

A Church Committee for the 21st Century: The Need for a Joint Select Committee on Mass Surveillance Practices by the Intelligence Community

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Executive Summary

The executive branch is conducting expansive domestic and global surveillance operations, unprecedented in scope and means, to collect and analyze information and communications of millions of people. These operations have raised serious questions about whether these activities are necessary, proportionate, and legal.

Given that neither Members of Congress nor the public were not—and still are not—adequately informed about these programs, Congress should form a special joint investigatory committee to conduct a full investigation and issue recommendations.

Americans have confronted these issues before. Today’s Congress should learn from historical examples and form a new investigatory committee modeled after notable and relevant past successes: The Church Committee¹ of the 1970s (named after its chair, Sen. Frank Church of Idaho) and the Joint Committee on Atomic Energy that existed from 1946 until 1977.

In the early 1970s, the public and Congress learned that the CIA was collecting millions of Americans’ communications. In response, Congress created the Church Committee as a special investigatory committee and adopted a bipartisan approach to independently investigate activities conducted by both Democratic and Republican administrations. The Church Committee also formed a cooperative relationship with the intelligence community to access relevant information, while undertaking rigorous scrutiny of intelligence programs and maintaining the objectivity and credibility to assess them.

The investigation is still considered one of the most successful in U.S. history. It provided a significant accounting of the executive’s activities, led to meaningful reforms that governed surveillance law for more than three decades, and restored public confidence that Congress was conducting its constitutional oversight role.

The Church Committee demonstrated that a **special investigatory committee** can, with political will and good leadership, effectively investigate executive surveillance and intelligence activities—and their abuses.

¹ Formally known as the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities.

² See *Watkins v. United States*, 354 U.S. 178, 187 (1957) (The “power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing law as well as proposed or probably needed statutes.”).

In creating such a committee today, Congress should also draw on the **bicameral structure** of the Joint Committee on Atomic Energy to address politically controversial and divisive issues using a bipartisan and collaborative approach.

A joint investigatory committee developed according to these models can restore everyone's confidence that U.S. surveillance operations are conducted consistently with our values and the law. The committee should include four key attributes:

1. It should provide **equal representation** to both political parties and both houses of Congress;
2. It should be given the **time, resources, expert staff, and access to information** necessary to conduct a rigorous and complete investigation;
3. It should have **sufficient powers to conduct a full, rigorous investigation**, including abilities to hold open and closed hearings, issue subpoenas, conduct staff depositions, grant witness immunity, and issue contempt citations;
4. Finally the committee should be required to issue a **comprehensive public report and recommendations** to both houses of Congress.

A successful inquiry requires an independent and powerful investigating body that can credibly assure the public that Congress is appropriately balancing security and individual liberty.

In the past two years, Members of Congress and the administration have proposed several alternative approaches. All, however, lack key elements needed for success. The existing permanent intelligence committees, the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, cannot provide the external audit that a Church-Committee-style body could bring to this debate, while the Inspector General of the Intelligence Community lacks sufficient independence. Other forums for investigation, like the Privacy and Civil Liberties Oversight Board and the Signals Intelligence Review Group created by the President, lack critical powers and resources. An independent and fully empowered joint investigatory committee is needed to delve fully into the ongoing leaks around the National Security Agency.

This white paper is divided into three parts:

Part I explains the need and historical justification for a new joint investigatory committee. Strong historical similarities between the modern surveillance programs and the expansive programs revealed in the 1970s demonstrate the need for a special investigation, as well as for a bicameral approach.

Part II provides a blueprint for forming the congressional investigatory committee. It lays out the key characteristics, powers, and responsibilities required for a successful congressional investigation by drawing from and analyzing historical examples of the Church Committee and the Joint Committee on Atomic Energy.

Part III considers strengths and weaknesses of alternative proposal for the needed investigation. Congress and the administration have put forward several proposed approaches, but each lacks key elements necessary to a successful investigation. A special joint congressional committee is the most appropriate body to investigate, review, and provide oversight of current domestic surveillance activities.

Introduction

The executive branch is conducting large-scale domestic and global surveillance operations involving the communications records and other data of millions of people. Many people question whether these activities are necessary, proportionate, and legal. Indeed, prominent legal experts, Federal courts, academics, and intelligence community personnel differ on core legal and policy aspects of the United State's surveillance operations. As a result of inadequate public information, competing legal interpretations, and lack of Congressional oversight, Congress should conduct a joint legislative investigation to inform lawmakers and the public on the extent of, and need for, additional oversight over the intelligence community. This investigation can be modeled after successful congressional investigative committees of the past.

Part I: The Need for a Joint Congressional Investigatory Body

A congressional investigatory body is both a necessary and proper response to investigate the reported activities of the intelligence community and to inform the public. Congress has the constitutional power² to review the surveillance activities that have led to recent controversies. A full investigation would help ensure that the intelligence community is following its constitutional and legislative mandates and inform Congress on ways to effectively oversee these secretive operations. It would also help address foreign policy concerns expressed by our allies and reinforce the public trust in the Intelligence Community.

Broad Surveillance Programs, Inadequate Information, and the Public Trust

The public has learned that the NSA collected “call detail records” on an ongoing basis for nearly every Verizon customer,³ “acquire[d] more than two hundred fifty million Internet

² See *Watkins v. United States*, 354 U.S. 178, 187 (1957) (The “power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing law as well as proposed or probably needed statutes.”).

³ Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, GUARDIAN (June 5, 2013); Secondary Order, No. BR 13-80, at 1-2 (FISC Apr. 25, 2013), available at

communications each year[,]”⁴ gathered data on Americans’ social connections,⁵ collected millions of contact lists and address books from e-mail and instant messaging services,⁶ experimented with collecting and tracking cell phone location data,⁷ actively undermined internet encryption protocols,⁸ infiltrated communication links between Google and Yahoo’s data centers,⁹ created online gaming accounts to surveil online video game chats,¹⁰ used everyday advertising cookies as surveillance tools,¹¹ broke privacy rules thousands of times per year,¹² and that some NSA employees violated protocols to spy on their love interests.¹³

Despite these piecemeal revelations, we do not have a clear picture of how far U.S. intelligence and surveillance operations extend. Based on what has already been revealed, the sheer magnitude of these programs has led many to question the appropriateness and legality of the NSA’s activities.¹⁴ Substantial majorities of both Democratic and Republican voters have voiced opposition to the NSA’s collection and storage of bulk data.¹⁵ In addition, the NSA faces multiple legal challenges that question whether the agency’s activities are permissible under foreign intelligence law and the Constitution.¹⁶ Most recently, the European Court of Justice has

<http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order?guni=Article:in%20body%20link>.

⁴ Memorandum Opinion and Order, at 29 (FISC Oct. 3, 2011), available at <https://www.eff.org/document/october-3-2011-fisc-opinion-holding-nsa-surveillance-unconstitutional>; see also Glenn Greenwald and Ewen MacAskill, *NSA Prism program taps in to user data of Apple, Google and others*, GUARDIAN (June 6, 2013).

⁵ James Risken and Laura Poitras, *N.S.A. Gathers Data on Social Connections of U.S. Citizens*, N.Y. TIMES (Sept. 28, 2013).

⁶ Barton Gellman and Ashkan Soltani, *NSA collects millions of e-mail address books globally*, WASH. POST (Oct. 14, 2013).

⁷ Charlie Savage, *In Test Project, N.S.A. Tracked Cellphone Locations*, N.Y. TIMES (Oct. 2, 2013).

⁸ Nicole Perlroth, Jeff Larson, and Scott Shane, *N.S.A. Foils Much Internet Encryption*, N.Y. TIMES (Sept. 5, 2013).

⁹ Barton Gellman and Ashkan Soltani, *NSA infiltrates links to Yahoo, Google data centers worldwide, Snowden documents say*, WASH. POST (Oct. 30, 2013).

¹⁰ Justin Elliott, *World of Spycraft: NSA and CIA Spied in Online Games*, ProPublica (Dec 9, 2013).

¹¹ Barton Gellman, Andrea Peterson, and Ashkan Soltani, *NSA used Google cookies to pinpoint targets for hacking*, Wash. Post (Dec 10, 2013).

¹² Barton Gellman, *NSA broke privacy rules thousands of times per year, audit finds*, WASH. POST (Aug. 15, 2013).

¹³ Siobhan Gorman, *NSA Officers Spy on Love Interests*, WALL ST. J. (Aug. 23, 2013).

¹⁴ See, e.g., Press Release, Senator Jeff Merkley, Merkley: NSA Spying Outrageous Breach of Americans’ Privacy (June 6, 2013).

¹⁵ A recent Associated Press poll found that over 60% of Americans oppose the NSA’s collection of telephone and internet data. Dennis Junius, *Poll: American public’s concerns rise over surveillance programs and privacy erosion*, ASSOCIATED PRESS (Sept. 7, 2013) see also Mark M. Jaycox, *Polls Continue to Show Majority of Americans Against NSA Spying*, ELEC. FRONTIER FOUND. (Oct. 7, 2013) (collecting polling data). More than 500,000 Americans have signed a petition calling for the full scope of domestic surveillance to be publicly disclosed. Stop Watching Us Petition, available at <https://optin.stopwatching.us/>.

¹⁶ See *Jewel v. NSA*, 965 F.Supp.2d 1090 (N.D. CA 2013); *First Unitarian Church of Los Angeles v. NSA*, No. 3:13-cv-03287 (N.D. CA, Sept. 10, 2013).

made it harder for U.S. companies to receive or transfer E.U. citizens' personal data from or out of the European Union on the reasoning that the U.S. government has too much and too easy access to data held by U.S. companies.

Moreover, the incomplete information given to Congress demonstrates the need for a review of intelligence oversight. The NSA's domestic surveillance activities caught many in Congress off-guard.¹⁷ Despite the effort of several Members to learn more about these programs, the intelligence committees withheld key documents and refused to answer questions.¹⁸ Even members of the congressional intelligence committees are under-informed. Then-Senate Intelligence Committee Chair Dianne Feinstein, for example, announced in 2013 that she was not told that the NSA tapped phones of heads of allied states for more than a decade.¹⁹ The Washington Post reported in 2013 that the NSA did not provide Senator Feinstein with a 2012 internal audit detailing thousands of instances where the NSA broke privacy rules.²⁰

The intelligence agencies remain reluctant to reveal their questionable practices. In an open session before the Senate in 2013, Director of National Intelligence James Clapper denied that the NSA collected "any type of data at all on millions or hundreds of millions of Americans," a statement he would later admit was "clearly erroneous."²¹ Furthermore, when, in

¹⁷ As Rep. Jim Jordan (R-Oh.) explained,

Everyone in the country was surprised . . . that this amount of data was being collected . . . and that's why you're seeing members of [C]ongress say "look, we need to make some changes here -- changes that are consistent with our Constitution, our Bill of Rights, and specifically the Fourth Amendment."

Andrea Peterson, *Here's why one of the most conservative members of the House wants to rein in the NSA*, WASH. POST (Oct. 2, 2013).

¹⁸ Spencer Ackerman, *Intelligence committee withheld key file before critical NSA vote, Amash claims*, GUARDIAN (Aug. 12, 2013). As Rep. Rush Holt (D-N.J.) explained, "This is another example of the difficulty in Congress exerting any oversight of the Intelligence Community, because the information is frequently not made available to all members." *Id.* The intelligence committees also ignored repeated requests from Rep. Morgan Griffith (R-Va.) and Rep. Alan Grayson (D-Fla.) for information about the NSA's spying programs. Glenn Greenwald, *Members of Congress denied access to basic information about NSA*, GUARDIAN (Aug. 4, 2013).

¹⁹ Press Release, Senator Dianne Feinstein, Feinstein Statement on Intelligence Collection of Foreign Leaders (Oct. 28, 2013); *Senate Intel chief furious over allegations NSA listened to allies; says she wasn't told*, ASSOCIATED PRESS (Oct. 28, 2013).

²⁰ The Washington Post reported that Senator Feinstein "did not receive a copy of the 2012 audit until The Post asked her staff about it" and quoted the Senator to say the committee "can and should do more to independently verify that NSA's operations are appropriate, and its reports of compliance incidents are accurate." Barton Gellman, *NSA broke privacy rules thousands of times per year, audit finds*, WASH. POST (Aug. 15, 2013).

²¹ Declassified Letter to Dianne Feinstein, U.S. Senator, from James Clapper, Director of National Intelligence (June 21, 2013), available at <http://www.lawfareblog.com/wp-content/uploads/2013/07/2013-06-21-DNI-Ltr-to-Sen.-Feinstein.pdf>; Kimberly Dozier, *Clapper Apologizes for 'Erroneous' Answer on NSA*, ASSOCIATED PRESS (July 3,

2009, “three members of the House Judiciary Committee asked the Department of Justice to tell the public more about how parts of the Patriot Act were being used to justify bulk phone record collections,” the DOJ declined, citing national security concerns.²²

The lack of information and Congressional access are not the only reasons for a Congressional investigation. There is also a significant trust gap between American public and the Intelligence Community. Polls from 2013 and onwards show an American public that is skeptical of the U.S. government's collection practices and that a majority of Americans oppose the government's collection of phone and Internet data as a part of anti-terrorism efforts.²³ A successful Congressional investigation will be able to encourage a national dialogue on these issues that assuages—or confirms—Americans' ideas about US surveillance practices.

The passage of the USA Freedom Act is a step forward for transparency and oversight issues, but does not provide the necessary congressional oversight over these activities. The mandatory reporting requirements of the Act are riddled with exemptions and carve outs. While the Act covers Section 215 and National Security Letters, it fails to provide for large categories of surveillance undertaken under Section 702 of the Foreign Intelligence Surveillance Act and omits any reference to Executive Order 12333.²⁴

The USA Freedom Act does contain new reporting requirements concerning the number of targets whose information is collected and the number of orders the FISA Court approved; however, these numbers are guaranteed to mislead, because as one FISC judge noted, a single order for a single target could “incidentally” collect hundreds of thousands of innocent users' content.²⁵ It also fails to provide access to opinions from the Office of Legal Counsel, the Office of the Director of National Intelligence, or any internal legal memos or analyses.²⁶

A special investigatory Committee by Congress can help clarify these core issues. Confidence and public trust in the intelligence community can be restored by a thorough—

2013); *see also* Aaron Blake, *Sen. Wyden: Clapper didn't give 'straight answer' on NSA programs*, WASH. POST (June 11, 2013).

²² Andrea Peterson, *Three congressmen asked the government to disclose more about NSA spying in 2009. It said no.*, WASH. POST (Oct. 28, 2013).

²³ Jaycox, Mark, *Polls Continue to Show Majority of Americans Against NSA Spying*, EFF.org (January 22, 2014). <https://www.eff.org/deeplinks/2013/10/polls-continue-show-majority-americans-against-nsa-spying>

²⁴ USA FREEDOM Act of 2015, H.R. 2048, 114th Cong. §§ 601-03.

²⁵ Foreign Intelligence Surveillance Court Opinion at 31 (Oct. 3, 2011) (Bates, J.)

²⁶ *Id.* § 402.

public—examination of current surveillance practices and public accounting of how surveillance laws are being used and interpreted.

Congress needs more information about the nature of the domestic surveillance programs and how current oversight structures have performed. A special joint congressional investigation can provide the information Congress needs to respond appropriately to the present situation. As discussed further in Part III, the standing committees of Congress are ill equipped to handle this comprehensive review; a special committee is needed.

A Congressional Investigation Will Aide Foreign Relations

The lack of information, public trust, and Congressional access are not the only reasons for a Congressional investigation. A Congressional investigation will aide foreign relations. International partners have consistently argued U.S. surveillance practices violate international law, treaties, and core human rights. The criticism was followed by proposals in countries like Brazil and Germany attempting to balkanize the Internet, and was further symbolized when the European Court of Justice (ECJ) invalidated a key economic agreement between the European Union and U.S. in 2015. The ECJ's decision explicitly pointed to the Intelligence Community's mass and indiscriminate surveillance authorities as a basis for its decision.²⁷

The United States is party to numerous international human rights agreements that are implicated by mass surveillance practices.²⁸ For example, it has supported the adoption of the Universal Declaration of Human Rights (UDHR) and has ratified the International Covenant on Civil and Political Rights (ICCPR). Our foreign partners often point to the contradictory nature of adopting these agreements, while also engaging in the dragnet collection of information about non-suspicious individuals. The criticism is specifically directed at U.S. mass surveillance programs for failing to meet the standard of necessity and proportionality in international law. Such complaints have disrupted foreign relations and aggravated key foreign partners. An investigation may be able to analyze such complaints and place them in the context of our mass surveillance practices.

²⁷ See <http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-10/cp150117en.pdf>

²⁸ United States of America, Common core document forming part of the reports of States parties, HRI/CORE/USA/2011, 2011, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=625&Lang=en

An investigation may not only provide insight into our international obligations, but also provide information related to the European Court of Justice's revocation of the Safe Harbor agreement. In October 2015, the European Court of Justice (ECJ) decided that United States companies can no longer be automatically trusted with the personal data of Europeans.²⁹ The court, by declaring invalid the safe harbor which currently permits a sizeable amount of the commercial movement of personal data between the EU and the U.S., has signaled that government surveillance (like the surveillance occurring under Section 702 of the Foreign Intelligence Surveillance Act)³⁰ undermines privacy rights found in European law. The judgment largely relied on the mass and indiscriminate nature of the disclosed surveillance programs. In response, the Intelligence Community has derided the opinion as one not based on facts.³¹

The proposed investigative committee can include the effect of the ECJ decision on NSA's mass surveillance practices, if any. The committee can also address key facts and surveillance programs the ECJ decision is based on. Such an investigation would be able to provide broader context of our surveillance practices for our foreign allies, the EU, and the ECJ.

The Church Committee Provides a Model for Success

Congress has, in the past, effectively addressed concerns over government surveillance overreach through comprehensive and independent congressional investigations. Congress can borrow from these past examples today.

The parallel between the current surveillance situation and the situation in the 1970s is striking. In January 1970, Christopher Pyle revealed that the Army was monitoring every known public demonstration of more than 20 people in the United States.³² In December 1973, reporter Carl Stern ran a story on the NBC Nightly News, detailing extensive domestic surveillance and

²⁹ Case C-362/14 Maximilian Schrems v Data Protection Commissioner

³⁰ See <http://www.washingtonpost.com/wp-srv/special/politics/prism-collection-documents/>

³¹ Litt, Robert, *Europe's court should know the truth about U.S. intelligence*, Financial Times (Oct 5, 2015). <http://www.ft.com/cms/s/0/90be63f4-6863-11e5-a57f-21b88f7d973f.html>

³² Christopher H. Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, WASH. MONTHLY (Jan. 1, 1970), reprinted in 91 CONG. REC. 2227-2231 (1970); see also Dava Castillo, *Christopher Pyle disclosed military spying in the 1970s: Could Snowden have followed his example?*, ALLVOICES.COM (June 24, 2013).

disruption the FBI was undertaking for national security purposes.³³ A year later, in December 1974, Seymour Hersh of the New York Times revealed massive U.S. government domestic spying activities.³⁴

Congress responded swiftly and thoroughly investigated the allegations. Within two months of the New York Times report, Congress formed the Pike Committee in the House³⁵ and the Church Committee in the Senate.³⁶ While the Pike Committee was overly confrontational and never gained the necessary cooperation of the Intelligence Community to successfully conduct its investigations,³⁷ the Church Committee formed productive relationships with intelligence officials and produced a balanced evaluation that had credibility with critics of American intelligence activities.³⁸

The Church Committee was designed to provide a comprehensive bipartisan investigation.³⁹ It held searching hearings,⁴⁰ and uncovered a decades-long CIA spying operation

³³ *NBC Nightly News* (NBC television broadcast Dec. 6, 1973), available at <http://centennial.journalism.columbia.edu/1973-exposing-cointelpro/>; see also JAMES KIRKPATRICK DAVIS, *SPYING ON AMERICA* 163 (1992).

³⁴ Seymour Hersh, *Huge C.I.A. Operation Reported in U.S. Against Anti-War Forces*, N.Y. TIMES (Dec. 22, 1974).

³⁵ *House Approves Investigation of CIA, FBI*, CONG. QUARTERLY, 240 (Feb. 19, 1975).

³⁶ *January 27, 1975 – Church Committee Created*, Senate Stories, 1964-Present, UNITED STATES SENATE (last visited Oct. 20, 2013), available at http://www.senate.gov/artandhistory/history/minute/Church_Committee_Created.htm.

³⁷ See Gerald K. Haines, *The Pike Committee Investigations and the CIA: Looking for a Rogue Elephant*, STUD. IN INTELLIGENCE, Winter 1998-99, CENT. INTELLIGENCE AGENCY (last visited Nov. 14, 2013), available at https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art07.html (noting that the White House “viewed Pike as ‘unscrupulous and roguish,’” and characterizing “the committee’s relationship with the Agency and the White House” as “open warfare”).

³⁸ See *id.* (contrasting the Pike committee’s inexperienced staff with “the Church Committee, which had carefully balanced younger staff with Hill professionals and ex-[Intelligence Community] members” and noting that “the CIA Review Staff, which worked closely with both the Church Committee and Pike Committee staffs, never developed the same cooperative relationship with the Pike Committee staffers that it did with the Church Committee”); DANIEL L. SOLOVE, *NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY* 70 (2011) (arguing that “reviews such as the one done by the Church Committee should be carried out regularly and frequently”).

³⁹ As former Church Committee Staff Director William Miller described,

The composition of the Church Committee was carefully designed by elders of the Senate. . . .

They decided that they would have a committee that was bipartisan. . . . [It] would reflect all the major committees that had purchase on the intelligence world. . . . And it would reflect diversity of ideological position so that the Republican spectrum was reflected by their own choice, and the Democratic spectrum was chosen by [their own choice].

William Miller, Remarks at the Georgetown Law Surveillance & Foreign Intelligence Gathering in the United States: Past, Present, and Future (Sept. 24, 2013) (Georgetown Law Surveillance Gathering), available at <http://apps.law.georgetown.edu/webcasts/eventDetail.cfm?eventID=2104>.

⁴⁰ As former Vice President Walter Mondale recalled,

The most important thing we did was have searching hearings that went into almost all aspects of the problem and made a record that was irresistible, I would say. And you could see early on,

called SHAMROCK that (at the time) was “probably the largest governmental interception program affecting Americans ever undertaken.”⁴¹ NSA analysts were reviewing about 150,000 telegrams per month, including the majority of the international telegrams leaving New York City.⁴² The Committee found that, by the 1970s, executives of both parties had spied on “numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security.”⁴³ Targets included both prominent and ordinary American citizens, including Supreme Court Justice William O. Douglas; members of the civil rights movement, including Martin Luther King, Jr.; Senator Adlai Stevenson and Congressman Abner Mikva; White House advisers and congressional staff members; “journalists and newsmen;” and ordinary “teachers, writers, and publications.”⁴⁴

The Church Committee’s report spurred the passage of the Foreign Intelligence Surveillance Act of 1978 (FISA)⁴⁵ and a variety of oversight mechanisms that continued for more than three decades. Today, the report⁴⁶ is regarded as “the most famous discussion of the deeds and misdeeds of the intelligence agencies.”⁴⁷

before that record was made clear, the intelligence agencies were resisting us, you know ‘we gotta defend America, this will hurt us.’ . . . [But] when the case finally came out and it couldn’t be argued with, then the agencies sort of changed their approach and began to often cooperate with us.

Walter Mondale, Remarks at Georgetown Law Surveillance Gathering, *id.*

⁴¹ The description of the SHAMROCK program appears at pages 765-776 of Book III, *Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans*, Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, U.S. Senate, 1976.

⁴² See L. Britt Snider, *Unlucky SHAMROCK: Recollections from the Church Committee’s Investigation of NSA*, *STUD. IN INTELLIGENCE*, Winter 1999–2000, at 45; SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *SUPPLEMENTAL DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS (Book III)*, S. Rep. No. 94-755, at 765 (1976) (“Church Committee Book III”).

⁴³ SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS (Book II)*, S. Rep. No. 94-755, at 12 (1976) (“Church Committee Book II”).

⁴⁴ *Id.* at 8, 10, 12, 17, 49, 121.

⁴⁵ Pub. L. No. 95-511, 92 Stat. 1783, 50 U.S.C. ch. 36 § 1801 *et seq.*

⁴⁶ SENATE SELECT COMM. TO STUDY GOV’TAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, *FOREIGN AND MILITARY INTELLIGENCE (Book I)*, S. Rep. No. 94-755, at 765 (1976) (“Church Committee Book I”).

⁴⁷ Peter Swire, *The System of Foreign Intelligence Surveillance Law*, 72 *GEO. WASH. L. REV.* 1306, 1316 (2004). Note: Prof. Swire was appointed in August 2013 to the five-member Presidential Review Group that examined the NSA’s surveillance activities.

The Church Committee’s success can be attributed to its broad access, investigatory powers, and methodical investigation of intelligence activities. In particular, the Senate Resolution⁴⁸ that created it authorized the committee to:

- directly access government data;⁴⁹
- commit resources and secure staff and services;⁵⁰
- hold hearings and take depositions, even when Congress was in recess;⁵¹
- issue subpoenas to private and government actors;⁵²
- grant witness immunity;⁵³ and
- recommend the enactment or amendment of legislation “to strengthen or clarify the national security, intelligence, or surveillance activities of the United States and to protect the rights of United States citizens with regard to those activities.”⁵⁴

The Church Committee was required to issue a final report of its findings and recommendations. It was further authorized to disclose secret information as necessary, and was also charged with preventing unauthorized disclosure of such information.⁵⁵

The powers, requirements, and agreements with the intelligence community allowed the Church Committee to complete a thorough investigation of domestic intelligence community activities and issue candid assessments of any abuses. A modern-day committee should be afforded the same powers, be held to the same standards and requirements as the Church Committee, and should draw from both houses of Congress.

⁴⁸ Resolution to Establish a Select Committee of the Senate to Conduct an Investigation and Study with Respect to Intelligence Activities Carried out by or on Behalf of the Federal Government, S. RES. 21, 94th Cong. (1975) (“Church Committee Resolution”).

⁴⁹ *Id.* § 3(a)(11).

⁵⁰ *Id.* §§ 3(a)(1), (8), (9), (10), (12).

⁵¹ *Id.* §§ 3(a)(2)–(3), (7).

⁵² *Id.* §§ 3(a)(4)–(5), (3)(b).

⁵³ *Id.* § 3(c).

⁵⁴ *Id.* § 4.

⁵⁵ *Id.* § 7.

A Committee Modeled After the Joint Committee on Atomic Energy is the Appropriate Approach

Intelligence surveillance is a complex issue that calls for the bipartisan approach a joint committee offers. Calls for the two houses of Congress to join forces in intelligence oversight began just over a decade after the formation of the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI).⁵⁶ The Congressional Research Service has clearly explained why a joint structure is an appropriate organizational model for a congressional intelligence committee:

- A single, smaller committee can investigate more effectively and efficiently:
 - With a single, smaller oversight body, “[t]he executive would be more open and forthright. . . than with two with a larger combined membership;”⁵⁷
 - A small, unified committee could respond rapidly to new information and developments;⁵⁸
 - Executive officials testifying, briefing, notifying, and meeting with members and panels would need to spend less time if appearing before a single committee;⁵⁹
 - A small committee would more easily control and protect classified information;⁶⁰
 - A single committee would need fewer staff and offices than separate committees;⁶¹
- A joint committee can streamline the legislative process:
 - To be efficient, the joint committee should have authority to report legislation to the floor of both chambers, a power unique to joint committees that unicameral committees lack.⁶²

⁵⁶ See, e.g., Frederick M. Kaiser, *A Proposed Joint Committee on Intelligence: New Wine in an Old Bottle*, 5 J.L. & POL. 127, 128 (1988).

⁵⁷ FREDERICK M. KAISER, CONG. RESEARCH SERV., RL32525, A JOINT COMMITTEE ON INTELLIGENCE: PROPOSALS AND OPTIONS FROM THE 9/11 COMMISSION AND OTHERS 9 (2004).

⁵⁸ *Id.*

⁵⁹ *Id.* at 10.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 4.

- A joint structure would improve investigatory coordination, cooperation, and respect between the House and Senate as both houses can stand on equal footing with one other;⁶³
- A smaller joint committee would mean that fewer legislators in the House and Senate would have to take on extra committee assignments and be “spread too thin.”⁶⁴

Initiated in 1946, the Joint Committee on Atomic Energy (JCAE)⁶⁵ is an example of effective oversight that has repeatedly been cited as a model to reform the intelligence committees.⁶⁶ The JCAE has been described as “one of the most powerful, if not ‘the most powerful congressional committee in the history of the nation,’”⁶⁷ in part because it had authority to report legislation to both chambers.⁶⁸ An administrative cabinet department replaced the JCAE in 1977,⁶⁹ yet decades later the committee stands as an example of effective oversight and legislative action. A special investigative committee should adopt the joint structure that made JCAE so effective.

Key benefits of a joint committee are ease of formation and investigatory independence. Congress can form a special joint investigatory committee through a resolution passed by both houses.⁷⁰ Thus, Congress would not need to sacrifice effectiveness or independence in exchange for presidential approval.

⁶³ *Id.* at 9.

⁶⁴ *Id.* at 10.

⁶⁵ JCAE was set up by the Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 772 (1946).

⁶⁶ *See, e.g.*, THE 9/11 COMMISSION REPORT 420 (2004) (“Tinkering with the existing structure is not sufficient. [] Congress should create a joint committee for intelligence, using the Joint Atomic Energy Committee as its model”). The Tower Board and the Congressional Research Service have also advocated for a joint intelligence committee modeled on JCAE. *See* REP. OF THE PRESIDENT’S SPECIAL REVIEW BOARD V-7 (J. Tower, Chairman) (1987); CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RL32538, 9/11 COMMISSION RECOMMENDATIONS: JOINT COMMITTEE ON ATOMIC ENERGY – A MODEL FOR CONGRESSIONAL OVERSIGHT? (2004); L. ELAINE HALCHIN AND FREDERICK M. KAISER, CONG. RESEARCH SERV., RL32525, CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: CURRENT STRUCTURE AND ALTERNATIVES (2012); Kaiser, *supra* n. 44.

⁶⁷ Davis, *supra* n. 53, at 2 (quoting Harold P. Green & Allen Rosenthal, THE JOINT COMMITTEE ON ATOMIC ENERGY: A STUDY IN THE FUSION OF GOVERNMENT POWER, 288 (George Washington University 1961)).

⁶⁸ *Id.* at 3.

⁶⁹ *See* Department of Energy Organization Act, Pub. L. No. 96-91 (1977); Alice Buck, *The Atomic Energy Commission*, United States Dep’t of Energy (Jul. 1983), *available at* <http://energy.gov/sites/prod/files/AEC%20History.pdf>.

⁷⁰ *See, e.g.*, Joint House-Senate Iran-Contra Committee, H.R. RES. 12, 100th Cong. (1987), S.RES. 23, 100th Cong. (1987).

Further, as a bipartisan, bicameral effort, a joint investigatory committee could more objectively assess the domestic intelligence operations of past and present presidential administrations from both political parties.

As discussed further in Part II, a joint committee can and should be formed with appropriate structure, access, powers, and duties to ensure the investigation is complete and effective.

Part II: Forming a Joint Investigatory Body: A Blueprint for Success

The decision to form a special joint congressional committee to investigate domestic NSA surveillance is an important first step to restoring the balance between national security, privacy, and civil liberties. It is equally important to form the committee in such a way that provides all the tools required to successfully carry out the committee's charter. The important characteristics of a successful joint investigatory committee are discussed below.

Purpose and Duties

The purpose of this special joint investigatory committee is to conduct a comprehensive examination of current foreign and domestic intelligence practices. Such a review should include an examination of:

- Current surveillance programs where untargeted persons' content or other sensitive information is being collected;
- Whether intelligence agencies or officials engaged in any illegal, improper, or unethical activities while carrying out any intelligence or surveillance activities, including activities around international cryptographic standards;⁷¹
- The intelligence agencies' practices for sharing information about surveillance programs with Congress and the courts;
- Existing standing congressional intelligence committee rules and procedures for

⁷¹ See Church Committee Resolution, *supra* n. 35, §2(a)(1).

- Obtaining and handling sensitive information on intelligence programs and
- Informing the rest of Congress;
- Existing rules and procedures concerning whether the current classification system is adequate for Congressional and judicial oversight as well as overall democratic accountability;
- Whether the current congressional oversight of domestic intelligence activities is sufficient to protect privacy and civil liberties in light of modern technology; and,
- The United States' international obligations regarding surveillance practices.

As delineated below, the investigatory committee should be vested with all necessary and appropriate powers to conduct a complete investigation. Furthermore, it should be required to produce a report of its findings and recommendations for ensuring proper oversight of domestic intelligence activities in the future.

Membership, Resources, and Access to Information

The joint investigatory committee's membership should be bipartisan, qualified, and appropriately sized to adequately conduct its investigative function. To avoid political imbalance, the committee should have equal representation from both houses and both political parties. Moreover, to ensure adequate membership expertise, the chairs and ranking members of each of the Judiciary, Rules, Oversight, and Intelligence Committees should each select one committee member.⁷² This would create a 16-member joint committee, large enough to conduct a thorough investigation without becoming administratively unwieldy.⁷³

The joint committee should have sufficient staff, time, and resources to conduct a thorough investigation. The committee should be allowed staff composed of clerical, investigatory, legal, technical, and other personnel as the joint committee considers necessary or

⁷² The committees includes, from the House: The Committee on the Judiciary, the Committee on Oversight and Government Reform, the Committee on Rules, and the House Permanent Select Committee on Intelligence. The committees involved from the Senate, include: The Committee on the Judiciary, the Committee on Rules and Administration, the Committee on Homeland Security and Government Affairs Committee, and the Senate Select Committee on Intelligence.

⁷³ *Cf., e.g.*, the Joint Committee on Atomic Energy had 18 members. *See* Atomic Energy Act of 1946, Pub. L. No. 79-585 (1946). The Joint House-Senate Iran-Contra Committee had 26 members. *See* REPORT OF THE CONG. COMMS. INVESTIGATING THE IRAN-CONTRA AFFAIR, S. REP. NO. 100-216, H. REP. NO. 100-433, at 6-7, (1987).

appropriate.⁷⁴ Although the current public interest in NSA surveillance demands a swift response, the committee must be given the time necessary to conduct its investigation free of arbitrary constraints.⁷⁵

To assist Congress in making informed policy judgments and to inform the public about the administration of laws, the investigatory committee should be granted direct access to all relevant information to the extent permitted by law.⁷⁶ This includes all reports the intelligence community is statutorily required to provide to the standing intelligence committees.⁷⁷ To ensure that the committee obtains this broad access to information, the committee should possess several important powers.

Powers

A congressional committee derives its investigatory powers as well as the scope of its investigatory authority from Congress.⁷⁸ Congressional committees have broad power to seek information on specific problems that have been or may be the subject of appropriate legislation.⁷⁹

Hold Open and Closed Hearings

A committee investigating sensitive information such as government surveillance should have the authority to hold both open and closed hearings. Holding searching hearings was one of the most effective tools in the Church Committee's arsenal for discovering the full scope of domestic surveillance.⁸⁰

⁷⁴ See Church Committee Resolution, *supra* n. 35, at §3(a).

⁷⁵ The co-chairs of the 9/11 Commission indicated that a shortened investigatory timeline and limited funding hampered the commission's effectiveness. See THOMAS KEAN & LEE HAMILTON, *WITHOUT PRECEDENT: THE INSIDE STORY OF THE 9/11 COMM'N* 14–34 (2007).

⁷⁶ See, e.g., Pub. L. No. 107-306, 107th Cong., §605(c)(1) (2002) (the 9/11 commission is “authorized to secure directly from any executive department . . . information, suggestions, estimates, and statistics . . . Each department . . . [s]hall, to the extent authorized by law, furnish such information suggestions, estimates, and statistics directly to the Commission”); S. Res. 21, 94th Cong., §3(a)(11) (1974) (the committee shall “have direct access through the agency . . . to any data, evidence, information, report, analysis, or document or papers, relating to any of the matters [being investigated] . . . in the custody or under the control of any department ”).

⁷⁷ See 50 U.S.C. §§3091-3093 (2012).

⁷⁸ *United States v. Rumely*, 345 U.S. 41, 42 (1953); see also *Watkins v. United States*, 354 U.S. at 198.

⁷⁹ *Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968), *cert denied*, 393 U.S. 1024 (1969).

⁸⁰ See Church Committee Resolution *supra*, n. 35, §3(a)(3); see also n. 28 *supra*.

Regular congressional committee meetings and hearings are open to the public, which can chill committee access to classified information. Closed sessions allow the sharing of confidential testimony and materials. Both houses of Congress have provisions that allow for conducting closed committee hearings.⁸¹ Confidential material received and testimony taken in closed session is normally releasable to the public by a majority vote of the committee.⁸² The ability to hold closed sessions would allow the investigatory committee to review and evaluate sensitive and classified information that it would otherwise not be able to publicly scrutinize.

Issue Subpoenas and Take Sworn Testimony

In order to obtain the information necessary to conduct a thorough investigation, a congressional committee should be able to issue subpoenas for documents and sworn testimony. Since the drafting of the Constitution, the power to subpoena has been “regarded and employed as a necessary and appropriate attribute of the power to legislate[.]”⁸³ The power of inquiry, with the accompanying process to enforce it, is “an essential and appropriate auxiliary to the legislative function.”⁸⁴

Although the Intelligence Community has mandatory reporting requirements,⁸⁵ the reported information may not be accurate or complete. Without legally enforceable congressional subpoena power, the committee would have no recourse if the Intelligence Community ignored the committee’s requests for information. Some means of compulsion is essential.⁸⁶ The investigatory committee should, as all standing committees and subcommittees do, have the

⁸¹ See House Rule XI(2)(g)(2)(A), 113th Cong. (provides that a hearing “shall be closed to the public” if a majority of a committee or subcommittee determines that the testimony or evidence “would endanger national security, would compromise sensitive law enforcement information, or would violate a law or rule of the house.”); Senate Rule XXVI(5)(b) et seq, 113th Cong. (Senate committee members can approve a closed session if confidential information may be disclosed that could compromise national defense, represent an unwarranted invasion of personal privacy, could compromise secret law enforcement or investigation activities, would reveal trade secrets, or would violate some other law of Congress.).

⁸² FREDERICK M. KAISER, WALTER J. OLESZEK, & TODD B. TATELMAN, CONG. RESEARCH SERV., RL30240, CONG. OVERSIGHT MANUAL 31(2011).

⁸³ *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927); see also *Buckley v. Valeo*, 424 U.S. 1, 138 (1976), *Eastland v. U. S. Servicemen’s Fund*, 421 U.S. 491, 504-505 (1975).

⁸⁴ *McGrain*, 273 U.S. at 174-75.

⁸⁵ See 50 U.S.C. §§3091-3093 (2012).

⁸⁶ The principal means of enforcing a congressional subpoena is through the contempt power. See Contempt of Congress discussion *infra*.

power to require the attendance and testimony of witnesses and the production of documents.⁸⁷ Congress must specifically delegate the authority to issue subpoenas to the committee.

Grant Witness Immunity

To encourage witnesses to provide candid testimony about the intelligence community's surveillance operations, the committee requires the power to grant immunity to witnesses.⁸⁸ Witnesses that participated in potentially illegal activities in connection with the executive's surveillance operations may invoke Constitutional privileges and refuse to provide information to the committee.⁸⁹ However, these witnesses may be compelled to cooperate if they are granted immunity. The investigatory committee should have the authority and discretion to grant witness immunity, as when the situation "require[s] the type of quick, decisive disclosures that could result from a congressional investigation but not from the slower, more deliberate criminal investigation and prosecution process."⁹⁰

Contempt of Congress

Through the contempt power, Congress can combat resistance to legislative inquiry, such as refusal to comply with a duly authorized congressional subpoena. Congress typically exercises its contempt power in two ways: criminal contempt and civil contempt. Against executive officials, only civil contempt provides a realistic mechanism to force compliance with a congressional subpoena.

⁸⁷ See Senate Rule XXVI(1); House Rule XI(2)(m)(1); CONG. OVERSIGHT MANUAL, *supra* n. 68, at 28.

⁸⁸ See 18 U.S.C. §§ 6002, 6005 (2012). Since 1970, congressional committees have obtained more than 300 immunity orders (almost half were in connection with the 1978 investigation into the assassinations of JFK and MLK). CONG. OVERSIGHT MANUAL, *supra* n. 68, at 32. Congress has granted immunity in a number of major congressional investigations, including Watergate (John Dean and Jeb Magruder) and Iran-Contra (Oliver North and John Poindexter). *Id.*

⁸⁹ "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. CONST. amend. V.

⁹⁰ MORTON ROSENBERG, CONG. RESEARCH SERV., No. 95-464, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY 7 (1995) ("Investigative Oversight") at 10 & n.67 (citing Michael Gilbert, *The Future of Congressional Use Immunity After United States v. North*, 30 AMER. CRIM. L. REV. 417, 430-31 (1993); Arthur L. Limon and Mark A. Belnick, *Congress Had to Immunize North*, WASH. POST (July 29, 1990)).

Statutory criminal contempt allows Congress to refer the contemnor to a U.S. Attorney to bring criminal contempt charges.⁹¹ However, the U.S. Attorney, a member of the executive branch, may exercise prosecutorial discretion and refuse to bring the charges against executive officials.⁹² Civil contempt, however, remains an option to deal with uncooperative executive officials. In civil contempt, Congress files an action for declaratory judgment in federal court to enforce its congressional subpoena. The judge can force compliance if the judge finds the subpoena was duly authorized and non-compliance was not excused by some privilege.⁹³

Conduct Staff Depositions

Competent staff should aid the investigatory committee and be able to stand in for committee members to take depositions of testifying witnesses.⁹⁴ Because committee members cannot always devote time to lengthy hearings with every witness, staff depositions are necessary to help committees quickly and confidentially obtain sworn testimony. Members can avoid devoting time to hearing “witnesses [that] do not have the facts needed by the committee or refuse to cooperate.”⁹⁵ As well as taking depositions, staff should be authorized to participate in

⁹¹ See 2 U.S.C. §§192, 194 (2012).

⁹² See *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008).

⁹³ For an example of the interplay between civil and criminal contempt proceedings, see the House’s recent contempt resolutions against Attorney General (AG) Eric Holder. After President Obama invoked executive privilege regarding a Bureau of Alcohol, Tobacco, Firearms, and Explosives operation known as “Fast and Furious,” AG Holder refused to comply with a congressional subpoena for documents. The House passed two resolutions to hold Holder in both criminal and civil contempt. See H.R. RES. 711, 112th Cong. (2012) (criminal citation); H.R. RES. 706, 112th Cong. (2012) (authorizing Rep. Darrell Issa (R-CA) to seek declaratory judgment in a civil action in federal court). The U.S. Attorney’s Office refused to bring criminal contempt proceedings against Holder. In response, the House Committee on Oversight and Government Reform filed a civil action against Holder seeking a force compliance with the subpoena. *Committee on Oversight and Government Reform v. Holder*, No. 1:12-cv-1332 (D.D.C. Aug. 13, 2012), available at <http://images.politico.com/global/2012/08/householdercomp.pdf>. The case is pending and may have important implications for the scope of Congress’s contempt power when confronted with a claim of executive privilege.

⁹⁴ Investigative Oversight, *supra* n.76 at 6 & n.39 (“With more frequency in recent years, congressional committees have utilized staff conducted depositions as a tool in exercising the investigatory power.”) (citing S. RES. 229, 103d Cong. (Whitewater); S. RES. 23, 100th Cong. (Iran-Contra); H.R. RES. 12, 100th Cong. (Iran- Contra); H.R. RES. 320, 100th Cong. (impeachment proceedings of Judge Alcee Hastings); S. RES. 495, 96th Cong. (Billy Carter/Libya)).

⁹⁵ No case law addresses “the ability to enforce a subpoena for a staff deposition by means of contempt sanctions, and [] the applicability to such a deposition of various statutes that proscribe false material statements.” Investigative Oversight, *supra* n.76, at 6.

committee hearings and address witnesses. In addition, because staff depositions can be conducted in private, they can promote more candid responses.⁹⁶

Requirement to Report and Recommend to Congress

In order to make practical use of information obtained through the investigation, the committee should be required to issue a public report and recommendations based on its findings of fact. The purpose of the investigations is to restore the public's trust that the intelligence community's surveillance activities are appropriate and in accordance with the law. To serve this purpose, the committee must issue a public finding regarding whether the government's intelligence programs are protecting the privacy and civil liberties of innocent people.

To complement this reporting requirement, the committee should have the authority to declassify documents and information on government programs. Both houses of Congress have provisions allowing committees to publicly release information in their possession.⁹⁷

This proposed joint investigatory committee should have the power and duty to recommend corrective legislative actions as are warranted and appropriate. The committee's recommendations might include:

- new legislation or amendments to existing laws governing U.S. intelligence activities;
- guidelines for protecting privacy and civil liberties while conducting surveillance;
- additional congressional oversight and enforcement mechanisms;
- increased reporting or transparency requirements for the standing intelligence committees; or
- increased congressional approval required for implementation or expansion of surveillance programs.

These recommendations would help ensure that Congress responds correctly and that the Intelligence Community properly carries out constitutional and congressional mandates.

⁹⁶ *Id.*

⁹⁷ House and Senate committees have the power to release to the public or use evidence or testimony taken in closed sessions if a majority of the committee agrees to do so. House Rule XI(2)(k)(7), 113th Cong; S. RES. 400, 94th Cong., §8.

Part III: Proposed Options Lack Key Elements For Success

Members of Congress and the Obama administration have proposed a variety of ideas for a special investigation. Although each approach may offer certain strengths, each also lacks one or more critical elements required for a successful investigation into the Intelligence Community's domestic and global surveillance.

The Congressional Intelligence Committees Are Not Positioned For a Successful Investigation

The standing committees with primary responsibility to oversee the intelligence community—the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI)—are ill suited to investigate NSA, FBI, and general intelligence community surveillance.

That many lawmakers were unaware of the true extent of surveillance operations prior to the disclosures demonstrates the need for a comprehensive review of information sharing practices and the Congressional oversight and classification regimes.⁹⁸ Doing a comprehensive review requires several features that neither SSCI nor HPSCI can provide.

First, a comprehensive examination of current intelligence practices requires a rigorous, independent review. This in turn requires a reviewing body that is not part of the current structure. The investigation should examine not only the surveillance programs, but also how information about those surveillance programs is shared with the intelligence committees and the rest of Congress. A special investigatory committee is needed to provide this independent outside review.

Supporters of the surveillance programs have argued that members of Congress are adequately informed on surveillance operations.⁹⁹ But several lawmakers have stated that the

⁹⁸ See fn. 15–19 *supra*, and accompanying text.

⁹⁹ President Obama, for example, argued after the revelations that “These programs were originally authorized by Congress, . . . They have been repeatedly authorized by Congress. Bipartisan majorities have approved them. Congress is continually briefed on how these are conducted.” Timothy B. Lee, *Obama says the NSA has had plenty of oversight. Here’s why he’s wrong.*, WASH. POST (June 7, 2013); see also Michael McAuliff & Sabrina Siddiqui, *Harry Reid: If Lawmakers Didn’t Know About NSA Surveillance, It’s Their Fault*, HUFFINGTON POST (June 11, 2013).

briefings they receive fail to provide crucial information.¹⁰⁰ Others have described how the classification system and nondisclosure rules prevent Congress from obtaining sufficient answers.¹⁰¹ For example, Rep. Justin Amash explained that if he asks a question

In slightly the wrong way they will tell you no. They're not going to tell you 'No, this agency doesn't do it but this other agency does it' or 'No we can't do it under this program, but we can do it under this program.' But you don't know what the other programs are, so what are you going to ask about?

Still others have suggested the standing committees are too loyal to the Intelligence Community to share classified information.¹⁰² For example, Rep. Alan Grayson noted:

Many of us worry that Congressional Intelligence Committees are more loyal to the 'intelligence community' that they are tasked with policing, than to the Constitution. And the House Intelligence Committee isn't doing anything to assuage our concerns.

The standing intelligence committees' processes and procedures for informing Congress and the public must be reviewed as part of the evaluation of intelligence sharing practices, which they themselves cannot do objectively. As former Vice President and Church Committee member Walter Mondale recently explained:

The [intelligence] agencies of course, and often legitimately, want to keep things secret, but the [intelligence] committee has a unique and different function. . . .to keep the Congress informed and if necessary the public informed. And I'm not comfortable that that part of the committees' role is being as fully pursued as we had hoped.¹⁰³

Further, SSCI and HPSCI have been slow and defensive about identifying and scrutinizing potential intelligence community abuses. Not until the national media reported on

¹⁰⁰ Senator Bob Corker (R-Tenn.) stated: "members of Congress are left to wonder why the prior briefings provided by the Executive Branch did not cover the material contained in these articles." Letter from Bob Corker, U.S. Senator, to Barack Obama, President of the United States (Aug. 21, 2013), *available at* http://www.corker.senate.gov/public/index.cfm/news?ContentRecord_id=cb3463c8-2a14-44ea-a082-60724e39bef8; *see also Patrick Leahy At NSA Hearing: We Get More In The Newspapers Than In Classified Briefings*, HUFFINGTON POST (Oct. 2, 2013).

¹⁰¹ Andrea Peterson, *Obama says NSA has plenty of congressional oversight. But one congressman says it's a farce.*, WASH. POST (Oct. 9, 2013).

¹⁰² "Many of us worry that Congressional Intelligence Committees are more loyal to the 'Intelligence Community' that they are tasked with policing, than to the Constitution. And the House Intelligence Committee isn't doing anything to assuage our concerns." Alan Grayson, *Congressional oversight of the NSA is a joke. I should know, I'm in Congress*, GUARDIAN (Oct. 25, 2013)

¹⁰³ Walter Mondale, Remarks at Georgetown Law Surveillance Gathering, *supra* n. 27.

overbroad spying activities did then-SSCI Chair Dianne Feinstein state that the Committee would conduct a “total review of all intelligence programs.”¹⁰⁴ As Senator John McCain noted:

I’m glad that the intelligence committee is going to have a ‘thorough review[]’. . . Then the question is, what were you doing the last four years? What has the Intelligence Committee been doing the last four years? Aren’t they supposed to be overseeing [sic] these government programs?. . . Obviously these standing committees haven’t done their job. We need a select committee.¹⁰⁵

Senator McCain's call for an investigation was reiterated by the Republican National Committee (RNC), which develops and promotes the Republican national political platform. In late January 2014, the RNC passed a resolution calling for a special investigative committee.¹⁰⁶ Senator McCain and the RNC are right. A special investigatory committee is the only way to conduct a thorough investigation.

Finally, a key function of congressional investigation is to restore public confidence that intelligence operations are conducted with appropriate consideration of privacy and civil liberties. That members of Congress and others have voiced skepticism about the standing committees’ efforts further indicates that generating this public confidence requires a new, independent investigation.

In short, an investigation must provide both actual objectivity and the public appearance of objectivity. Because the standing committees have had oversight authority over the executive’s surveillance programs for years, the public will be skeptical if the same committees that “oversaw” the NSA and FBI’s operations now conduct the review. Other proposed alternatives to a special investigatory committee similarly fall short of providing the powerful and thorough scrutiny of intelligence activities that is needed.

¹⁰⁴ Press Release, Senator Dianne Feinstein, Feinstein Statement on Intelligence Collection of Foreign Leaders (Oct. 28, 2013); *Senate Intel chief furious over allegations NSA listened to allies; says she wasn’t told*, ASSOCIATED PRESS (Oct. 28, 2013).

¹⁰⁵ Michael McAuliff, *John McCain Says NSA Probe Requires Select Committee*, HUFFINGTON POST (Oct. 29, 2013); see also Rick Pearson, *McCain: Select hearings may be needed on NSA eavesdropping*, CHICAGO TRIBUNE (Oct. 28, 2013).

¹⁰⁶ Ward, Jon, *Republican National Committee Denounces NSA Spying, Calls for Committee*, HUFFINGTON Post (Jan. 24, 2014).

The Inspector General of the Intelligence Community Is Not Sufficiently Independent

Recently, a bipartisan group of nine senators publicly urged the Intelligence Community Inspector General (IC IG) to conduct a “comprehensive review” of intelligence activities and to make publically available findings.¹⁰⁷ The IC IG¹⁰⁸ serves within the Executive branch to provide independent review of activities of the intelligence community. In response to the Senators, the IC IG declined the senators’ request for an investigation and decided not to conduct a review, claiming that his office does not have sufficient resources.¹⁰⁹

Even if an investigation were conducted, the IC IG’s ability to conduct an investigation is limited in several critical respects. First, the IC IG has limited access to information held by federal agencies. The IC IG may only request, not compel, federal agencies to provide information, and may only do so “subject to the concurrence of the Director of National Intelligence.”¹¹⁰ This restriction is likely to prevent the IC IG from obtaining information essential to understanding how surveillance operations are conducted or legally justified.¹¹¹

Second, the IC IG reports directly to, and can be dismissed by, the very officials who authorized the programs under investigation.¹¹² The IC IG may be reluctant to openly disagree with direct superiors over the legality of surveillance programs or decisions to classify the existence of programs in the interest of national security.

¹⁰⁷ Press Release, Senator Patrick Leahy, Senate Judiciary Committee Members Call For IG Review Of Surveillance Authorities (Sept. 23, 2013).

¹⁰⁸ See 50 U.S.C. §3033 (2012) (creating an Inspector General of the Intelligence Community to “conduct independent investigations, inspections, audits, and reviews on programs and activities within the responsibility and authority of the Director of National Intelligence”).

¹⁰⁹ Tony Romm, *Intel IG rebuffs Hill on surveillance probe*, POLITICO (Nov. 6, 2013).

¹¹⁰ See 50 U.S.C. §3033 (j)(4)(A).

¹¹¹ For example, in 2003, the executive refused an IC IG request for legal documents justifying a metadata spying program unless the request came directly from the Director of National Intelligence. Leaked Inspector General NSA Report, 21 (Mar. 29, 2009), available at <http://www.theguardian.com/world/interactive/2013/jun/27/nsa-inspector-general-report-document-data-collection>.

¹¹² The Inspector General of the Intelligence Community reports directly to the Director of National Intelligence and can be fired by the President. See 50 U.S.C. §3033 (c)(3)–(4).

Finally, the Executive may prevent the IC IG from even initiating an investigation or releasing sensitive information from an investigation.¹¹³ This limitation allows the executive to unilaterally defeat the purpose of the investigation by preventing information from ever reaching Congress. In combination, these limitations severely hamper the ability of the inspector general to serve as an objective and independent investigator of surveillance programs.

The Privacy and Civil Liberties Oversight Board Lacks Power

A group of 12 Senators recently called for an investigation by the Privacy and Civil Liberties Oversight Board (PCLOB),¹¹⁴ an independent executive agency established in 2004 to advise the President and members of the executive to “ensure privacy and civil liberties are appropriately considered in the implementation of laws, regulations, and executive branch policies related to efforts to protect the Nation against terrorism.”¹¹⁵ The PCLOB has conducted two reviews so far: one on Section 215 of the Patriot Act¹¹⁶ and another on Section 702 of the Foreign Intelligence Surveillance Act.¹¹⁷ A third, on two surveillance programs occurring under Executive Order 12333, is ongoing.¹¹⁸

Although the PCLOB is an independent agency, its powers are too limited to enable it to conduct a complete investigation. The PCLOB cannot directly subpoena information from agencies such as the NSA, and while it may request that the Attorney General (AG) issue a subpoena on the PCLOB’s behalf, the Attorney General can simply refuse.¹¹⁹ Thus far, PCLOB’s

¹¹³ See *id.* §3033 (f)(1) (“The Director of National Intelligence may prohibit the Inspector General of the Intelligence Community from initiating, carrying out, or completing any investigation, inspection, audit, or review if the Director determines that such prohibition is necessary to protect vital national security interests of the United States.”).

¹¹⁴ Press Release, Senator Tom Udall, Udall Calls for Independent Investigation on NSA Data Collection, Director Says NSA Will Cooperate (June 12, 2013).

¹¹⁵ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458 §1061(c)(3) (2004). The President appoints and the Senate confirms a five-member Board to lead PCLOB. See 42 U.S.C. §2000ee(h) (2012).

¹¹⁶ Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted Under Section 215 of the USA Patriot Act and on the Operations of the Foreign Intelligence Surveillance Court*, (Jan. 23, 2014).

¹¹⁷ Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act*, (July 2, 2014).

¹¹⁸ See https://pclob.gov/library/20150408-EO12333_Project_Description.pdf

¹¹⁹ 42 U.S.C. §2000ee(g) (2012). The Attorney General is not required to issue the subpoena and may respond with a written explanation of why the subpoena has been denied.

activities have not required subpoenas,¹²⁰ but the need to rely on an executive officer (the AG) for access to critical information may halt or influence the contours of PCLOB's investigations. Moreover, the PCLOB cannot take sworn testimony and cannot hold a non-compliant witness in contempt,¹²¹ so it has little recourse if provided inaccurate or incomplete information. In addition, even if the PCLOB receives full cooperation, it has no authority to release classified information or make any policy changes.¹²²

Even if the PCLOB were granted a robust subpoena power, limited resources and staff constrain its effectiveness. The Board only has five members, four of whom serve part time, and fewer than a dozen full-time staffers.¹²³

The reports released so far by the PCLOB exclude key aspects of the NSA's activities reported in the press. For instance, the Section 215 report only discusses the collection of Americans' calling records, yet multiple news releases reveal that Section 215 may have also been used to collect Americans' financial records.¹²⁴ Likewise, while the Section 702 report describes a surveillance program called "Upstream" collection, the PCLOB focuses only on the government's methods for searching and filtering out unwanted information. It mentions "NSA devices" installed on a carriers' fiber network, but does not delve into how, why, or when those devices search Americans' communications. The report ignores the fact that the government is collecting and searching through the content of millions of emails, social networking posts, and other Internet communications—steps occurring before the PCLOB analysis starts. In addition, the forthcoming EO 12333 report will only focus on two specific programs and not the underlying legal regime or entire gamut of surveillance practices carried out under the authority.

¹²⁰ Cyrus Farivar, *As U.S. gov't surveillance watchdog group opens for business, questions linger*, ARSTECHNICA.COM (Nov. 7, 2013).

¹²¹ PCLOB's Chairman David Medine recently stated: "We don't have the authority to make people swear an oath." *Id.*

¹²² Medine continued, "We can't release classified information, but nonetheless we benefit in forming our conclusions. Ultimately, we will issue a public report so the public can learn what we will learn, but it's likely that we will issue a classified appendix. We will also urge that declassification of some issues or documents that are important in our final report" *Id.*

¹²³ See <https://www.pcllob.gov/library/CBJB16.pdf>

¹²⁴ Charlie Savage & Mark Mazzetti, *C.I.A. Collects Global Data on Transfers of Money*, NEW YORK TIMES, Nov. 14, 2013, at A11.

An investigative committee could more fully delve into these unanswered questions and large information gaps.¹²⁵

Conclusion

Recent revelations about the extent of the NSA's and other executive agencies' domestic surveillance activities illustrate that neither the American public nor Congress have been adequately informed about these activities, and that proper oversight of the Intelligence Community is lacking.

To restore public confidence and heighten Congress's proper legislative oversight role, a special congressional investigatory committee that undertakes a comprehensive review of surveillance practices and that recommends needed reform is needed. Accordingly, public sentiment for such a committee has grown rapidly. Proponents of a special congressional investigatory committee today include Pentagon Papers whistleblower Daniel Ellsberg,¹²⁶ former Church Committee chief counsel Fritz Schwarz, Senator Frank Church's widow Bethine Church,¹²⁷ and Harvard law professor Yochai Benkler.¹²⁸ As former Senator and Church Committee member Gary Hart put it, "We need another Church Committee[.]"¹²⁹

¹²⁵ It's important to note in 2013, the Obama administration convened a Review Group on Intelligence and Communications Technologies ("President's Review Group"), a five-member panel tasked with investigating NSA spying practices. Although the President's investigatory panel was intended to be a "high-level group of outside experts to review our intelligence and communications technologies,"¹²⁵ the appointed members of the panel are Democratic, Obama administration insiders, and former intelligence officials. Similarly in the 1970s, President Gerald Ford appointed a small committee, chaired by his own Vice President Nelson Rockefeller, to examine the CIA's domestic surveillance actions. The Rockefeller Commission, created by President Ford on January 4, 1975 and formally known as the United States President's Commission on CIA Activities within the United States, was considered to be ineffective. Its investigation was limited to the CIA, and the commission did not critically evaluate domestic surveillance activities, finding that "the great majority of the CIA's domestic activities comply with its statutory authority." See http://history-matters.com/archive/contents/church/contents_church_reports_rockcomm.htm.

Like President Ford's Rockefeller Commission, President Obama's panel is composed of the President's political allies. The President's Review Group released its report on December 12, 2013. The report includes over 40 recommendations for promoting transparency; protecting online security tools; and, making organizational reforms to the NSA, the Foreign Intelligence Surveillance Court, and the civil liberties oversight bodies. Similar to the report by the PCLOB, the Review Group's report was a good first step, but did not report on many of the known activities of the NSA unsaid. It also did not include a legal analysis of the surveillance authorities or an investigation into other NSA activities.

¹²⁶ Miranda Green, *Daniel Ellsberg Issues Call for a New Church Committee To Probe NSA*, DAILY BEAST (July 1, 2013).

¹²⁷ *Flashback: A Look Back at the Church Committee's Investigation into CIA, FBI Misuse of Power*, DEMOCRACY NOW (Apr. 24, 2009)

Commentators' specific call for a congressional investigation styled after the Church Committee of the 1970s makes sense.¹³⁰ That committee both investigated intelligence operations specifically, and also stands as one of the most successful investigatory bodies in congressional history.

The new committee should borrow from relevant powers and structural features of the Church Committee and the equally successful Joint Committee on Atomic Energy, which provides an additional useful historical model. In particular, the special congressional investigatory committee should be a joint body, with equal representation from both the House and Senate and of both Democrats and Republicans. The committee should be allocated the necessary time, resources, expert staff, and access to information to conduct a thorough evaluation and formulate recommendations for action. To properly investigate, the committee must have sufficient powers, including the ability to hold open and closed hearings, issue subpoenas, conduct staff depositions, grant witness immunity, and compel cooperation with the investigation through contempt powers.

Ultimately, the new joint committee should be required to issue a public report and recommendations to both houses of Congress on its findings and conclusions regarding any needed reforms.

A special joint congressional investigatory committee would allow Congress to determine whether proper oversight is conducted over the intelligence committee and thus restore the trust of the American public in its government.

Throughout his time as senator, Bethine's involvement in her husband's campaigns and active participation in public life earned her the informal title as "Idaho's third senator." Besides actively campaigning for her husband four times for senator and once for president, Bethine discussed most issues that came across Frank's desk with her husband. Bethine accompanied Frank on many of his trips around the world to meet with foreign leaders, as well as American cultural icons.

See also Bethine Church Collection, Boise State University – Albertsons Library Digital Collections, available at <http://digital.boisestate.edu/cdm/landingpage/collection/bchurch>.

¹²⁸ Yochai Benkler, *We Need a New Church Committee*, NEW REPUBLIC (June 11, 2013).

¹²⁹ Gary Hart, Remarks at Georgetown Law Surveillance Gathering, *supra* n. 27.

¹³⁰ *See, e.g.*, Mark Rumold, *What the government is hiding from you*, CNN (Sept. 6, 2013) ("It's now apparent that we need a second Church Committee to fully and independently investigate the full scope of the NSA's surveillance practices and to recommend meaningful reforms."); Conor Friedersdorf, *Lawbreaking at the NSA: Bring On a New Church Committee*, THE ATLANTIC (Aug. 16, 2013).