Statement of

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Madam Chairwoman, Ms. Myrick, Members of the Subcommittee, it is a pleasure to be with you this morning. I have been asked to provide a brief historical perspective on the congressional notification issue.

I would say, by way of background, that I served on the staff of the Church Committee in the Senate in the mid-1970s, then went to the Defense Department where I continued to be involved in intelligence oversight. I returned to the Senate Intelligence Committee staff at the beginning of 1987, as Iran-contra was unfolding, and stayed on as its General Counsel through 1995. After a hiatus as staff director of the Aspin Brown commission, and teaching for a short time at Cambridge, I came back to the CIA in 1997, first as a special counsel to DCI Tenet, and then was appointed by President Clinton as Inspector General in 1998. I retired from federal service in 2001, but continued to write about the congressional oversight of intelligence as well as teach a graduate-level course on it at Georgetown. More recently, I wrote a book under contract with the Agency about its relationship with Congress over the years. So, I've been dealing with this subject both as a practitioner and as an academic for quite some time.

There was nothing that required intelligence agencies to keep Congress informed of their activities until the mid-1970s. Before that, what was shared with Congress was a matter of what a DCI believed Congress needed to know in order to secure his appropriation each year, or else what the DCI believed Congress needed to know to explain something that had found its way into the press. The level of detail provided Congress varied not only from DCI to DCI, but it varied in terms of who the people doing the oversight were. During this early period, oversight of the CIA was handled by small, hand-picked subcommittees of the Armed Services committees and Appropriations committees in each house. Some of those doing the oversight were tougher than others; some were more demanding. But, by any standard, oversight was far more cursory, far less intrusive than it is today.

Having said that, I could find no instance in the course of my research when a DCI ever refused a request from the chairmen of one of his subcommittees. Indeed, DCIs took great pains to court them during these early years. But those doing oversight did not ask much of the Agency. All of them, I think, wondered if they were being given the whole story–in fact, they would seek such assurance from time to time from the DCI. But they thought CIA was carrying out an important mission, and that an overly inquisitive Congress could only detract from that. As its foremost overseer during most of this early period--Senator Richard Russell of Georgia--wrote in 1956, "if there is one agency of the government in which we must take some matters on faith, without a constant examination of its methods and sources, it is the CIA."

By the mid-1970s, however, it had become painfully clear that the existing oversight arrangements were inadequate. The CIA subcommittees had simply not known of the alleged improprieties and illegalities that suddenly began coming to light in wave after wave of press exposes: Collecting on the political activities of U.S. citizens, for example, using every kind of technique imaginable, from intercepting their communications and opening their mail to examining their tax returns. Interfering in the elections of democratic countries. Building an infrastructure at CIA to assassinate foreign heads of state. Doing drug experiments on unwitting subjects in the United States. The CIA subcommittees were not aware of any of these activities and did not know enough to ask.

The congressional committees that were set up to investigate these dubious activities–the Church Committee in the Senate and the Pike Committee in the House–both recommended at the end of their work that the old system be scrapped in favor of establishing separate oversight committees in each House dedicated to oversight of the CIA and the rest of the Intelligence Community. And, of course, the Senate acted first in May, 1976 to create the SSCI. The House took a bit longer, creating the HPSCI in August, 1977.

I think if there was one thing Congress intended when it created these committees, it was to improve the awareness of Congress as an institution, with respect to intelligence activities.

In fact, one only need look at Senate Resolution 400 that created the Senate Intelligence Committee to find, among other things, "sense of the Senate" language that the heads of intelligence agencies should keep the new select committee "fully and currently informed" of their activities "including any "significant anticipated activities." The resolution went on to say that it was the sense of the Senate that intelligence agencies should provide any documentation requested by the new committee, and report to it any violation of law or Executive branch regulations they became aware of. These words were not legally binding upon the agencies, but they were the first expressions by either house of Congress of what it was they expected intelligence agencies to do vis-à-vis these new oversight committees.

Two years earlier, Congress had enacted legislation that required that certain of its committees be informed of covert actions. This was the so-called Hughes-Ryan Amendment, enacted in 1974, which prohibited CIA from spending money for covert actions unless the President had personally found that they were important to the national security, and these "findings" had been reported to the "appropriate committees" of the Congress in a "timely" manner. The term "appropriate committees" was interpreted to include the two armed services committees in each house, the two appropriations committees, and the two foreign relations committees. When the intelligence committees were created, they were added to the list, bringing to a total of eight the number of committees that had to be notified of covert actions.

The Hughes-Ryan amendment did not say *how* notice was to be provided to these eight committees, and in practice, the notification process was haphazard and chaotic. Occasionally one of the committees receiving such notice would launch an inquiry into what they'd been told, but this was rare.

Regardless of how well the notification process worked in practice, however, the requirement to notify eight congressional committees of covert actions discouraged the Agency from doing them. Frank Carlucci, who was Deputy DCI at the time, told the Senate Intelligence Committee in 1978 that CIA's capability to do covert action had essentially become "moribund" as a result of the notification requirement. As a practical matter, only the intelligence committees, by virtue of their secure infrastructures, were capable of doing oversight of covert action, and, as the intelligence committees began to establish themselves in the late 1970s, the other committees became increasingly willing to defer to them.

In 1978, the Carter Administration issued an Executive order on intelligence, following upon an earlier one issued by President Ford, and, among other things, it picked up the "sense of the Senate" language from S. Res. 400, I referred to a moment ago, and made it binding upon the Intelligence Community. Thus, for the first time, intelligence agencies would be required to keep the two intelligence committees fully and currently informed of their activities, including significant anticipated activities. They would have to tell the two intelligence committees not simply what they were doing, but what they planned to do, if it was "significant."

But the Carter Executive order provided that these obligations were to be carried out under procedures established by the President, and had to be "consistent with applicable authorities and duties, including those conferred by the Constitution...and by law to protect sources and methods." In fact, no implementing procedures were issued by President Carter in part because Congress at the time was considering incorporating the notification provisions into statute.

Indeed, two years after the Executive order issued, Congress passed such legislation. I'm referring, of course, to the Intelligence Oversight Act of 1980, enacted in the final year of the Carter Administration. The new law carried over the obligations that were in the Carter Executive order, making them binding on future Administrations–and this was particularly important to the two intelligence committees–but the Administration also insisted that the same kind of preambular language that had been used in the Executive order be carried over in the new statute.

Neither of the committees much liked these preambular clauses–they weren't sure how the Executive branch would interpret them–but in the end they accepted them in order to get the legislation enacted. So, you had one preambular clause saying essentially that the obligation to notify had to be consistent with all applicable authorities including those conferred by the Constitution. You had another saying notification had to be consistent with the protection of sources and methods. The committees accepted this latter clause because they were amenable to discussing with the Executive branch *how* notification of intelligence activities would be provided them, and to guard against this clause being used to justify withholding information from them altogether, they inserted a provision saying that nothing in the Act should be construed to suggest that the protection of sources and methods was justification in and of itself for withholding information from them.

So, the 1980 Act was a compromise that attempted to accommodate the interests of both branches. Overall, the committees believed, it was a significant improvement over the status

quo.

Among other things, the new law pared the number of committees to receive notice of covert actions from 8 to two, the two intelligence committees. This was something that both the Carter Administration and the committees wanted.

At the request of the Administration, the Act also gave the President the option of providing notice where particularly sensitive intelligence activities were concerned to a group of 8 congressional leaders–the so-called gang of 8–rather than the committees as a whole. This option was to be available whether the intelligence activity involved sensitive collection or covert action.

In addition, where covert actions were concerned, the new law specifically recognized that there may be occasions when the President could not provide prior notice–either to the committees or to the gang of 8–and that when this occurred, notice would be provided the committees "in a timely fashion" together with an explanation of why prior notice could not be given. The Administration argued that the President may have to act quickly to deal with a fast-moving situation, and there simply may not be time to provide notice to the Congress.

The 1980 Act was amended in 1991, both to take into account what had happened during the Iran contra scandal in the latter half of the 1980s, as well as take into account what the practice under the statute had been until that point. I was General Counsel of the SSCI when these amendments were enacted and heavily involved in their development.

The basic obligations of intelligence agencies vis-à-vis the oversight committees remained the same, but several important adjustments were made in the notification framework.

First, the preambular language suggesting the notification be consistent with the powers conferred by the Constitution was taken out. This issue had been raised by the Iran contra affair. The Office of Legal Counsel at the Justice Department had issued a legal opinion after the scandal came to light, interpreting the intelligence oversight statute, and had opined that the constitutional authorities of the President as commander in chief gave him "virtually unfettered discretion" when or if the intelligence committees would be notified. The committees themselves did not accept the notion that the Constitution provided the President such authority, but a court had never ruled on the issue. If such authority did exist in the Constitution, the committees reasoned, it existed whether this preambular language was in the statute or not. So, it came out, and the Bush Administration did not fight it.

Another important change brought about by the 1991 amendments limited the "gang of 8" option to covert actions, rather than making it available to notify the committees of any intelligence activity that was particularly sensitive. This was done for several reasons. First, the gang of 8 option had, to that point, only been used for covert action. Sensitive collection programs had been briefed to the committees as a whole. The view on the two intelligence committees was that if an agency was instituting a new, ongoing program to collect intelligence, they all needed to know about it, regardless of its sensitivity. This was what the committees were set up to do. They had to authorize the funding for these programs. How could they not

know of them? Again, the Bush Administration did not resist the change.

Finally, the requirements for reporting covert actions to the Congress were broken out of intelligence activities generally, and treated in a separate section of the law. The "timely fashion" formulation was retained when prior notice of a covert action had not been given, but the committees said in report language that they expected notice to be provided, without exception, within "a few days" of presidential approval. They also said in report language that while they did not agree that the Constitution allowed the President to withhold notice from the Congress altogether, they recognized a future President might assert such authority. The issue was left at that in the absence of an authoritative judicial opinion.

There have been no major changes to the congressional notification requirements since the 1991 Amendments. But I think it is fair to say that practice under the law has changed over time. It changed, for example, in the late 1990s when the CIA began to disclose more information to the committees about its collection operations, especially those that were experiencing problems. And, of course, it changed after 9/11, but there is no need for me to go into that with you.

I will, however, close with two observations and an eye towards the future.

Ever since the obligation to keep the oversight committees "fully and currently informed" first appeared in the law, there has been, as a practical matter, a degree of latitude in how this was done. From the very beginning, in fact, the heads of intelligence agencies would broach particularly sensitive intelligence activities first with the leaders of the two oversight committees, and perhaps their key staff, before providing notice to the committees as a whole. The purpose of these consultations would be to discuss how the sensitive matter at issue should be handled within the committee–*when* the full committee should be briefed, whether there were certain details that could be withheld without affecting the committee's ability to weigh the activity in question, whether documentary evidence would be kept at the committees, how many staff should be cleared–the kinds of things you might do to minimize the security risk while still satisfying the needs of the committees. There's nothing in the law that precludes this kind of consultation, and, in fact, over the years, I think it's been very useful to have these discussions. I do not see them as a *substitute* for notice to the full committees, but rather as a means of getting there and accommodating the needs of both branches.

The last observation I would make because I know you are wrestling with the issue in conference this year deals with notice to the gang of 8. From the standpoint of the Congress, it has never worked very well. The problem has been not with notice to the gang of 8 per se, but rather with how it's been implemented. It's weighted too heavily in favor of the Executive branch, and does not sufficiently take into account congressional needs. I don't think Congress, in providing for this option, intended it to be this way, but that's the way it's evolved. The statute itself simply says that in especially sensitive cases, the President has the option to provide notice of covert actions to the smaller group. It doesn't say what this group of congressional leaders can do with the information. But the Executive branch has told them--they can't do anything with it--and over the years the gang of 8 has acquiesced in what the Executive branch has told them, presumably out of fear that, if they don't abide by what the Executive branch says,

it may withhold information from them the next time.

Unfortunately, though, whenever this has happened, it has effectively marginalized congressional oversight of the activity being briefed. It has meant that the 8 congressional leaders can only react to what they hear, without advice from their professional staffs and without advice from knowledgeable colleagues. This is difficult for them to do, coming at it cold, and having it presented to them in the most benign way possible. If they do decide they have a problem, they have to be able to articulate what it is on the spot in a convincing way. If they *later* decide they have a concern, they have to take it upon themselves to go back and raise it with the Administration. Like Senator Rockefeller did a few years ago, they will even have to type their own letter since their secretaries can't be told. Nor are they allowed to take notes or given access to a record of what they were earlier told. They have to rely on their memory. If there is going to be any ongoing oversight of what they've been briefed about, they're going to have to do it themselves, including making the arrangements for it, because their staffs can't know. How many of these congressional leaders have the time and inclination to do this on their own? Almost none. But rest assured, if whatever program they've been briefed about subsequently goes south, their buy-in will be prominently touted by the Administration.

I don't think this is fair to the Members involved. If the gang of 8 option is to be kept, and I think an argument can be made that it should, then I think something needs to be done to restore the balance, something that better recognizes and accommodates the needs of the eight congressional leaders. I personally think it could be done by each committee adopting procedures, without amending the statute itself, but it would also be desirable that these be developed with and agreed to by the Administration. I believe this is possible if both branches operate in good faith, and I continue to hope that will happen.

Thank you, Madam Chairman.

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