, *Trump's Approval Ratings So Far Are Unusually Stable – and Deeply Partisan*, PEW RESEARCH CTR. (Aug. 24, 2020), https://www.pewresearch.org/fact-tank/2020/08/24/trumps-approval-ratings-so-far-are-unusually-stable-and-deeply-partisan [https://perma.cc/7MFJ-65ER].

159. *See, e.g.*, Sergio Martinez-Beltran, *Senate Race Candidates Fight to Show Loyalty to Trump at Tennessee's Primary*, NAT'L PUB. RADIO (Aug. 5, 2020), https://www.npr.org/2020/08/05/899230745/senate-race-candidates-fight-to-show-loyalty-to-trump-at-tennessees-primary [https://perma.cc/RX9V-YALN].

160. *See* Rebecca Tan et al., *Trump Supporters Storm U.S. Capitol, with One Woman Killed and Tear Gas Fired*, WASH. POST (Jan. 6, 2021) https://www.washingtonpost.com/local/trump-supporters-storm-capitol-dc/2021/01/06/58afc0b8-504b-11eb-83e3-322644d82356_story.html [https://perma.cc/TXV9-LUAK].

161. Senator Mitt Romney described this event as an "insurrection" incited by President Trump. *See* Press Release, Sen. Mitt Romney, Romney Condemns Insurrection at U.S. Capitol (Jan. 6, 2021), https://www.romney.senate.gov/romney-condemns-insurrection-us-capitol [https://perma.cc/W93A-2Y64]. North Carolina Republican Senator Richard Burr stated that "President [Trump] bears responsibility for today's events by promoting the unfounded conspiracy theories that have led to this point." *See* Press Release, Sen. Richard Burr, Senator Burr Statement on Congressional Vote to Certify the 2020 Presidential Election (Jan. 6, 2021),

Moreover, the election of President Biden[162] may encourage Republican legislators to support the Gang of Eight Committee. Republican lawmakers have demonstrated their interest in investigating any alleged—if factually dubious—misconduct by President Biden.[163] Republican lawmakers can commit to effective oversight of the incoming Biden administration by adopting this Note's proposal.

Under Presidents Bush and Obama, Congress unsuccessfully sought to amend the National Security Act to increase congressional oversight of the IC. Congress should consider reform efforts that are not susceptible to the president's veto power. Ultimately, when compared to other proposals to reform congressional oversight, such as amending the National Security Act, this Note's proposal would be less politically costly, allow Congress to better

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https://www.burr.senate.gov/press/releases/senator-burr-statement-on-congressional-vote-to-certify-the-2020-presidential-election [https://perma.cc/RMC6-UR3V]. And Nebraska Republican Senator Ben Sasse stated that the U.S. Capitol "was ransacked while the leader of the free world cowered behind his keyboard — tweeting against his vice president for fulfilling the duties of his oath to the Constitution." Colby Itkowitz & Paulina Firozi, *Democrats, Republicans Blame Trump for Inciting 'Coup' as Mob Storms Capitol*, WASH. POST (Jan. 6, 2021) https://www.washingtonpost.com/politics/2021/01/06/democrats-republicans-reaction-trump [https://perma.cc/6AER-XJ3H]. But see Karen Yourish et al., *Which Members of Congress Objected to Certifying Biden's Victory?*, N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/interactive/2021/01/07/us/elections/electoral-college-biden-objectors.html [https://perma.cc/K4ZK-QXCU] (listing the Republican lawmakers who voted to sustain objections to certifying the results of the 2020 presidential election).

162. Jonathan Martin & Alexander Burns, *Biden Wins Presidency, Ending Four Tumultuous Years Under Trump*, N.Y. TIMES (Nov. 7, 2020), https://www.nytimes.com/2020/11/07/us/politics/biden-election.html [https://perma.cc/WK8Q-2MXW].

163. Senate Republicans have already investigated corruption allegations against President Biden and his son. *See* Nicholas Fandos, *Republican Inquiry Finds No Evidence of Wrongdoing by Biden*, N.Y. TIMES (Sept. 23, 2020), https://www.nytimes.com/2020/09/23/us/politics/biden-inquiry-republicans-johnson.html [https://perma.cc/TX2T-ANFR]. And in the aftermath of the 2020 presidential elections, "GOP senators . . . discuss[ed] probes into the 2020 election." Lauren Fox & Jeremy Herb, *After Biden Win, GOP Eyes Investigations into the 2020 Election*, CNN (Nov. 10, 2020), https://www.cnn.com/2020/11/10/politics/republican-congress-investigation-senate/index.html [https://perma.cc/5PBN-SDUR].

oversee the IC, and is a natural response for Congress to protect its institutional interests.

B. Congressional Leaders Will Learn When the President Unlawfully Withholds IC Programs from Congress

The Gang of Eight cannot issue subpoenas nor file lawsuits if congressional leaders are wholly unaware that an IC program that has been unlawfully withheld from Congress. Some critics may question whether congressional leaders will know whether the president is withholding an IC program. Due to leaks and formal whistleblower complaints, it is highly unlikely that a president could permanently withhold an IC program from Congress.

Whistleblowers during the Bush, Obama, and Trump administrations inhibited the executive's efforts to withhold IC programs from Congress. In 2002, President Bush approved the NSA's mass surveillance of calls and e-mails of persons within the United States without court-approved warrants. Contrary to his statutory obligations, President Bush did not inform the congressional intelligence committees. In December 2005, after sitting on the story for thirteen months,[164] the *New York Times* revealed the NSA's program due to a whistleblower from within the IC.[165]

During President Obama's administration, Chelsea Manning, an Army intelligence analyst, provided hundreds of thousands of classified intelligence-related documents to WikiLeaks in 2010.[166] And in June 2013, the *Guardian* revealed that, under President Obama, the NSA was secretly collecting the telephone records of millions of American customers of

164. Eric Lichtblau, *The Education of a 9/11 Reporter: The Inside Drama Behind the Times' Warrantless Wiretapping Story*, SLATE (Mar. 26, 2008, 7:08 PM), https://slate.com/news-and-politics/2008/03/the-inside-drama-behind-the-warrantless-wiretapping-story.html [https://perma.cc/TR4K-ZRM9].

165. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html [https://perma.cc/A7T9-7KWS].

166. Thom Shanker, *Loophole May Have Aided Theft of Classified Data*, N.Y. TIMES (July 8, 2019), https://www.nytimes.com/2010/07/09/world/09breach.html [https://perma.cc/NYJ2-VH95].

Verizon.[167] Edward Snowden, a former systems analyst at the CIA, leaked the NSA's program.[168]

Most recently, in September 2019, a CIA officer stationed at the White House filed a formal whistleblowing complaint, alleging that President Trump urged the Ukrainian president to investigate former Vice President Joe Biden.[169] That this complaint was provided to Congress and eventually made public demonstrates that formal whistleblower complaints are treated seriously within the IC. As Acting Director of National Intelligence Joseph Maguire stated, "We must protect those who demonstrate the courage to report alleged wrongdoing, whether on the battlefield or in the workplace."[170]

Leaks and whistleblowers make it difficult for the president to effectively hide an IC program in perpetuity. This is important in assessing both the effectiveness of the Gang of Eight Committee and in considering how the president might respond to its creation. Some critics may question whether the president could retaliate against Congress by withholding all covert and non-covert IC operations from Congress, but leaks and whistleblower complaints minimize the risk that the president will pursue strategy. Ultimately, congressional leaders will likely eventually learn of an IC program, even if the president attempts to withhold it from Congress, because of leaks and whistleblower complaints.

167. Glenn Greenwald, *NSA Collecting Phone Records of Millions of Verizon Customers Daily*, GUARDIAN (Jun. 6, 2013), https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order [https://perma.cc/5SLF-Z6F6].

168. *Profile: Edward Snowden*, BBC (Dec. 16, 2013), https://www.bbc.com/news/world-us-canada-22837100 [https://perma.cc/ABR3-3Q4Z].

169. Michael D. Shear, *White House Tried to 'Lock Down' Ukraine Call Records, Whistle-Blower Says*, N.Y. TIMES (Sept. 27, 2019), https://www.nytimes.com/2019/09/26/us/politics/whistleblower-complaint-released.html [https://perma.cc/T4AH-R6NX].

170. Julian E. Barnes et al., *White House Knew of Whistle-Blower's Allegations Soon After Trump's Call with Ukraine Leader*, N.Y. TIMES (Sept. 26, 2019), https://www.nytimes.com/2019/09/26/us/politics/who-is-whistleblower.html [https://perma.cc/8S9Q-JCGS].

C. Courts Will Not Simply Defer to the Executive When Adjudicating Gang of Eight Lawsuits

Courts are highly deferential to the executive branch on issues of national security.[171] History demonstrates that when members of Congress sue the president over a national security issue, the suits are often dismissed on procedural grounds.[172] Critics of Gang of Eight lawsuits may allege that courts will simply defer to the executive because the lawsuits pertain to national security matters.

This argument is not unfounded. Many judges believe that "wartime, emergencies, or national security matters" require judges to afford "an additional degree of deference to the executive branch."[173] Some judges have been persuaded by the argument that electorally accountable branches of government ought to make national security decisions.[174] Others have argued that in exigent circumstances "decisions relating to national security must be made quickly" and the president ought to have the requisite flexibility to make decisions to protect the nation.[175]

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171. *See* W. Neil Eggleston & Amanda Elbogen, *The Supreme Court Should Rethink Deference to the Executive in the Travel Ban Case*, JUST SECURITY (Apr. 19, 2018), https://www.justsecurity.org/55059/supreme-court-rethink-deference-executive-travel-ban-case [https://perma.cc/2F98-ETJT] ("Courts ordinarily defer to the judgments of the Executive Branch in areas of national security and foreign policy, and rightly so.").

172. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979) (After granting cert on this challenge to President Carter's nullification of the Sino-American Mutual Defense Treaty, the Court heard no oral arguments, vacated the D.C. Circuit's opinion, and ordered the district court to dismiss the case.); EPA v. Mink, 410 U.S. 73 (1973) (denying an attempt by members of Congress attain top-secret information about an underground nuclear test under FOIA); United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1382 (D.C. Cir. 1984) (finding lack of standing where a member of Congress and others challenged the legality of Executive Order No. 12,333, which established an intelligence gathering framework); Harrington v. Bush, 553 F.2d 190, 199 (D.C. Cir. 1977) (finding that a member of the House lacked standing in a lawsuit to enjoin the CIA from engaging in illegal activities).

173. Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 997 (2018).

174. *Id.* at 1000.

175. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1424 (2009).

Congressional leaders can effectively respond to each of these claims. Gang of Eight lawsuits do not require courts to rule on the legality of IC programs. Instead, these lawsuits simply ask courts to determine whether the president lawfully withheld an IC program from Congress. Courts are more likely to permit these lawsuits due to their narrow ambit.

Judicial deference to the executive "is not carte blanche" and courts "face a perpetual dilemma of how to provide a judicial check against truly improper action without hamstringing or unduly delaying workable government."[176] Recently, in *Department of Commerce v. New York*,[177] Chief Justice Roberts noted that courts can be less deferential to the executive branch when plaintiffs have made a "strong showing of bad faith or improper behavior" on the part of the executive. Gang of Eight lawsuits allege that the executive is acting unlawfully, which may encourage courts to be less deferential to the president.

Furthermore, courts may be encouraged to support congressional oversight of the IC given the American public's increasing consternation over the War on Terror. This Note proposes Gang of Eight lawsuits at a time in which the United States is involved in a "War Without End."[178] As a result of the War on Terror, the American public has become "tired of the failures of [the United States'] militarized foreign policy."[179] "Judges are not immune from popular opinion . . . and can face real consequences when issuing decisions that are manifestly contrary to public will."[180] The public's increasing frustration with the War on Terror may augur against complete deference to the executive on national security matters.

Finally, congressional leaders can effectively argue that Gang of Eight lawsuits will not impair the president's ability to quickly and unilaterally respond to exigent national security events. Because these lawsuits do not

176. David A. Martin, *Executive Discretion and Judicial Deference After the Census Case: The Chief Justice's Tightrope*, LAWFARE (Jul. 23, 2019, 12:06 PM), https://www.lawfareblog.com/executive-discretion-and-judicial-deference-after-census-case-chief-justices-tightrope [https://perma.cc/PBB4-DQ7W].

177. 139 S. Ct. 2551, 2574 (2019).

178. C. J. Chivers, *War Without End*, N.Y. TIMES MAG. (Aug. 8, 2018), https://www.nytimes.com/2018/08/08/magazine/war-afghanistan-iraq-soldiers.html [https://perma.cc/E4KE-D8D4].

179. Stephen Miles, *Americans Are Sick of Endless War*, NATION (June 21, 2018), https://www.thenation.com/article/americans-sick-endless-war [https://perma.cc/8ZBR-VBLQ].

180. Scott M. Sullivan, *Judicial Deference and Democratic Values*, 53 TULSA L. REV. 363, 368 (2018).

ask courts to rule on the legality of the IC program, courts need not worry about improperly impeding IC programs critical to national security.

D. The Gang of Eight Committee Will Not Undermine HPSCI and SSCI's Role in Overseeing the IC

The creation of the Gang of Eight Committee will not undermine HPSCI and SSCI's role in overseeing the IC. Critics of this Note's proposal may contend that, after the Committee is created, the president may consider replacing intelligence programs with military programs to impede congressional oversight. Alternatively, critics may allege that the Committee will undermine the relative importance of HPSCI and SSCI. Neither criticism is accurate. Under this Note's proposal, HPSCI and SSCI will retain their role regulating the American intelligence community.

The creation of the Gang of Eight Committee will not incentivize the president to replace IC programs with military programs. Surely, the president likely has the ability to authorize at least some IC programs under Title 10 (which authorizes military operations) rather than Title 50 (which authorizes most intelligence programs).[181] However, Title 50 programs often provide the president with greater statutory authority to withhold sensitive operations from Congress.[182] Furthermore, members of the

181. Since 9/11, "military and intelligence activities [have become] increasingly integrated." MICHAEL E. DEVINE & HEIDI M. PETERS, CONG. RESEARCH SERV., R45175, COVERT ACTION AND CLANDESTINE ACTIVITIES OF THE INTELLIGENCE COMMUNITY: SELECTED DEFINITIONS IN BRIEF 4 (2018). Further, "the differentiation in the purview between military and CIA operations is not always clear." J. Robert Kane, *Covert Action, Military Operations and the DOD—CIA Debate*, REAL CLEAR DEF. (Aug. 9, 2018), https://www.realcleardefense.com/articles/2018/08/09/covert_action_military_operations_and_the_dodcia_debate_113701.html [https://perma.cc/7TG4-KL6T]. The increasing similarity between many Title 10 "military" activities and Title 50 intelligence activities empowers the executive with significant flexibility. For example, the military can conduct Operational Preparation of the Environment (OPE) operations that are often seen as a "pseudo-covert action" that is authorized under Title 10. *See* Kane, *supra* note 181. HPSCI has expressed concern that there is a "blurred distinction between the intelligence-gathering activities carried out by the [CIA] and the clandestine operations of the [DOD]." H.R. REP. NO. 111-186, at 48 (2009).

182. For example, under 10 U.S.C. § 130(f), the Secretary of Defense is required to inform the congressional defense committees of "any sensitive military operation conducted under this title no later than 48 hours following such

intelligence committees typically have less experience in overseeing the IC compared with other oversight committees.[183] Because the president retains strong incentives to continue authorizing intelligence programs through Title 50, HPSCI and SSCI's oversight capacity will not be diminished.

Alternatively, critics of the Gang of Eight Committee may argue that, by formalizing the Gang of Eight, Congress may reduce the relative importance of the congressional intelligence committees. Such arguments ignore the overall purpose of the Committee: ensuring HPSCI and SSCI are fully informed about IC programs. The Committee will not be empowered to enact legislation or interfere with HPSCI and SSCI's intelligence appropriations process. And, as mentioned in Section II.C.3, Congress exerts most of its influence over the IC through the intelligence appropriations process. If congressional leaders can ensure that HPSCI and SSCI are fully informed of the scope of IC programs, the intelligence committees will be better able to regulate the IC through the appropriations process.

CONCLUSION

The "great gulf between the interbranch cooperation prescribed by the Constitution and the current reality of unilateral executive action" in issues of national security indicates that Congress may need to be creative to reassert its oversight role over the IC.[184] Congress is unlikely to frequently file Gang of Eight lawsuits. Typically, disputes between Congress and the president "have been resolved through negotiation and political

operation." 10 U.S.C. § 130(f). Sensitive military operations include operations conducted by military personnel outside a declared theater and sensitive military cyber operations. DEVINE & PETERS, *supra* note 181. Unlike a Title 50 operation, these operations cannot be withheld from congress or briefed to congressional leaders, but not the entire defense committee.

183. HPSCI has committee-specific term limits that greatly reduce the relative expertise of the committee members. *See* Zegart, *supra* note 150, at 10 ("Not surprisingly, term limits have created substantial experience gaps between the intelligence committees and Congress's other oversight committees."). Furthermore, congressional members have far more experience working with the Department of Defense than the IC. While the armed services committees have typically been comprised of more than one-third veterans, Congress rarely has any members with experience in the IC. *Id.* at 6.

184. Neumeister, *supra* note 141, at 2530.

accommodation, without resort to the judicial process."[185] Nevertheless, Congress should consider all possibilities in increasing congressional oversight of the IC.

Under the status quo, the Gang of Eight is essentially powerless to counter the president's decision to unlawfully withhold non-covert IC programs from the intelligence committees. While some reform (such as the removal of the Gang of Eight carveout) may be preferable to congressional lawsuits, Congress must act strategically and acknowledge that its avenues for reform are severely limited by the presidential veto.

Gang of Eight lawsuits provide Congress with a powerful regulatory tool. These lawsuits can constrain executive power and can signal to the American public that congressional leaders are using every tool possible to constrain unlawful presidential action. Furthermore, Gang of Eight subpoenas can empower congressional leaders to better understand ongoing intelligence programs and to exact a political cost on the executive's decision to withhold IC programs from Congress.

This Note does not propose (and certainly cannot produce) a complete solution to Congress's oversight problems. Nevertheless, the Gang of Eight Committee is an oversight tool that can, at least on the margins, substantively improve congressional oversight of the most sensitive IC programs.

In accordance with Justice Jackson's traditional *Youngstown* analysis of presidential power, the president often operates "in absence of either a congressional grant or denial of authority."[186] When working in this "zone of twilight . . . congressional inertia, indifference or quiescence may . . . enable, if not invite, measures on independent presidential responsibility."[187] Justice Jackson's widely adopted concurrence makes clear that the president's powers are not fixed, but "fluctuate, depending upon their disjunction or conjunction with those of Congress."[188]

Courts often consider historic norms between Congress and the president in adjudicating disputes between the co-equal branches of government. If the executive continues to advocate for a narrowing of legislative standing, and Congress remains silent, courts may narrow congressional standing. The Gang of Eight Committee provides a natural

185. Una Lee, *Reinterpreting* Raines*: Legislator Standing to Enforce Congressional Subpoenas*, 98 GEO. L.J. 1165, 1167 (2010).

186. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

187. *Id.*

188. *Id.* at 635.

way for Congress to affirmatively defend its understanding of legislative standing. The Constitution created a government of shared governance between co-equal branches of government. The Gang of Eight Committee is dedicated to this idea of equality.