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Provision of Cryptologic Information to the Congress

Congressional access to executive branch records represents one example of the traditional tug-of-war between the executive branch and the legislative branch. The term "executive privilege" denotes the constitutional basis on which the president denies information to the Congress. Congress on the other hand has the power to subpoena government officials and charge them with "contempt of Congress" should such officials fail to respond to congressional requests. More recently, individual congressmen and congressional committees have resorted to the courts and to the passage of additional laws to obtain broader access to executive branch records. The significant expansion of the Freedom of Information Act in 1973, for example, was the result of an adverse decision in a suit by members of the U.S. House of Representatives against an executive agency, *Mink v. EPA*, in which the representatives were denied access to that agency's records. This article will not examine this latter subject but will be limited to a review of congressional access to cryptologic information; it is divided into three parts: the period prior to the issuance of executive orders dealing with intelligence activities, the period during which the congressional investigating committees were active, and the period covering the formation of intelligence oversight committees by the Congress, including the issuance of Executive Orders 11905 and 12036, as well as the enactment of new legislation.

The Early Years

Prior to the formation of intelligence investigative committees in 1973, there was little congressional interest in access to information concerning cryptologic activities. The House and Senate Armed Services Committees conducted authorization and oversight of both intelligence and communications-security activities. These committees generally conducted some re-

view of communications-security activities in open session and all reviews of signals-intelligence activities in closed session. The House and Senate Appropriations Committees appropriated funds used for the conduct of cryptologic activities, with the House taking the lead. Of the four committees, the House Appropriations Committee was the most energetic in its requests for information. As a practical matter, since it controlled the purse strings it generally received whatever it requested. Other committees occasionally requested information, and, where appropriate or required, the information was provided, subject to suitable protections. Examples of such occurrences include the investigation in 1962 by the House Committee on Un-American Activities into the defection of Bernon Mitchell and William Martin, the investigation by the House Armed Services Committee into the losses of the U.S.S. *Pueblo* and the EC-129, and several other lesser inquiries. For a number of years, NSA served as the repository for congressional records containing classified cryptologic information, because no facilities existed in the Congress to store and protect such information.

During this same period the Congress passed several pieces of legislation to protect cryptologic information. Earlier, in 1933, the Congress had enacted legislation making it a crime for a federal employee who had access to any diplomatic code or information prepared in any code or any matter obtained while in the process of transmission between any foreign government and its diplomatic mission in the United States to publish or otherwise disclose such information without authorization. In 1951, the Congress enacted what is now section 798 of title 18, U.S.C. This law makes it a crime to reveal any classified information pertaining to communications intelligence and communications security. Subsection (c) of section 798 provides that nothing in section 798 shall prohibit the furnishing, upon lawful demand, of information to any

regularly constituted committee of the U.S. Senate or House of Representatives, or any joint committee thereof. The important aspects of this provision are the terms "lawful demand" and "regularly constituted committee." These provisions were interpreted to (1) require that the request be made by a committee having jurisdiction over such subject matter and that the provision of information be subject to suitable protections, i.e., not releasable to the public and in closed or executive session, and (2) mean that no individual congressman could demand access. This provision of section 798 was of considerable importance during the congressional investigations of the 1970s.

Section 798 is limited to classified information. In 1959, the Congress enacted Public Law 86-36. This statute contains at section 6 a provision that no law shall be construed to require the disclosure of the organization or any function of the National Security Agency, or of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency. This provision permits NSA to protect from public disclosure sensitive information that is not classified. The Congress has generally honored this provision by holding closed sessions and by not releasing the names of NSA employees who appear at such sessions.

In this same context, it is also useful to note that the Congress, in enacting personnel security procedures for NSA in 1964, specifically provided in Public Law 88-290 that the provisions of the Administrative Procedures Act were not to apply to the authorities granted in P.L. 88-290. This is important in that Congress established in the Administrative Procedures Act a number of public disclosure requirements pertaining to agency actions, regulations, and proceedings that were designed to inform both the public and the Congress.

One final authority to note is section 403(d)(3) of title 50, U.S.C., the National Security Act of 1947, which contains a provision assigning responsibility to the DCI for the protection of intelligence sources and methods. The DCI had invoked this provision in the context of requests by the Congress for information, including requests related to cryptologic activities.

Investigative Committees

With the advent of the 1970s, the situation changed considerably. There was a protracted and, at times, bitter struggle between the executive branch and the Congress during congressional investigations of the intelligence agencies over access to intelligence information. The two committees in the forefront of that

investigation were the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities and the House Select Committee on Intelligence, more commonly known by the names of their respective chairmen, Senator Frank Church and Representative Otis Pike, as the Church and Pike Committees.

Although NSA was generally able to sustain its position that access to information had to be in closed session, both the Church and Pike Committees held at least one public session. The Church Committee issued a report containing some classified information that the executive branch had agreed to declassify and some on which there had been no agreement. The Pike Committee report was never formally issued, due to a premature leak of the report, allegations that it contained classified information, and a subsequent investigation concerning those allegations. Probably the most interesting aspect of this confrontation, from an Agency standpoint, was the lengthy disagreement over whether section 798 precluded any open session and disclosure of information pertaining to NSA. Both Chairman Church and Vice-Chairman Tower (through Senator Goldwater) requested the Congressional Research Service (CRS) to provide a legal opinion on the matter. The American Law Division of the CRS did provide a lengthy opinion which was inconclusive. The CRS essentially said that section 798 may mean what NSA maintained it meant, i.e., that no public disclosure was authorized, and thus the speech and debate clause of the Constitution may not protect individual congressmen from the criminal penalties of section 798. The committee was extremely divided on the question and voted several times not to conduct an open session. However, the chairman finally did obtain a vote to have a public session, based on an opinion of the Senate Parliamentarian that the Senate rules permitted the committee to decide the question. This action was strongly questioned by the minority members of the committee, with several asserting that the disclosure constituted a violation of law. NSA officials were not required to be present during the disclosure to which NSA objected because the disclosure was not authorized and they too could have been considered to be subject to the criminal penalties of section 798 had they participated.

Another interesting session during this period was one conducted by the House Government Operations Committee's Subcommittee on Government Information and Individual Rights. Chaired by Representative Bella Abzug, this subcommittee attempted to review in open session allegations concerning the provision to NSA by international communications carriers of in-

UNCLASSIFIED

ternational communications. The subcommittee was not able to force senior governmental officials to testify, so it issued subpoenas to various employees of three international communications carriers, several employees of the FBI, and one NSA employee whose name appeared on a document in the possession of one of the carriers that was cooperating with the subcommittee. The carriers and the employees were advised by the executive branch that any public disclosure of cryptologic information by them would constitute an unauthorized disclosure within the meaning of section 798. The NSA employee was advised of this as well and provided with a letter from the Deputy Secretary of Defense indicating that the employee was only authorized to state his name and certain other information and that any other response was subject to a claim of executive privilege. The NSA employee was accompanied by a Department of Justice attorney who was there to answer questions concerning the claim of privilege. Needless to say, it was not an enjoyable experience for the employee. However, although a contempt of Congress charge against the employee was voted by the subcommittee, it was not sustained by the full committee or the House.

Oversight Committees

With the establishment of the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI), relations with the Congress changed considerably. The rules governing access by the Congress to classified information have also changed. Executive Order 11905, United States Foreign Intelligence Activities, was issued on 19 February 1976. The Senate and House did not establish the intelligence committees until after that date. Thus, E.O. 11905 did not deal with provision of information to the Congress.

The SSCI was established pursuant to Senate Resolution 400, which passed the Senate on 19 May 1976. The SSCI is, in part, an informational body in that it is comprised of two members each from the Senate Committees on Appropriations, Armed Services, Foreign Relations, and Judiciary, several at-large members, and the majority and minority leaders of the Senate. Tenure on the committee is limited to eight years of continuous service. The committee's jurisdiction includes legislation, authorizations for appropriations, and oversight of all intelligence activities or matters related thereto. Senate Resolution 400 deals with access to, and protection of, information and sets out procedures for congressional declassification of information. The SSCI is tasked with obtaining an

annual report on intelligence activities from the DCI, secretary of defense, secretary of state, and director, FBI, and may make unclassified versions of such reports available to the public. Senate Resolution 400 indicates that it is the sense of the Senate that each agency head keep the committee fully and completely informed, furnish to the committee, on its request, any documents or information in the agency's possession, and report to the committee any violations by the agency of law or the constitutional rights of individuals. Members of the Senate have all the necessary clearances by virtue of their office and may have access to the records of the SSCI, subject to the SSCI's regulations. Senate employees must receive a security clearance from the committee, sign an agreement, and take a Senate oath. Investigation of any unauthorized disclosure of classified intelligence information is the responsibility of the Senate Select Committee on Standards and Conduct. The SSCI may release classified information if the committee votes by a majority vote to release the information and the president does not object to the proposed release. If the president objects, the SSCI may appeal to the full Senate, and the Senate, in executive session, may debate the matter and vote to approve or disapprove the release or to refer the matter back to the SSCI and give it the authority to act on behalf of the Senate.

The House Permanent Select Committee on Intelligence was established through the addition of a new rule, XLVIII, to the House Rules. Although there are differences in the membership and the reporting responsibilities of the committee, the rules pertaining to access, responsibilities, and release of information are virtually identical. One noteworthy difference is that while the Senate made access to committee records by other Senate members discretionary, access by members of the House to HPSCI records and to closed hearings held by the HPSCI is mandatory. In addition, each year the HPSCI invites all House members to examine in its spaces the classified annex to the annual Intelligence Authorization Act.

Executive Order 12036, United States Intelligence Activities, which replaced E.O. 11905 and which was issued on 26 January 1978, sets out at section 3-4 the responsibilities of the DCI and heads of departments and agencies in discussing intelligence activities with the HPSCI and SSCI. This section provides, subject to certain caveats, that agency heads (1) keep the HPSCI and SSCI fully and currently informed concerning intelligence activities, (2) provide any documents or information in their possession requested by the committees, and (3) report to the committees

information relating to intelligence activities that are illegal or improper.

Information related to budget or legislative issues must be provided in accordance with OMB and DoD or DCI regulations governing such matters. Most of these regulations distinguish between classified and unclassified information.

In addition, during the 1970s but prior to the formation of the SSCI and HPSCI, two laws were passed that affect the reporting of information to the Congress. The Case Act, section 112b of title 1, U.S.C., requires the reporting by the Department of State to the Senate Foreign Relations Committee of agreements with foreign governments, including intelligence agreements. Such agreements include treaties, executive agreements and agreements between agencies of the respective governments. The so-called Hughes-Ryan Amendment, section 2422 of title 22, U.S.C., requires the prior reporting to various congressional committees of information concerning covert activities. This latter requirement received considerable attention during the Ninety-sixth Congress (1979-1980).

The Ninety-sixth Congress initially considered extensive legislation dealing with the Intelligence Community and individual agencies. These bills, S.2284 and H.R.6588, also dealt in part with access and reporting to the Congress. After deliberations on this so-called charter legislation were stymied, Congress continued to consider matters related to congressional oversight, Hughes-Ryan, and access to information. S.2284 was modified and redesignated the Intelligence Oversight Act. The House introduced a similar bill, H.R. 7668. Both bills required the reporting to the HPSCI and SSCI of any special activity prior to its initiation. A narrow exception is included for circumstances where the president determines that such reporting should be limited. In addition, heads of agencies involved in intelligence activities are required to (1) keep the committees fully and completely

informed of all intelligence activities, (2) furnish any information or material concerning intelligence activities requested by the committees, and (3) report to the committees any improper or illegal activities. S.2284 was subsequently incorporated into S.2597, the Intelligence Authorization Act for Fiscal Year 1981, as section 407 and, slightly modified by the House, was enacted as part of Public Law 96-450; it is now section 501 of the National Security Act of 1947 (59 U.S.C. 501).

Thus, the provisions pertaining to access to information and reporting to the Congress have become a statutory requirement for heads of intelligence agencies. Section 501 and section 3-4 of Executive Order 12036 are subject to an introductory caveat concerning the authorities and duties of the executive and legislative branches under the Constitution. Since this division of authorities and responsibilities is the basis for executive privilege, executive privilege, as it pertains to intelligence, will remain a part of the traditional executive-legislative tug-of-war, albeit considerably circumscribed.

(b) (3) - P.L. 86-36