

**CONGRESSIONAL NOTIFICATION: INTELLIGENCE
COMMUNITY POLICIES, PRACTICES, AND PRO-
CEDURES**

HEARING
BEFORE THE
SUBCOMMITTEE ON
INTELLIGENCE COMMUNITY
MANAGEMENT
OF THE
**PERMANENT SELECT
COMMITTEE
ON INTELLIGENCE**
ONE HUNDRED ELEVENTH CONGRESS
FIRST SESSION

Hearing held in Washington, DC, October 27, 2009



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**CONGRESSIONAL NOTIFICATION: INTEL-
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TUESDAY, OCTOBER 27, 2009

HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
JOINT WITH THE SUBCOMMITTEE ON
INTELLIGENCE COMMUNITY MANAGEMENT,
Washington, DC.

The subcommittee met, pursuant to call, at 10:05 a.m., in Room HVC-210, Capitol Visitor Center, the Honorable Jan Schakowsky, [chairwoman of the Subcommittee on Oversight] presiding.

Present: Representatives Schakowsky, Eshoo, Holt, Schiff, Myrick, Thornberry, Miller, and Conaway.

Chairwoman SCHAKOWSKY. I'll call this meeting to order.

Today we will examine how the Intelligence Community honors and implements its legal obligation to keep Congress informed about intelligence activities. This hearing is part of the full committee's investigation into the Intelligence Community's compliance with the National Security Act. This is a combined hearing of the Oversight and Investigation Subcommittee and the Intelligence Community Management Subcommittee, chaired by Congresswoman Eshoo.

Under the National Security Act, the executive branch is required to keep the committee "fully and currently informed of the intelligence activities" of the United States, including any "significant anticipated intelligence activity" and covert actions. These requirements are critical. The executive branch's intelligence activities are secret, and the American people rely on the congressional Intelligence Committees to scrutinize them. They rely on this committee to make sure that those activities are consistent with the Nation's best interest and values. The committee is, in the truest sense, the people's representative when it comes to secret intelligence activities.

For the committee to perform these vital functions, the committee must receive—and the executive branch must provide—truthful, complete, and timely information. If this does not occur, Congress cannot adequately perform its constitutional obligation to authorize and appropriate money for intelligence activities.

In recent years, various members of the committee from both sides of the aisle have expressed concerns that the Intelligence Community has failed to provide the committee with full and com-

plete information. Recent revelations have raised yet more questions about whether the Intelligence Community has violated the National Security Act.

Last week, the Intelligence Community Management Subcommittee held a hearing focused on the National Security Act's provisions that require the executive branch to keep the committee informed about intelligence activities. That hearing was an important step in the committee's investigation.

Today's hearing represents another important step. For the National Security Act to be effective, the executive branch must properly implement and enforce it. We need to understand how the Intelligence Community carries out this obligation, whether its notification policies gave rise to past notification failures, and what it is now doing to make sure that the committee is kept fully and currently informed.

In particular, I look forward to hearing about the ODNI's current review of the Intelligence Community's notification policies.

To discuss these matters, we will hear from Robert S. Litt, the general counsel of the Office of the Director of National Intelligence. While Mr. Litt has only been on the job for several months now, he joined the ODNI after an already distinguished legal career which has included time as a senior Justice Department official and as a partner at one of Washington D.C.'s most prominent law firms. As demonstrated by his substantial work on the subject since joining the ODNI, I know he takes the issue of congressional oversight seriously and I welcome him here today.

Chairwoman SCHAKOWSKY. At this point, I would like to recognize Ms. Eshoo, the Chair of the Intelligence Community Management Subcommittee, for any opening statement that she would like to make.

Ms. ESHOO. Thank you, Madam Chairwoman, and good morning to everyone. Welcome.

Mr. Litt, thank you for being willing to testify today on this joint session on congressional notification which is, of course, a very important topic, and it's the reason that we're here.

Last week the Intelligence Community Management Subcommittee held a hearing examining the provisions in the National Security Act of 1947 that established how the executive branch keeps Congress informed of its intelligence activities. This hearing comes as a welcome follow-up to that one, so we can examine how the executive branch has implemented the provisions of the act and how they interpret the statute.

As I said last week at our hearing, the executive branch's obligation to keep the committee fully and currently informed is really a solemn obligation. Congress has a right to know and the executive branch has a duty to share the information necessary for Congress to authorize and appropriate funds and oversee the activities of the Federal Government, including intelligence activities, to ensure that taxpayer funds are spent wisely and that the policy is really a sound one.

Last week, we heard that the relationship works best when the executive branch takes, in good faith, its obligation to share full and complete information about intelligence activities with the committee. In many cases, Congress provides the only outside over-

sight on intelligence activities, and thus its role is all the more crucial in checking executive excesses or strengthening its plans.

We examined the statute and we focused on a number of phrases where the law is ambiguous. Some in the executive branch could use that lack of clarity to circumvent their obligations to inform Congress. We need to understand how the agencies interpret their obligation to keep the committee “fully and currently” informed, what kinds of intelligence activities they consider “significant,” and how they view the obligation to inform rather than merely notify—and there is a big difference between the two. I think all of the members of the committee have a pretty deep appreciation of that.

I want to understand how the agencies interpret the phrase “significant.”

Last week’s witnesses explained that the factors that make an intelligence activity significant are those that are approved at high levels of leadership or are particularly sensitive or are likely to have serious foreign policy implications.

I would also like to understand whether the agencies are basing any of their decisions to inform Congress on whether an activity is operational. As we heard last week, that phrase is not in the statute and should not be used to decide what information should be shared with the Intelligence Committees.

I hope, Mr. Litt, that you will shed light on how the Intelligence Community implements its obligation to keep the committees fully and currently informed. I am also looking forward to hearing about some of the changes that the Intelligence Community is considering to improve its congressional notification practices so that the failures of the past do not repeat themselves.

So thank you, Madam Chairwoman. I am delighted that we’re having this joint hearing.

Thank you, Mr. Litt, for testifying today.

And to everyone that’s here in the audience, we’re glad to see you and look forward to working with all of you.

Chairwoman SCHAKOWSKY. Now I would like to recognize Mr. Miller, the Ranking Member of the Oversight and Investigation Subcommittee, for any opening statement he would like to make.

Mr. MILLER. Thank you, Madam Chairwoman.

Mr. Litt, thank you for being here today. I believe this is the first time that you have had an opportunity to testify before this subcommittee, and as you might imagine, there are going to be quite a few questions that we’ll have for you today.

We all believe that timely and accurate notifications are vital to the work of this committee. In the past Congress, we’ve seen the negative effects and tensions created between the Congress and the executive branch when the notification process breaks down. No single case better illustrates my point than the Peru Program.

This intelligence program resulted in the deaths of two American citizens: Veronica and Charity Bowers. Their deaths directly affected friends and family members living in my district. The mishandling of this program is of great interest and of great concern to me.

But beyond the ineptitude that led to the Bowers’ deaths, I am stunned by the ease with which some at the CIA kept this information from reaching the Congress. The CIA Inspector General has

issued a report that detailed at length how certain intelligence officers deliberately misled the committees of jurisdiction on this matter. We have heard from the IG about their report. We don't need to rehash those specifics today.

Hopefully, Mr. Litt, you can provide some reassurance that this kind of misconduct cannot happen again, and I'd like to hear what changes have been made to the congressional notification process, not just at CIA but in the IC, to prevent something like this from ever happening again. I hope that the lessons learned from Peru have been incorporated as best practices in your procedures.

That being said, I want to make it clear that I don't believe that the CIA or any element of the community lies all the time. These kinds of statements made by senior Members of Congress are unhelpful to our efforts on this committee to foster a sense of trust and cooperation between the executive branch and Congress. And frankly, such statements are not accurate.

Moreover, I am also concerned about the level of partisanship that is attached to this issue. In our bill, a broadly supported bipartisan legislative proposal to fix the notification provisions of the National Security Act was scrapped by the Majority in favor of a narrowly supported partisan provision, a provision that actually drew a veto threat from the Obama administration. In this subcommittee's efforts, the majority has allowed oversight of critical matters of bipartisanship interest, such as Peru, to flounder.

Instead, the Majority has embarked on this vague and ill-conceived investigation of notification issues with little input or consultation with the Republican Members. Unfortunately, I don't believe the Majority will complete this investigation anytime soon. I also don't believe this investigation will realize positive results that will justify the time and resources that we will spend on it.

In any case, Mr. Litt, I welcome your statements in this process, and I hope that you can highlight for me how the process has been improved. And I'll save the rest of my time for questions after your presentation.

Chairwoman SCHAKOWSKY. Let me just say to my Ranking Member, that, well, first I was about to associate myself with your remarks about halfway through. But I do want to say that we were to have a briefing this week on Peru, which is of great interest to me, as the Ranking Member well knows, from day one. The briefer that was supposed to come was unable to make it so we have rescheduled for the week of November 4. And I absolutely agree with you that we need to move forward. There is no effort to delay or slow down this investigation, and we will absolutely do it.

I want to turn to Ms. Myrick, the Ranking Member of the Intelligence Community Management Subcommittee for any opening statement she'd like to make.

Mrs. MYRICK. Thank you. I have no opening statement. I'll wait to hear from Mr. Litt for questions.

Chairwoman SCHAKOWSKY. Mr. Litt, it is the policy now of the Oversight and Investigations Subcommittee to swear all witnesses before they testify. And if you would stand and raise your right hand.

[Witness sworn.]

Chairwoman SCHAKOWSKY. The record will reflect Mr. Litt answered in the affirmative.

And now we're ready for your opening remarks. Thank you.

**TESTIMONY OF ROBERT LITT, GENERAL COUNSEL, OFFICE OF
DIRECTOR OF NATIONAL INTELLIGENCE**

Mr. LITT. Thank you, Madam Chairwoman Schakowsky, Madam Chairwoman Eshoo, Ranking Member Miller, Ranking Member Myrick, members of the committee. Thank you for your kind words and for inviting me here to testify before you today on the policies and procedures the Intelligence Community uses to help ensure that the congressional Intelligence Committees are kept fully and currently informed of intelligence activities. As Ranking Member Miller noted, this is my first time testifying before you, but I do look forward to many opportunities to work with the committee in the future.

I believe that congressional oversight of intelligence activities is critical because of the importance of intelligence in protecting our national security, because of the power of the tools that are given to the Intelligence Community and their potential risks to privacy, civil liberties, and to foreign relations if they're not used properly, and because much of what the Intelligence Community does necessarily has to be done in secret. This oversight is a valuable way of improving the quality of the intelligence and the effective and efficient—cost-efficient—operation of the Intelligence Community, because Members of Congress often bring a different and valuable perspective to some of the difficult issues that we in the Intelligence Community have to deal with.

In addition, robust oversight can help assure the public and the Congress, give them confidence in the activities of the Intelligence Community. But the value of this oversight would obviously be limited if the Intelligence Committees were not aware of significant intelligence activities.

So the Intelligence Community does take seriously its statutory obligation to keep the Intelligence Committees fully and currently informed of intelligence activities. I know this committee has met on numerous occasions with Director Blair and that he's expressed this view to you. And I've heard him say this same thing in private, that he really does believe that it's important to keep the committees fully informed, and I share that view.

My written statement goes into more detail on the literally hundreds of occasions on which the Intelligence Community has provided information to the House and Senate Intelligence Committees, just since the beginning of this Congress, by way of written notification or briefings or hearings, among other ways.

I think that this does show that the Intelligence Community is working hard to try to make sure that the Intelligence Committees do have timely and accurate and complete information to inform policy and to enable the committees to conduct oversight. The notification process is subject to continued supervision and oversight by the Office of the Director of National Intelligence in the exercise of its statutory responsibilities.

For example, in January of 2006, the ODNI issued what's called an Intelligence Community Policy Memorandum, which is entitled

“Reporting of Intelligence Activities to Congress,” and this provides guidance to the Intelligence Community about the requirements of notification to the committees.

Then in March of this year, Director Blair sent another memorandum to the heads of all of the elements of the Intelligence Community, both reaffirming this memorandum and directing that notification of significant intelligence activity should be provided to the committees within 14 days.

Recently, he also discussed the importance of timely and complete congressional notification at a meeting of what is called his Executive Committee, the EXCOM, which is the heads of all of the 16 elements of the Intelligence Community.

And finally last summer, Director Blair directed that there be a comprehensive review of the congressional notification policies and procedures of each element of the Intelligence Community. This review had two purposes: first, to examine whether all elements of the community were currently in compliance with their obligations of congressional notification; and, second, whether they each had in place appropriate policies and procedures that would ensure that the committees going forward would be kept fully and currently informed.

At the conclusion of this review a couple of weeks ago, the DNI sent a memorandum in which he strongly encouraged each element of the community to compare its current policies and procedures to a set of best practices that were derived from the results of this review and to make any necessary changes. And from my conversations with the various elements of the Intelligence Community, I know that they’re taking this seriously. They’re going back, they’re reviewing their procedures, and if appropriate, they are strengthening them.

I can assure you that the DNI will continue to review compliance with the congressional notification requirements by the entire Intelligence Community, and, if necessary, will go back and look at the Intelligence Community Policy Memorandum and see whether that needs to be modified or strengthened or whether other procedures need to be put in place.

In summary, intelligence oversight is critical to the successful operation of the Intelligence Community, but it can only be effective if the Intelligence Community views the Intelligence Committees as partners and keeps them fully and currently informed of all intelligence activities. And the DNI and the ODNI are working with the Intelligence Committees and the Intelligence Community to try to ensure that this happens.

I appreciate having the opportunity to come before this joint hearing today, and I look forward to responding to your questions. However, as you know since the facts surrounding many of these issues are classified, I won’t be able to discuss specifics to any great degree in the open session, and I understand there’s a Closed Session planned for afterwards if we need to go into details.

Thank you, Madam Chairwoman.

[The statement of Mr. Litt follows:]

STATEMENT FOR THE RECORD BY

ROBERT LITT
GENERAL COUNSEL
OFFICE OF DIRECTOR OF NATIONAL INTELLIGENCE

BEFORE THE

HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS AND
SUBCOMMITTEE ON INTELLIGENCE COMMUNITY MANAGEMENT

OCTOBER 27, 2009

Chairwoman Schakowsky, Chairwoman Eshoo, Ranking Member Miller, Ranking Member Myrick, and Members of the Committee: thank you for inviting me to speak to you today about the Congressional notification process and the practices and procedures in place throughout the Intelligence Community to help ensure that the Congressional intelligence committees are kept fully and currently informed of significant intelligence activities.

Congressional oversight of the Intelligence Community is critical because of the importance of intelligence in protecting our national security, the power of the tools given to the Intelligence Community and their potential risks to privacy, civil liberties, and foreign relations if used improperly, and the necessarily secret nature of much of what the Intelligence Community does. Congress and the President have established reporting and oversight procedures that balance Congress' oversight responsibility with the need to protect our nation's most sensitive information. This oversight, conducted by the intelligence committees through dedicated Members and a cadre of knowledgeable and experienced staff, is a valuable contribution to improving the quality of intelligence and the effective, efficient operation of the Intelligence Community. In addition, robust oversight helps secure the trust of both Congress and the public

in the Intelligence Community. I believe that the Intelligence Community benefits from input from Members of Congress because they bring a different perspective on some of the difficult issues we confront. The value of their input would be limited if the intelligence committees were not “fully and currently informed” of significant intelligence activities.

The Intelligence Community takes seriously its obligation to keep the intelligence committees informed both of the information it needs to conduct intelligence oversight and of national intelligence to inform Congress in its policy-making role. Indeed, Director Blair has repeatedly emphasized the importance of timely congressional notification, and the notification process is subject to the DNI’s continued supervision and oversight. Let me give you some statistics: Since the beginning of the 111th Congress, the Intelligence Community has provided the HPSCI over 500 written Congressional notifications, given approximately 800 briefings, and participated in 20 HPSCI hearings. It has provided the HPSCI several thousand intelligence assessments, reports, and written products on intelligence programs. In addition, the Intelligence Community makes a significant amount of information available to Congress via our classified internet platform called ‘CapNet’, including daily classified intelligence updates on-line from the National Counterterrorism Center, State/INR, the CIA, DIA, NGA and the Office of the DNI among others. In short, the Intelligence Community is working hard to make sure that the intelligence oversight committees have timely and accurate intelligence information to inform policy and enable them to conduct oversight.

This is in accord with our statutory responsibility. To ensure that the intelligence committees are kept “fully and currently informed,” the National Security Act requires the Director of National Intelligence and the heads of all departments and agencies with intelligence

components to notify the committees of intelligence activities, including significant anticipated intelligence activities, significant intelligence failures, and covert actions. This obligation must be exercised “consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive sources and methods or other exceptionally sensitive matters,” which provides the DNI and the heads of departments and agencies a degree of latitude in deciding when and how to bring extremely sensitive matters to the committees’ attention.

In addition, the DNI has a statutory obligation to ensure that all Intelligence Community elements comply with the Constitution and laws of the United States, including the Congressional notification requirements of Title V of the National Security Act. DNI Blair takes seriously his responsibility to ensure that Congress has the information it needs to conduct oversight of the Intelligence Community, and I want to tell you a little bit about what Director Blair and his predecessors have done to carry out that obligation.

In January 2006, an Intelligence Community Policy Memorandum (ICPM) entitled “Reporting of Intelligence Activities to Congress” was issued. That Memorandum, which is binding on all elements of the Intelligence Community, provides guidance about the requirements of notification to the committees. In March of this year, Director Blair issued a memorandum to the heads of all the Intelligence Community elements reaffirming the ICPM and directing that notification of any significant intelligence activity be provided to the intelligence committees within 14 days.

In addition, beginning last summer, Director Blair directed a comprehensive review of the Congressional notification policies and procedures throughout the Intelligence Community.

This review examined whether all Intelligence Community elements were in compliance with Congressional notification obligations and had policies and procedures in place to ensure the intelligence committees would be kept fully and currently informed going forward. At the conclusion of this review, the DNI suggested that each element compare its current policies and procedures to a number of suggested “best practices” and make any necessary changes. These best practices include:

- A process for the head of each IC element informally to canvass his or her leadership regularly for matters requiring Congressional notification. In turn, senior leadership personnel should canvass their offices or components.
- Training and education programs to ensure that personnel understand the duty to identify and put forward matters requiring Congressional notification.
- Written procedures that both establish the obligations related to Congressional notification and outline the internal processes to ensure that significant intelligence activities are identified and reported in a timely fashion, including specifying a point of contact that will have responsibility for ensuring that notifications are timely made.

The DNI will continue to review compliance with Congressional notification requirements by the entire Intelligence Community and, if necessary, will evaluate whether to modify the ICPM.

Intelligence Community elements differ in size, structure, and mission. Some elements, such as the CIA, are large and conduct extensive operations; others are small and purely analytical. Accordingly, there is no need for a detailed “one size fits all” policy on Congressional notification for the entire Intelligence Community. For example, a dollar threshold for “significance” might be very different for the State Department’s Bureau of Intelligence and Research, compared to the National Reconnaissance Office. Rather, different elements should adopt procedures that are adapted to their particular situations. It is essential, however, that each element have standards and procedures that are designed to ensure, to as great an extent as possible, that significant intelligence matters are identified according to a clear and consistent standard, and that such matters are promptly and fully reported to the intelligence committees.

In summary, intelligence oversight is critical to the successful operation of the Intelligence Community, but this oversight can only be effective if the Intelligence Community keeps the intelligence committees fully and currently informed of intelligence activities. The DNI is committed to working with the intelligence committees and the Intelligence Community to address this important issue.

I appreciate having the opportunity to come before this subcommittee today, and I look forward to responding to your questions. However, as you know, because the facts surrounding particular notifications are often classified, I will not be able to discuss specific or hypothetical examples in this open session.

Chairwoman SCHAKOWSKY. So if you're asked a question that is best responded to in the Closed Session, you will tell us.

Thank you very much, Mr. Litt.

Under the National Security Act, the committee must be kept "fully and currently informed of any significant and significant anticipated intelligence activity." The National Security Act defines the phrase "intelligence activities" to include covert actions. Accordingly, does the National Security Act require the executive branch to notify the committee of anticipated intelligence covert actions?

Mr. LITT. I think the National Security Act makes a division in the procedures and the standards appropriate to covert actions and to other kinds of intelligence activities. As you know, section 502 covers other intelligence activities, section 503 covers covert actions.

And there's a fairly specific standard in section 503 setting forth what the President is required to notify the committees of in the case of covert actions. It says that the President has to ensure that any finding with respect to covert action is reported to congressional intelligence activities as soon as possible after the finding is approved and before the covert action is initiated, except as provided in some of the other sections.

And it further provides that the congressional Intelligence Committees have to be notified of any significant change in a previously approved covert action or any significant undertaking pursuant to a previously approved finding, also before the activities are carried out.

And I think that that statutory language embodies the general command of section 501 and sets forth the manner in which the President is supposed to inform the committee of significant anticipated activities in the area of covert actions.

Chairwoman SCHAKOWSKY. So the answer in short would be "yes."

Mr. LITT. Yes, as set forth in section 503.

Chairwoman SCHAKOWSKY. When assessing whether an intelligence activity is significant, what factors does the Intelligence Community take into consideration?

Let me give some examples. If the President, Vice President or National Security Adviser have directed or approved an intelligence activity, should that be considered evidence of significance?

Mr. LITT. Yes. That's specified in the Intelligence Community Policy Memorandum that I mentioned.

Chairwoman SCHAKOWSKY. And if an agency director, such as the NSA or CIA Director, has directed or approved a particular intelligence activity, should that be considered evidence of significance?

Mr. LITT. While that factor isn't specified, it's obviously one of a number of factors that an element of the Intelligence Community, in exercising its judgment as to what is significant, it should take into account the level of approval, yes.

Chairwoman SCHAKOWSKY. So not alone? If the NSA or CIA Director approves a particular intelligence activity, it's of significance, but not—

Mr. LITT. I wouldn't necessarily say that that would by itself, in all circumstances, require notification.

Chairwoman SCHAKOWSKY. But it's considered evidence of significance.

Mr. LITT. I would think it would be, yes, ma'am.

Chairwoman SCHAKOWSKY. In DNI Blair's October 13, 2009, memo to the IC, he noted that he's concerned "that not all elements may be taking the appropriate steps to ensure that significant intelligence activity is identified in a timely manner and that Congress is notified in a timely fashion."

What I want to know is who is responsible for ensuring the Congress is properly notified of intelligence activities?

Mr. LITT. When we went out and canvassed the elements of the Intelligence Community, generally speaking in each element of the Intelligence Community, their Office of Legislative Affairs has the primary responsibility for ensuring that congressional notification proceeds appropriately.

In almost every case, I think the General Counsel's Office also plays a role in helping assess whether a particular issue meets the standard that requires notification or not.

Chairwoman SCHAKOWSKY. That's you.

Mr. LITT. In the ODNI, that's me. In CIA, it's their general counsel.

But the primary responsibility rests with the Legislative Affairs Office.

Chairwoman SCHAKOWSKY. My concern is that there isn't a name necessarily attached that everyone is clear about.

So at NSA, for example, who is responsible for ensuring that Congress is properly notified of the intelligence activities, or at CIA, et cetera?

Mr. LITT. I can't give you the names. I can tell you that one of the best practices that the DNI referenced in his most recent memorandum was that there should be a single point of contact for these purposes. Some of the agencies may have established their own individual points of contact. In the case of the DNI, ultimately it's the head of our Legislative Affairs Office who has responsibility for it.

So I don't know the names of the individuals, but if they don't have them, yes, ma'am, they should have them, a single individual who is charged with that.

Chairwoman SCHAKOWSKY. I thank you.

Chairman Eshoo.

Ms. ESHOO. A couple of questions.

To what extent do you make recommendations to the NSC to brief members of the Intelligence Committee, the full committee, or the Gang of Eight?

Mr. LITT. Me personally, or the DNI?

Ms. ESHOO. Either.

Mr. LITT. I think that when—in general when those decisions are made—and they have not been common, at least since I have been on the job—

Ms. ESHOO. When did you start?

Mr. LITT. I started at the end of June of this year.

Ms. ESHOO. Neither have been common, or one or the other?

Mr. LITT. Limited briefings of any sort.

When a decision is made as to what sort of briefing is made, the ODNI has a role to play in that. The Director is one I expect would be consulted on that issue, and I would hope that he would seek the judgment of his general counsel as to compliance with the law on that issue.

Ms. ESHOO. I'm not so sure I understand your answer. Maybe you could walk me through the process of how it happens.

Have you experienced that yet?

Mr. LITT. I have not.

Ms. ESHOO. That's fair enough.

Mr. LITT. But my understanding is that the decision—

Ms. ESHOO. Since June, there have not been any decisions to brief members, even of the full committee, on anything?

Mr. LITT. No. The members of the full committee have been briefed on numerous matters. I've been actually present at some of those briefings. So there certainly have been plenty of decisions taken to—

Ms. ESHOO. But I'm asking about both.

Mr. LITT. I'm sorry. I've lost the question.

Ms. ESHOO. To what extent do you make recommendations to the NSC to brief members of the full committee or the Gang of Eight?

Mr. LITT. Most of the decisions about notifying or briefing the full committee, to my knowledge, are not made at the level of the NSC. When an issue is of sufficient importance that the NSC gets involved, it is my understanding—although as I said, I haven't participated in this process—that the decision of whether the briefing should be done at the level of the full committee or a more restricted briefing is a decision in which the DNI will play a role in the exercise of his responsibilities to protect sources.

Ms. ESHOO. When you say "play a role," are there others that play a role in that?

Mr. LITT. Well, I would assume, for example, if it's CIA information, that the CIA would play a role. If it's a covert action, obviously, since the White House owns covert actions, they would play a role. And as I also said, I would hope that the DNI would consult his Office of General Counsel if such an issue came up, to get our view on what the law requires in that instance.

Ms. ESHOO. As you know, Mr. Litt, this examination that the full committee is undertaking is, as the Chairman of the full committee has very wisely stated, broad, and that we will not only examine the history of the law, how it came about, and the history that's been made ever since.

Now, in recent history, we have had more than a real glitch, and this is what I would like to ask you about. And I think that there are probably some things that we can't go into, obviously, in an open session.

But my question to you is how can there be a program that was established in 2001 and the CIA Director being informed in 2009? What is broken, in your view, that would cause that to happen and the Congress not ever being informed?

Mr. LITT. Well, to the extent the issue—are you asking me about the CIA Director being informed or the Congress being informed? Because my understanding is that other earlier CIA Directors may

have been informed, and that it was simply that the current CIA Director didn't learn about this until several months after.

Ms. ESHOO. That's quite extraordinary, at least in my view, because he had been on the job for a while, and to have his own people not informing him I think should be a cause of concern for all of us, but certainly the Congress not ever being informed.

What do you think is broken, or do you think anything is broken? Do you think that it's a special case where, for whatever reasons you might want to share with us, that it really should have been that way, or do you think something is broken and, if so, what? And do you find there is a lack of clear direction relative to the language of the National Security Act?

Mr. LITT. Whether something is of significant intelligence activity that requires notification and briefing of the committee is obviously—

Ms. ESHOO. What is "significant"? Would you define that?

Mr. LITT. It's always going to involve the exercise of judgment.

The policy memorandum that was issued in 2006 sets forth some criteria for what constitutes a significant action which includes such issues as whether there's a potential loss of life, whether it's going to have an impact on foreign policy decisions, a variety of criteria set forth in there, and some of the individual components of the Intelligence Community have their own supplemental memoranda that provide other standards.

But anything that involves an exercise of judgment always leaves open the possibility that different people are going to have different judgments.

It's my understanding that both Director Blair and Director Pannetta indicated that they might have exercised their judgment differently and briefed this matter at an earlier date.

Ms. ESHOO. It's not a question of finding out at a much later date, and then the parties that have responsibility then weigh in and say, "You know what? If I'd known about that, perhaps my judgment would have been different."

I don't think that's the way we should be operating.

What I'm trying to find out with you—and maybe because you're new and it's really difficult for you to make a call on this—I mean that case says to me something is really broken. Something is really broken.

Now, you mentioned, you know, that there are policy papers relative to definition for "significant." I would like to ask that we receive those memorandums so that we can review them and see how the determinations are being made based on those memorandums.

Let me just ask one more question. Do you think that there should be one person that's primarily responsible for ensuring that Congress is properly notified of Intelligence Committees? I mean obviously there's the ODNI, there's NSA, CIA, and then the other intelligence agencies.

Do you think that there should be one from each, or just one that is totally responsible for this?

Mr. LITT. I think that each agency should have a single point of contact responsible for that. I also think it's part of ODNI's responsibility to ensure that all components of the Intelligence Commu-

nity are operating in accord with the law, and so it's part of ODNI's responsibility to do what we're doing now.

Ms. ESHOO. So for notification today, how does it work? Does the head of each one of those agencies meet with the ODNI, and he's the one responsible; or he makes the call as to who should come and notify?

Mr. LITT. No. Generally speaking, each individual component of the Intelligence Community is responsible for its own notifications.

Ms. ESHOO. And they're independent of anything else. Nothing is coordinated.

Mr. LITT. In most instances, that's right. Each agency is responsible for its own.

Ms. ESHOO. Thank you.

Chairwoman SCHAKOWSKY. Mr. Miller.

Mr. MILLER. Mr. Litt, thanks for your commitment and stated commitment to Director Blair in keeping this committee fully informed with respect to intelligence activities and information needed to carry out policymaking responsibilities. But given this commitment, why has the administration continued to refuse to provide this committee with information regarding its planning with respect to Guantanamo Bay detainees?

And in your answer, could you please say do you believe that Congress should receive information on this planning before or after a final decision is made?

Mr. LITT. Well, I—let me begin by saying that I know that there have been—for example, there was a substantial report that was provided to this committee recently, going through all of the detainees and the information that we have about each of them. And I know the committee is notified, for example, as individuals are transferred from Guantanamo abroad. The fact is that the President has announced very publicly his intention to close the facility at Guantanamo.

Mr. MILLER. He did that on the first day he was inaugurated.

Mr. LITT. That is correct. And I'm confident that when a decision is made, that this committee is going to be briefed fully and consulted on it. But I don't think that an obligation to inform—to keep the committee fully and currently informed of all intelligence activities is the same thing as requiring the committee to be kept fully and currently informed of all internal executive branch decisions.

Mr. MILLER. You don't think that anything in regard to the Gitmo detainees, that this committee has any jurisdiction over that?

Mr. LITT. No, that's not what I'm saying.

Mr. MILLER. But that's what the law says. Section 502 of the National Security Act requires the DNI and the heads of departments and agencies to furnish the congressional Intelligence Committees any information or material concerning intelligence activities, other than covert actions, which is within their custody or control.

Now, Ranking Member Hoekstra has specifically requested information by letter regarding the planning for the relocation of Gitmo detainees which affects the collection of intelligence from them, and he hasn't received any response.

So how do you square the refusal to provide the information with the law?

Mr. LITT. Well, to the extent we're talking about the collection of intelligence information, that's obviously not something that I can discuss in an open session. But it is true, as I think Chairman Reyes noted last week, that the Guantanamo Bay facility is a DOD facility, it's not an Intelligence Community facility. And the decisions on closing it are affecting the DOD facility. I think to the extent that there are significant intelligence activities that are affected, that this committee is entitled to be informed and will be informed.

Mr. MILLER. I sit on the HASC as well. Has that committee been informed?

Mr. LITT. That, I wouldn't know.

Mr. MILLER. Okay. I think the answer is "no."

Does the ODNI believe that State governments and communities should have some access to some appropriate version of intelligence information about the background and any potential threat posed by Gitmo detainees before they are potentially released to their towns? And if not, why doesn't the ODNI believe that they have a right to know?

Mr. LITT. It's my understanding that the administration intends to work closely with Federal and State and local law enforcement officials, once a decision has been made, to ensure that the detainees are held securely and that there is no threat to individuals in the area.

I would note that there are maybe several hundred terrorist-related defendants currently held in U.S. prisons without any of them ever having escaped. But it's my understanding that there, in fact, is an intention to work with State and local law enforcement on the matter you raised.

Mr. MILLER. Why do we keep State secrets?

Mr. LITT. We keep State secrets because there are often matters where the protection of national security is paramount, where there could be significant danger to the Nation's interest if certain information came out.

Mr. MILLER. Do you concur with Mr. Schwartz of the Church Commission's statement in regards to sharing, widely outside the Intelligence Community, information?

Mr. LITT. I'm not sure what his statement is. I do know that this administration and, in fact, both administrations and the Congress since 9/11 have made efforts to ensure that information is shared more widely, as necessary to protect our Nation.

I think that one of the things we learned was if there is too much stovepiping of information, it can end up damaging national security. So it's important to try to share information as broadly and easily as you can, consistent with the needs of protecting national security information.

Mr. MILLER. Do you think this is a true statement? CIA lies all the time to Congress.

Mr. LITT. No.

Mr. MILLER. Thank you.

Chairwoman SCHAKOWSKY. Mrs. Myrick.

Mrs. MYRICK. Thank you.

I grew up in a generation of “what is your need to know.” And so just following up on Mr. Miller’s questions about State secrets being secret, one of the concerns that I have is very recently there were press reports that said Ranking Member Bond over in the Senate Intelligence Committee was concerned about the leaks and things that had happened that you read about in the press, which we read about in the press before we know about it here in the committee. And it just really—that concerns me greatly and has.

I’m new to the committee, so this is new to me. But the bottom line of it is how does that affect the administration, executive branch’s willingness to share information, sensitive information, and what can be done about that and where is it coming from? Where do the leaks come from, this kind of thing. Because those of us in the committee aren’t talking to any press that I know of.

Mr. LITT. Well, I share your frustration. I know Director Blair does as well. He has made very clear that he wants to find ways to deal with the leaks; that they are, in fact, very damaging to national security, and frequently in very specific and identifiable ways. A leak comes out and you can see that as a result of that leak, a foreign nation or target changes behavior. And this is really something that’s of great concern to him. And he has asked me, as general counsel, and others within the ODNI, to work with the other elements of the Intelligence Community and the Department of Justice to try to find ways to tighten up, to see if it’s possible to more easily identify leakers—which frequently is a tremendous challenge—and to prevent these leaks from happening, or punish them when they do.

Mrs. MYRICK. What is the punishment if they do?

Mr. LITT. There’s a variety of criminal statutes. I don’t have the penalties in front me.

Mrs. MYRICK. Do they lose their job or do they just get slapped on the hand?

Mr. LITT. It can range from a slap on the hand, for something that merits a slap on the hand, through loss of job, through criminal prosecution and incarceration.

Mrs. MYRICK. When Mr. Miller asked the question about State and local officials being notified of detainees from Guantanamo coming into their area, I maybe wasn’t listening closely. But did you say they would be notified after the decision had been made to place them there? They wouldn’t be in any way included beforehand to know that was going to happen?

Mr. LITT. I don’t think that any final decision has been made yet on how and when people are going to be notified. I do know they are going to be appropriately consulted on the process to ensure there is no risk to national security or to local security from bringing people wherever—

Mrs. MYRICK. But you don’t know when in time that would take place?

Mr. LITT. I don’t know that that decision has been made yet, ma’am.

Mrs. MYRICK. And one of the other concerns are yes, there are people kept in State prisons, et cetera, all the time. But these aren’t your normal prisoners. And then my concern is, again, what happens to them after that?

I know this is going a little beyond what we're talking about here, but when he asked the question, it just brought it back to mind again.

Mr. LITT. Well, we do have some experience in holding people who aren't normal prisoners as well. We hold people, like the blind sheik, and people like that. And I think the Bureau of Prisons is reasonably well set up in the super-max facilities and with the use of Special Administrative Measures. So I don't think that there is any intention or any expectation on the part of the administration that they will take any steps that will endanger people in this country at all.

Mrs. MYRICK. I appreciate that.

Thank you, Madam Chair.

Chairwoman SCHAKOWSKY. Thank you.

Mr. SCHIFF.

Mr. SCHIFF. I want to follow up on the last series of questions just to clarify them for the purposes of today's hearing.

The decision where to detain a Guantanamo detainee is a very important one, but it's not necessarily per se an intelligence-related activity, correct? It may be a decision about incarceration or incapacitation, but not necessarily intelligence activity for the purposes of the sections we're talking about today, correct?

Mr. LITT. Yes. That is correct, sir.

Mr. SCHIFF. I wanted to talk to you about the language of significant anticipated intelligence activity.

Is there any indication from your research on this issue and how the various agencies within the Intelligence Community have dealt with this language, that any of the community has viewed that statutory requirement of reporting or notification on significant anticipated intelligence activities as somehow legislative surplusage, that it was superfluous; that the other language in the statute is actionable, but there was really no obligation to inform Congress of things that were only anticipated?

Have you found any indication that any parts of the Intelligence Community have used that as their modus operandi?

Mr. LITT. No, not at all. Quite the contrary. The policies make clear that anticipated intelligence activities need to be notified and briefed as well.

Mr. SCHIFF. So as far as you know within the CIA and other agencies, there has always been an understanding in the Legal Counsel's Office and in terms of the mechanism they have to report to Congress, that they are required to report anticipated intelligence activities as well as ongoing ones.

Mr. LITT. So far as I know, that is correct.

Mr. SCHIFF. And how do you interpret the term "anticipated"? You wouldn't conclude, would you, that something has to be operational before you are required to notify Congress about an anticipated significant intelligence activity, would you?

Mr. LITT. I think that some of the controversy there about the use of the term "operational" with reference to the specific matter that was briefed at the end of June, you have to consider what "operational" is opposed to. And I think the term "operational" there was used to differentiate it from something that's just in

planning or not even at the stage of planning, but it's a concept that people are working on.

I think that anticipated—the term “anticipated” involves some level of definiteness that goes beyond merely, you know, we're looking at a bunch of options and this is one possibility we're considering. There has to be some level of commitment that this is going to happen before it rises to the level of something that's “anticipated” as opposed to possible or theoretical.

And I think the use of the term “operational” was meant to convey that concept that there is not an obligation—by the use of the term “anticipated” in the statute, that there's not an obligation to brief every time somebody at the agency comes up with an idea, every time even that they explore the idea to some extent. It's when it actually becomes an anticipated operation.

Now having said that, as I said, I think both Director Blair and Director Panetta have said that with respect to that particular operation, they might have exercised their judgment differently. But there's a difference between a mere possibility or a theory on the one hand and something that's actually anticipated on the other.

Mr. SCHIFF. You would agree, though, that if there are significant expenditures made in support of an intelligence activity, even if it's not operational yet, even if there hasn't been a decision made to necessarily go forward with the ultimate object, if you're expending a significant amount of money on it, that would trigger the anticipated significant intelligence reporting requirement, wouldn't it?

Mr. LITT. I would think it would. Part of the oversight involves oversight of how funds are spent.

Mr. SCHIFF. And if your risk of exposure of a potential operation via arrest or some other means, that would certainly trigger the requirement, wouldn't it?

Mr. LITT. I think that the policy memorandum talks about risk of exposure as one possibility. But you have to consider not only the degree of risk of exposure but the consequences of the exposure as well. But, yes, that certainly is a factor that would play in.

Mr. SCHIFF. So what we're talking about, then, if you're sitting in a room ruminating about several potential directions you could go in, several potential operations, that might not trigger the requirement. But when you start taking steps, very concrete steps to determine whether you should go forward, even though the decision hasn't been made yet, you can still trigger the anticipated significant intelligence activity reporting requirement, right?

Mr. LITT. You could. It would depend upon the significant steps you're talking about, yes.

Mr. SCHIFF. Thank you. I yield back.

Chairwoman SCHAKOWSKY. Mr. Thornberry.

Mr. THORNBERRY. I appreciate you being here, Mr. Litt, and attempting to answer questions on a classified program in an unclassified way. It makes it pretty hard to have a real discussion about what is or is not broken, what should or should not be briefed, and where that threshold is.

But it brings to my mind kind of the other half of the story that we don't talk about as much, and that is the responsibility of Congress in these briefings to fulfill our role in a responsible sort of way.

We have had instances in recent years where programs have been briefed, and yet only when they become leaked in public do Members come out and say, Oh, I never knew that or I didn't—I wasn't for that, or so forth.

So let me ask you. You talked about the process and the procedures. Has some attempt been made to go back and reconstruct who was in briefings and what was briefed and so forth, it's been fairly confusing. Sometimes administration records don't jibe exactly with the committee's records.

So since you've been there, are there written records of who is briefed on what and any concerns that they raise in those briefings?

Mr. LITT. I think that throughout the various agencies, there are records of that that have a greater or lesser degree of formality and detail. I don't think there is a consistent rule across the entire Intelligence Community for that.

Mr. THORBERRY. Do you think there should?

Mr. LITT. I think it's definitely something that should be considered, whether there ought to be more formality to that process.

Mr. THORBERRY. Would it be a good idea for the committee to keep better records of who was in what briefing and to see whether the committee's records and the administration's records jibe as far as who was briefed on what, how many times, and on what program?

Mr. LITT. As a member of the executive branch, I would not presume to give advice to the Congress on what rules and procedures it should adopt, sir.

Mr. THORBERRY. Let me go back to the beginning in my mind a bit.

The general proposition in section 501 is that the administration should keep Congress fully and currently informed. In your mind, are there any constitutional limits on the President from doing so?

Mr. LITT. I think that this area is one of those where you have two constitutional authorities bumping up against one another. You have the Congress' constitutional authority to exercise oversight and you have the President's constitutional authority to protect national security information.

And I think that the statute recognizes the President's constitutional authority in this area explicitly in section 503. So I'm not sure I would categorize it as a constitutional limit. I would say that there are executive branch prerogatives that are affected here by the notification process.

Mr. THORBERRY. I'm trying to understand, as we talk about the way this works, what's the difference between an executive prerogative and a constitutional power or authority that the President needs to protect. And let me get into one specific.

In the statement of administration policy on the House authorization bill, it says the administration strongly objects to the provision, as Mr. Miller noted, in the House bill.

Now, is that because it doesn't work, or are there constitutional objections, or exactly what are your objections to what's in the House bill now?

Mr. LITT. I'm not going to purport to list all of the objections, because I'm not sure I could do that right now. I could give you one

example which is, for example, that the House bill required extensive disclosure of deliberative and legal advice within the executive branch. And I believe that it is the opinion of the administration that that requirement does trench on executive prerogatives that are accorded to the President.

That's one example.

Mr. THORNBERRY. If I agree with you on that, is there—if there's a presumption that the administration will share all intelligence collection and covert action information with Congress, does that cause you constitutional concerns?

Mr. LITT. I'm not enough of a scholar on the exact limits of constitutional authority. We have OLC at the Department of Justice that is sort of the institutional repository of that.

I would think that a requirement that everything be shared would probably arouse their opposition as something that would trench on constitutional concerns.

Fundamentally, I think that this process, like many of those where the constitutional powers are in tension, this process is one that has to be worked out by cooperation between the two branches, and working out ways of ensuring that Congress gets the information it needs while ensuring that the President retains the ability to protect national security when it's required.

Chairwoman SCHAKOWSKY. Mr. Holt.

Mr. HOLT. Thank you, Madam Chair. Thank you, Mr. Litt, for coming.

I would like to explore several different points. I understand you to say that there have been no Gang of Eight-level briefings under this administration; is that correct?

Mr. LITT. I don't know. I don't know what happened before I started. And since June, I can say that I am personally not aware of any. It's conceivable that one happened and I wasn't aware of it. That's all I can say.

Mr. HOLT. Let me make sure that I have your title correct.

As the general counsel of the Office of the Director of National Intelligence, would there be—or under what circumstance could there be the so-called Gang of Eight, the restricted briefings, restricted only to eight members of the House and Senate, without your knowledge?

Mr. LITT. Well, as I said earlier, I would hope that the Director would consult his legal counsel. I suppose that there might be a program that is so compartmented that they felt they did not want to bring the Office of General Counsel into it. My hope and expectation would be that that would not happen, that they would seek my legal advice.

Mr. HOLT. Do you think in any of the subunits of the Central Intelligence Agency, or others, that there might be restricted briefings that the Director of National Intelligence would not be aware of?

Mr. LITT. That should not happen.

Mr. HOLT. Now, I know in the October memo from the Director of National Intelligence, it's titled "A Follow-Up to Reporting Intelligence Matters to Congress," he refers to the obligation to keep Congress fully and currently informed, lays out some recommendations for establishing and writing the obligation and ensuring that

personnel understand the duty and so forth. He finishes by saying, "I strongly encourage you to compare your current procedures to those outlined above."

Mr. HOLT. That struck me as odd phrasing for the Director of National Intelligence. I encourage you to compare your current procedures. Do we need some attention to the legislation, or should the Director of National Intelligence be in the position to suggest to other agency heads this and that and the other thing.

Mr. LITT. I think that the DNI does have more power than just to suggest. I think that the DNI does have the power to set policy for the Intelligence Community. And there's an ICD process for doing that that involves consultation throughout the community. I think that before that is done, I think it was probably the appropriate judgment to say let's see if the members of the Intelligence Community can do this on their own, without having to instruct them or order them to do it. I am hopeful that they will do that.

Mr. HOLT. So you are not, as a member of the Office of the DNI, you are not suggesting that there needs to be different authority.

Mr. LITT. In my view, there would be authority for the Director to issue policy in this area.

Mr. HOLT. Now, let me ask your and the Director's interpretation of the wording of the obligation to keep Congress fully and currently informed. In many cases that has, in practice, a rather perfunctory meaning. In fact, the language that is used within the Intelligence Community is "congressional notification." It doesn't say anything about fully and currently informing. I actually see a difference in meaning, but I wanted to ask whether you and the Director and the O/DNI Office think of this as informing or notifying or briefing or consulting. What is the obligation?

Mr. LITT. Well, I think that with respect to the obligation to keep the committees fully and currently informed, that the obligation needs to be measured by the purposes for which the information is being provided. And by that I mean we have an obligation to get you the information that you need to provide oversight. And the scope of what we provide you needs to be adequate to permit you to provide oversight of the Intelligence Community. And that should be the measure of the obligation to inform.

Mr. HOLT. It is more than to perfunctorily check off on a list that some words have been sent to Congress.

Mr. LITT. I think in many cases it would be more than that, yes.

Mr. HOLT. In what cases would it be only that.

Mr. LITT. Well, if you are being notified that a new facility is being opened at a cost of X million dollars, which is something that might constitute an activity that requires notification, it might be that simply sending you a written notification of that would suffice in that instance. I could conceive of other instances where simple written notification would suffice.

But again, as I said earlier, both Director Blair and I view this as a partnership, and we do have an obligation as well to provide additional information if a member or the committee feels that the notification is inadequate and wants more information. This needs to be a two-way street. We need to be responsive to further requests for information as well.

Mr. HOLT. Thank you, Madam Chairs.

Chairwoman SCHAKOWSKY. Thank you Mr. Holt. Mr. Conaway.
Mr. CONAWAY. Thank you Madam Chairman.

Robert, welcome. In your testimony, while I appreciate 800 briefings and 500 written notifications and all that other kind of stuff, I am not persuaded that volume equates to quality. On the review of the compliance, or the review that was asked to be done that has just been finished that came up with the suggestion that the community look at the best practices, did the review find any exceptions to the policy where it wasn't being followed? Can you talk to us about things that didn't—or that wasn't working?

Mr. LITT. We didn't find anything systemic. I think that when some of the agencies went back and looked at their records, they found a couple of matters where they had determined not to brief, and they relooked at it and decided it probably ought to be briefed. But those were few isolated issues. We didn't find any systemic issues.

Mr. CONAWAY. DNI has got its 2005–100–3, the CIA has got AR–72, the NSA has got Policy 1–33. In your written testimony you make some reference to not being in favor of a blanket policy where everybody is agreeing off the same phraseology, the same words. Do you want to expand on that a little bit why the DNI wouldn't bring all those folks together, let's have one policy that is written out. Again, you are going to have judgments as to what all that stuff means, but if you are hiding behind the differences between subtle changes in wording between 2005–100–3 and AR–72 as to confusion there, why wouldn't a broader blanket that says it is one for everybody.

Mr. LITT. I actually think that the way you articulate it is—the way I understand it is, which is that the DNI's ICPM 2005–100–3 does apply across the Intelligence Community. The definitions in there are adhered to, according to my understanding, by every element of the community.

Mr. CONAWAY. And they are the exact definitions that are used in AR–72 and Policy 1–33? Why wouldn't those have been withdrawn so that it is clear CIA understands it, NSA understands it? And the follow-up question: Does NRO and NGA, all these other ones, have their own equivalent to AR–72 and Policy 1–33?

Mr. LITT. Not all of the agencies have their own individual policies. But I think that CIA and NSA, for example, their policies go beyond the general level of what the DNI's memorandum says and provide more specifics and also set out their specific procedures.

Mr. CONAWAY. So the conflicts between the two would be resolved with the ODNI's policy.

Mr. LITT. That is right. The ODNI's policy trumps to the extent it applies, yes, sir.

Mr. CONAWAY. Looking for this one point of contact of having only one person responsible other than the Director of whatever, you mentioned Leg Affairs. Is the Leg Affairs team—they know everything that is going on in the agency—are they going to be the most informed group of everything that is happening? If they are the ones going to be held responsible for congressional notification, have they cleared the site? Does one of those folks sit with Leon Panetta at CIA all the time? If I am going to be held responsible for something as important as this, then does the Leg Affairs team

across the community, are they in on every single height—you know, sensitive meeting.

Mr. LITT. No, that is obviously not the case. Although it is my understanding, for example, in the CIA they have Leg Affairs people who are assigned to each of the directorates to work with them. But saying that the Leg Affairs people are responsible for the notifications doesn't absolve the head of the agency of his or her responsibility as well.

Mr. CONAWAY. So it really should be the head of the agency's focus and not the Leg Affairs.

Mr. LITT. Well, the head of the agency has a lot of things to focus on.

Mr. CONAWAY. I understand.

Mr. LITT. One of the things that the DNI mentioned in the more recent memo was that the head of the agency on a periodic basis ought to sit down with all of his or her top people and canvas them and direct them to go back to their people, so that there is that kind of responsibility as well.

Mr. CONAWAY. Was the DNI's—and something Rush Holt brought up, a suggestion that they review. Shouldn't there be more teeth in his statement, or is there an implied teeth in his statement that I am going to circle back in some fixed period of time to see that you have done the review for this best practice implementation, and if you haven't implemented the best practices that the group thought, you need to have good reason as to why it doesn't work in your agency? Is that implied or had it been stated?

Mr. LITT. I think it is implicit that the DNI is going—

Mr. CONAWAY. Okay. We will look forward to at some point in time having that conversation with Dennis as to how he did in fact circle back against his own best practices to make sure that they are implemented.

Thank you, Ms. Chairman, I yield back.

Chairwoman SCHAKOWSKY. Thank you. If we could do another brief round and then go into closed session for those who want to ask any more questions. I wanted to just say that the reason that I think you are hearing on a bipartisan basis the need to be fully informed is that time after time we are learning from the television or newspapers about something that we were not briefed on; then someone comes in, the head of an agency, and does a mea culpa, it was really my responsibility.

And so I want to get back to the issue that I raise and Mr. Conaway raised also. My concern is that if this is not a central part up front, not later. I don't want to hear any more mea culpas, but that someone is assigned and that at every desk people know who that person is so that they can be contacted. I am fearful that it will never happen. That in fact what will happen is what we have heard, that there was a breakdown—I mean that word has been used before—that there was a breakdown somehow in communications.

And so—and Mr. Holt also was talking about, I think this is not an area where there can be any fuzziness, where people have to know what the procedure is, who is in charge. And, yes, of course that head of a division, of an agency, finally the DNI himself is responsible.

So I think what some of us are looking for is what is the clarity in this process; what are the penalties for diverting from that; if there is a breakdown, what happens; and do you feel that we are moving in that direction?

Mr. LITT. Well, I think early on in your question you put your finger on what I think the most important solution to this issue is, and that is getting it down to the desk level and getting everybody in the agency to treat this as a part of their responsibilities.

And I know in preparation for this hearing I talked with some of the other agencies about what kind of training they do. And as you might expect, it varies somewhat across an agency. But, for example, CIA has training modules for everybody where they instruct them in congressional notification and they have a brochure on their Web page.

Chairwoman SCHAKOWSKY. But where does the buck stop? Mr. Conaway raised the question about Leg Affairs. Well, if Leg Affairs is not him or herself informed of what is going on, how do we make sure that the breakdown doesn't occur there.

Mr. LITT. Ultimately, as I said, if you have an agency with thousands of people out there, the only way you can—no matter who the individual person who is responsible is—and as I said, the DNI has indicated that he thinks there should be one person responsible in each component of the community—but no matter who that person is, if the rest of the agency doesn't have in mind at all times: "Is this something that needs to be notified? If I have any doubt let me call this point of contact and discuss it with them, and if it is compartmented so that I don't know if I can talk about it with this person, let me raise it with my supervisor and let's talk about it." If you don't have that kind of culture, no kind of process that you set up is going to make this work. It has to be something that the people in the agency understand is A, part of their job and B, ultimately for their benefit and the benefit of their agency.

Chairwoman SCHAKOWSKY. Well, then I would suggest that what Mr. Holt raised, this idea of encouraging is not sufficient for culture change; that there needs to be much stronger language and much stronger policies that follow, that just encourage people to review their policies.

Mr. LITT. I can only tell you, Madam Chairwoman, that in the course of getting ready for this hearing, and the discussions I have had with the other agencies, it is my sense that they do recognize that there need to be additional steps taken, and they are working on beefing up their training programs, making their processes clearer and so on. And I am certainly hopeful that that, plus the commitment from the top, which people like Director Blair and Director Panetta have expressed, that that will help change the culture.

Chairwoman SCHAKOWSKY. Thank you. Ms. Eshoo.

Ms. ESHOO. Thank you. I have an appreciation for training programs and people at the variety of desks being in the loop and updating them on responsibilities and such. But I have to say that I think that what the committee is looking at goes far beyond that. I think what you are talking about, and Band-Aids are important when you have scratches so that you don't, you know, bump what

is sore or what you might have cut, but I think that this is far beyond that, I really do.

We are looking at the language in the National Security Act. Does it provide the direction that the Intelligence Community needs in order to meet the obligations that both the executive branch and the legislative branch have?

Now, I mean you said earlier that both the—that the DNI and the CIA Director might have rendered different judgments, and yet there is for the CIA a regulation that came out in March of 1996 that is absolutely clear about reporting of intelligence activities to Congress. So it is not a matter of what someone feels like doing or going through multiple choice, it is set forward. And yet we are still experiencing things that should not be the way they are.

I am not looking for the Congress, Mr. Litt, to have more power than the executive branch or vice versa. But when there is not, when it is not equal there is a problem, there really is a problem. And I think that just even looking at this regulation in all of our three-ring binders here, I don't see how the 2001 to 2009 incident could have taken place given what is in the statute.

On the accountability for intelligence activities and general congressional oversight provisions, you made mention earlier about the President having the responsibility for national security and that the Intelligence Committees have responsibility for oversight. But nowhere in this Title V does it say anywhere that the withholding of information to the Congress in any way, shape, or form is okay.

And I think that for you to best understand at least where I am coming from is what I am so concerned about, and it is based on the experience that we have had, is because there is a lack of clarity, various interpretations of these terms, then bring about requirements on the part of the executive branch, that we are getting into multiple choice. Well, it was this, but it wasn't that. So we have an obligation to report this, but we don't have an obligation to report that.

And I do think that there is a huge difference between notification and informing. If someone is informed, then there is a discussion. That is how information is shared. It is not a drive-by briefing where some information is just dropped off, and there is sloppy at best—and then it goes downhill from there—recordkeeping both on the part of the Congress and the executive branch.

So I think that we have some real work to do on this. And while I appreciate your view about people being trained and people at desk jobs and whatever, I have had many desk jobs in my life so I am not diminishing the importance of those individuals, but I think that this is really at a higher level. And I don't know what actions have ever been taken relative to violations.

And the National Security Act doesn't have any penalties in it. We know if something has gone wrong, but there aren't any penalties. And I don't know who has exercised any when something hasn't gone right.

In my first round of questions I asked for the memorandums that are being used for guidance. Are the standards the same across the IC in all of that?

Mr. LITT. Generally—

Ms. ESHOO. Or is it up to each agency to come up with whatever it is they come up with?

Mr. LITT. Generally speaking, the Intelligence Committee Policy Memorandum issued by the DNI applies across the Intelligence Community.

Ms. ESHOO. You said “generally.” Are there exceptions?

Mr. LITT. No.

Ms. ESHOO. So the standards are all the same, and the same memorandum applies to all agencies.

Mr. LITT. As I said, at that level of generality, that memorandum applies across all agencies. Agencies are free to develop their own standards consistent with that memorandum if they think it is necessary to give more specific guidance to their community in their individual case, but they all have to be consistent.

Ms. ESHOO. And this is all relative to informing Congress.

Mr. LITT. Yes.

Ms. ESHOO. Well, I think that we need to see all of that. I think we need to see what the interpretations are.

Thank you, Madam Chair. And I am prepared to go to the closed session to deal with whatever needs to be dealt with there, but I appreciate the extra round.

Chairwoman SCHAKOWSKY. Mr. Miller.

Mr. MILLER. Mr. Litt, you said earlier that you were from the executive branch and you would not attempt to tell Congress how to do its job, and we appreciate that. Article I, Section 5, Clause 2 of the Constitution gives Congress the power to determine the rules of its proceedings. In your view does the rulemaking clause give Congress the authority to determine how to share classified information with and between its Members? And if not, on what basis and to what extent do you believe the President’s powers circumscribe the explicit constitutional authority?

Mr. LITT. I am getting a little bit out of my comfort zone here on the legal interpretation, but I think my view on this is that this is one of those areas where each branch has the right to exercise its own powers, which is to say that—and the problem with that approach is that that frequently leads to collisions.

So that, for example, if the Congress—and this is a purely hypothetical example—if the Congress imposed a rule that said you can do a limited briefing but we retain the right to tell everybody else in the membership or everybody else on the committee about it, and the Executive didn’t like that, the Executive might say, well, then okay, we are going to exercise our constitutional power to protect national security information and we are not going to brief you. At which point, the Congress might exercise its constitutional power of the purse and say, well, we are not going to fund these activities. And that is not a productive approach to governance, in my view. And that is why I said earlier, I think in response to Mr. Thornberry’s question, that these are the sorts of things that need to be worked out by a process of accommodation and compromise between the branches.

Mr. MILLER. And I agree. I think given this respect, Congress and the executive branch need to work together to set out the framework for notification. What role does the President have in the process to determining what, if anything, should be briefed?

Mr. LITT. Ultimately the President is responsible for all of the national security apparatus. I think to a great extent that is delegated downward. I would be surprised if the President himself personally participates in a lot of these decisions. But ultimately it is his responsibility.

Mr. MILLER. Notification to Congress is, as a practical matter, carried out with a degree of latitude—and we have just established that—and as a result of consultation and cooperation between the branches on how to handle sensitive matters. Do you think it helps such consultation and cooperation when Members of Congress say that the CIA lies all the time?

Mr. LITT. I would hope that everybody would approach the consultation and notification process in the spirit of cooperation.

Mr. MILLER. In a follow-up question to Mr. Schiff's earlier round of questions as to what would trigger a notification, and I think everybody was trying to go down the route of when something is funded, and I think there was a comment "significant amount of dollars." Can you explain what "significant" amount of money is?

Mr. LITT. Well, that—I think your question, sir, highlights why I keep saying this is a matter of judgment. Because obviously a significant amount of money, there is no algorithm that you can plug in to determine what is significant. And what is a significant amount of money may differ depending upon what agency you are talking about. What is a significant amount of money for the National Reconnaissance Office may be different than what is a significant amount of money for the intelligence component of the Department of Energy or the State Department. So I don't think you can quantify that with any number that would be meaningful across the entire Intelligence Community.

Mr. MILLER. And I don't think you can either, and I think that is why we are having the discussion that we are having today.

One final question. Other than the CIA inspector general's report on the Peru shutdown, are you aware of any substantiated instance in which it has been established that Congress was deliberately provided with false information with respect to intelligence activities? And other than the CIA inspector general's report on the Peru shutdown, are you aware of any substantiated finding that the Intelligence Community systemically misleads or has misled Congress?

Mr. LITT. I am not aware of any such finding.

Ms. ESHOO. Madam Chairwoman, may I just do a quick follow-up? You are not aware because you are new? You are not aware because you haven't done the research? You are just not aware, why?

Mr. LITT. Well, I consider myself, even though I am new on the job, to be reasonably informed.

Ms. ESHOO. Exactly.

Mr. LITT. And I am not aware—as Ranking Member Miller put the question, I am not aware of anything that meets the specification of his question.

Ms. ESHOO. Because you are new.

Mr. LITT. No. I mean I suppose there is something out there, some inspector general's report out there. But in preparation for this hearing, I asked about what sorts of reviews of congressional

notification processes have been conducted. And assuming that I was provided accurate information, I am not aware of anything.

Ms. ESHOO. Thank you.

Chairwoman SCHAKOWSKY. Mrs. Myrick.

Mrs. MYRICK. Thank you. I wanted to follow up what I was asking before about the leaking of classified information and people being prosecuted. And I know you have to get back to me on this, but I would appreciate very much if you would let me know when was the last time someone was prosecuted for leaking classified information. And then was it a guilty plea, or did someone just throw in the towel, or did the defendant fight it?

If you could let me know that, I would appreciate it very much. Thank you, Madam Chair.

Chairwoman SCHAKOWSKY. If you could inform the whole committee of that.

Mr. LITT. Of course.

Chairwoman SCHAKOWSKY. Mr. Holt.

Mr. HOLT. Thank you, Madam Chair. Just a very brief preamble. You should want this, everyone in the Intelligence Community should want the fullest possible consultation with Congress. These are serious matters. We want to get the best intelligence results, we want to avoid horrific mistakes. Historically over the decades, there have been horrific mistakes that have cost lives, cost national reputation, have diminished national security. So I would urge every leader in the Intelligence Community to actively seek this consultation, not perfunctory notification.

Mr. LITT. And if I could just—

Mr. HOLT. And recognizing, if I may finish and then I'll turn to you for a comment. You know, by oath and by the Constitution, although we are not Commander in Chief, we have an equal responsibility to provide for the common defense. And so if it comes to a push and a tug about how fully Congress will be informed, I think we stand on pretty—pretty solid constitutional grounds.

Let me ask one specific question, and then if you could answer that question and then comment as you might on my comments. Has the Director undertaken a review of previous Gang of Eight briefings, previous restricted briefings from the preceding administration, revisited those to see if any of them now no longer need to be restricted? Has that review taken place? If not, is that review about to take place?

Mr. LITT. It hasn't taken place that I am aware of, and I am not aware of any plans to do it. In response to your broader comments at the beginning, I can only say that—

Mr. HOLT. Let me just jump in there. In keeping with my earlier comment, I would urge the Director most strongly to undertake such a review. Maybe it is a null set. Possibly there is nothing out there that hasn't been fully briefed. If there is, he certainly should be looking at it.

Yes, sir, go ahead, please.

Mr. LITT. I was just going to say that I understand that Director Blair shares your views of the importance of the oversight process and a full consultation with Congress and, frankly, the value to the Intelligence Community of having Congress involved. I know he shares that and I know he is trying to make it happen.

Madam Chair, something that Mr. Holt just said refreshed my recollection on something. I am aware of one instance where there has been a limited briefing since I have been involved here. There was one. And in fact the Office of the General Counsel was consulted on it.

Mr. HOLT. Thank you, Madam Chair.

Chairwoman SCHAKOWSKY. Mr. Thornberry.

Mr. THORNBERRY. Thank you. Mr. Litt, do you believe that the National Security Act of 1947 and those provisions we are talking about, 501, 2 and 3, need to be clarified to make a clearer standard that an administration and a Congress both have to live up to?

Mr. LITT. I think that it is not—that it is an unrealistic expectation to think that we could create any standard that would not ultimately devolve to the exercise of judgment.

Mr. THORNBERRY. And I am not disagreeing with that. There will be judgment. But I guess if I could ask you, do you think the statute itself needs to be clarified to help the exercises of judgment and to make it clearer about where the responsibility lies and so forth.

Mr. LITT. I think that in my view the better approach, as I said, is in refocusing the Intelligence Community on the importance of complying with the statute as it is currently written.

Mr. THORNBERRY. Now, if you read the statute, it provides for Gang of Eight limited notification procedures for covert action. It does not on other intelligence collection activities. And yet that happens sometimes. But if you read the statute it shouldn't. Do you agree?

Mr. LITT. Well, I think that the executive branch reads the preamble language of Section 502 which refers “to the extent consistent with the protection of sensitive intelligence sources and methods” as providing some ability to the Intelligence Community, not on whether to inform the committees but on how the committees are to be informed, and that a practice has grown up that has been more or less tolerated by both sides of more limited briefings on unusual occasions. That is, obviously, the exception rather than the norm.

Mr. THORNBERRY. That is helpful to me. So there is that provision that says to the extent necessary to protect sources or methods or whatever. And so your view is that that provides a greater discretion for any Executive about whether to brief and to whom to brief all intelligence activities.

Mr. LITT. As I said, I think that the—our view is that it doesn't provide discretion on whether to brief, it provides discretion on perhaps how to brief and who to brief. But that if something rises to the level of a significant intelligence activity, it ought to be briefed.

Mr. THORNBERRY. Well, I would just say a year ago, there was some bipartisan agreement of a change in the statute that would essentially put the presumption on any administration to fully brief Congress. And if there was, if any administration felt there was a need to limit who got briefed, it would be this matter of consultation back and forth with basically the decision resting between the Chair and the Ranking Member of the full committee on whether it would be limited to fewer Members of Congress or whether the whole committee. It seemed to make sense to me. It seems to pro-

vide some clarification to me about—in going forward, rather than this different structure setup under 502 and 503.

I hope someday we can get back to kind of looking at this in a simpler, easier way on a bipartisan basis. And obviously one needs—any Congress would need to work with your office, the administration, to make that happen.

So I appreciate you being here and yield back.

Chairwoman SCHAKOWSKY. Mr. Conaway.

Mr. CONAWAY. Thank you, Madam Chairman. You mentioned the blind sheikh. I got great confidence in the Bureau of Prisons that wherever we hold these guys, whether in Guantanamo Bay or somewhere else, that none of them are going to escape. But wasn't the sheikh's lawyer convicted of material support for a terrorist organization by helping the sheikh run the organization from prison? Can you talk to us about that case? And also how does that impact bringing Guantanamo Bay detainees to the United States where they may in fact have a broader opportunity for visitors and other access that they currently don't have in Guantanamo Bay?

Mr. LITT. My knowledge of that case is derived from reading newspaper reports and the case reports of it, so I don't have any—I can't give you any more detailed information than that.

It is my understanding that his lawyer was convicted of essentially passing coded messages. It is also my impression from reading the case—and I will tell you this is only my impression, I don't have any inside information on this—but it is my impression that the monitoring systems that were in place picked up these conversations and enabled the prosecution in a manner that was sufficient so that if there had been any genuine risk to national security, it could have been taken care of.

Now as I said, that is just my impression from reading the reports. I don't know that for certain. I think that, by and large, the super max prisons and the Special Administrative Measures that can be put in are adequate to protect national security and to protect individuals and that whatever process is put into place for bringing these people here will ensure that the safety of Americans is not threatened.

Mr. CONAWAY. Would you anticipate, though, that more people getting to have access to the detainees here in the United States is less preferable than a limited number of people getting access to them in Guantanamo Bay?

Mr. LITT. Well, I am just not sure that more people would have access to them here than in Guantanamo Bay.

Mr. CONAWAY. And that is based on?

Mr. LITT. I mean—

Mr. CONAWAY. And that is a rhetorical question. The real issue about bringing those folks onto United States soil is Federal judges beginning to interpret their rights broader than even the administration would want them interpreted and, certainly, I and my colleagues would want them interpreted. And once they are here and you have got Federal judges involved, then you really can't answer beyond that, because there are thousands of Federal judges that might have the sympathies that are different than others.

So I thank you, Mr. Litt, I appreciate your very candid comments. Thank you, sir. I yield back.

Chairwoman SCHAKOWSKY. At this point we will recess the committee and close the open session and reconvene in our regular hearing room downstairs. And we will move right there.

[Whereupon, at 11:38 a.m., the subcommittees proceeded in Closed Session.]

