

Symposium
Presidential Power in the Obama Administration:
Early Reflections

“A NEW ERA OF OPENNESS?”:
DISCLOSING INTELLIGENCE TO
CONGRESS UNDER OBAMA

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As a candidate, Barack Obama promised “a new era of openness,” and his administration has taken some significant steps to increase transparency in the executive branch. But it has also continued the Bush administration’s policy of invoking the state secrets privilege to avoid judicial scrutiny of controversial warrantless surveillance and torture programs. Many commentators have noted the parallels between the Bush and Obama policies on disclosing sensitive information to courts, but they have paid little attention to whether the Obama administration has continued Bush administration policies regarding the disclosure of sensitive information to Congress.

This Essay fills that gap, and looks in detail at the Bush and Obama Administration responses to legislative proposals for expanding intelligence disclosures to Congress. It reviews the Bush and Obama Administration positions on legislation that would require intelligence disclosure to Congress, and finds that there are substantial similarities—though not identity—between the Bush and Obama Administration approaches. Both Administrations have opposed disclosure of covert actions to the full intelligence

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committees and the disclosure of internal executive branch legal advice. On these most sensitive intelligence issues, we will see increased disclosure to Congress only over the objection of President Barack Obama.

I. INTRODUCTION

The Obama Administration came into office with great expectations for increased transparency. As a candidate, Barack Obama promised “a new era of openness,” pledging that he would “restore the balance we’ve lost between the necessarily secret and the necessity of openness in a democratic society.”¹ On his first full day in office, he issued memoranda proclaiming that his “Administration is committed to creating an unprecedented level of openness in Government,”² directing the Attorney General to issue new guidelines to agency heads about the Freedom of Information Act (“FOIA”), “reaffirming the commitment to accountability and transparency,”³ and an executive order on presidential records, reversing the George W. Bush executive order that permitted the heirs of deceased former Presidents to invoke constitutional privileges and prevent disclosure.⁴ Since then, Attorney General Eric Holder issued a memorandum reversing John Ashcroft’s 2001 FOIA memorandum, and indicating that the Justice Department would defend nondisclosure only if disclosure will harm “an interest protected by one of the statutory exemptions . . . or [if] disclosure is prohibited by law.”⁵ The Justice Department released long-sought legal memoranda about the CIA’s torture program,⁶ and the Office of Management and Budget directed

1. Senator Barack Obama, Remarks on Fifth Anniversary of Speech Opposing the Iraq War (Oct. 2, 2007), *available at* http://www.barackobama.com/2007/10/02/on_fifth_anniversary_of_speech.php.

2. Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC. 10 (Jan. 21, 2009), *available at* <http://www.gpoaccess.gov/presdocs/2009/DCPD200900010.pdf>.

3. Memorandum on the Freedom of Information Act, 2009 DAILY COMP PRES. DOC. 9 (Jan. 21, 2009), *available at* <http://www.gpoaccess.gov/presdocs/2009/DCPD200900009.pdf>.

4. Exec. Order No. 13,489, 74 Fed. Reg. 4669 (Jan. 21, 2009); Exec. Order No. 13,233, 66 Fed. Reg. 56,025 (Nov. 1, 2001).

5. Memorandum from the Attorney Gen. to Heads of Executive Departments and Agencies 2 (Mar. 19, 2009), *available at* http://www.dhs.gov/xlibrary/assets/foia/ag_foia_memo2009-03-19.pdf. The Ashcroft memorandum pledged to defend all decisions not to disclose “unless they lack a sound legal basis.” Memorandum from Attorney Gen. John Ashcroft to Heads of All Federal Departments and Agencies (Oct. 12, 2001), *available at* <http://www.justice.gov/archive/oip/011012.htm>.

6. See Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of*

executive branch agencies to make high value data sets freely available on the web.⁷

But the Obama Administration has disappointed open government advocates by opposing efforts to hold accountable those involved in several controversial Bush Administration intelligence programs: warrantless surveillance, torture and extraordinary rendition. President Obama personally opposes a proposed truth commission to investigate the interrogation and warrantless surveillance programs,⁸ preferring to look forward rather than backward.⁹ Obama personally intervened and reversed a Justice Department decision to abide by an appellate court decision that the FOIA requires the government to release photographs of U.S. military personnel abusing prisoners in Iraq and Afghanistan.¹⁰ Instead, the executive branch sought Supreme Court review of that decision, and while the case was pending, convinced Congress to revise FOIA in order to avoid disclosure.¹¹

In a move that has received much attention in the press and blogosphere, the Obama Administration has favored secrecy over transparency to avoid judicial scrutiny of the Bush Administration's warrantless surveillance and torture policies.¹²

Interrogation, N.Y. TIMES, Apr. 17, 2009, at A1, available at <http://www.nytimes.com/2009/04/17/us/politics/17detain.html>.

7. See, e.g., Data.gov, www.data.gov/about (last visited Aug. 14, 2010) ("The purpose of Data.gov is to increase public access to high value, machine readable datasets generated by the Executive Branch of the Federal Government."); USAspending.gov, www.usaspending.gov (last visited Aug. 14, 2010) (providing information about government contracts).

8. President's Remarks at the National Archives and Records Administration, 2009 DAILY COMP. PRES. DOC. 388 (May 21, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900388.pdf>.

9. David Johnston Charlie Savage, *Obama Signals His Reluctance To Investigate Bush Programs*, N.Y. TIMES, Jan. 12, 2009, at A1, available at <http://www.nytimes.com/2009/01/12/us/politics/12inquire.html> (quoting then-President-elect Obama as stating that "we need to look forward as opposed to looking backwards").

10. *Am. Civil Liberties Union v. Dep't. of Def.*, 543 F.3d 59 (2d Cir. 2008), vacated, 130 S. Ct. 777 (2009); Jeff Zeleny & Thom Shankar, *Obama Reversal on Abuse Photos*, N.Y. TIMES, May 14, 2009, at A1, available at <http://www.nytimes.com/2009/05/14/us/politics/14photos.html>.

11. Department of Homeland Security Appropriations Act of 2010, Pub. L. No. 111-83, § 565, 123 Stat. 2142 (2009) (amending FOIA by granting the Secretary of Defense the discretion to withhold the release of photographs of prisoners being abused). In light of this Act, the Supreme Court reversed the appellate court decision. *Dep't of Def. v. ACLU*, 130 S. Ct. 777 (2009).

12. See, e.g., John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 10, 2009, at A12, available at <http://www.nytimes.com/2009/02/10/world/americas/10iht-10torture.20065435.html>; Glenn Greenwald, Op-Ed., *The 180-Degree Reversal of Obama's State Secrets Position*, SALON.COM, Feb. 10, 2009, <http://www.salon.com/>

Although the Administration instituted new *internal* executive branch procedures for invoking the state secrets privilege, it has not changed the executive branch's stance in court. In lawsuit after lawsuit seeking redress for the Bush Administration's warrantless surveillance and torture policies, the Obama Administration has argued that the state secrets doctrine requires courts to dismiss these cases, using the same arguments (and even nearly identical affidavits) as the Bush Administration.¹³ On the question of whether courts can serve as an accountability mechanism for controversial intelligence policies, there is little difference between the positions of the Obama and George W. Bush Administrations.¹⁴

While the parallels between the Bush and Obama policies regarding the disclosure of sensitive information *to courts* has received a great deal of attention, less attention has been given to how the Obama Administration compares with the Bush Administration in disclosing sensitive information to Congress. This Essay examines the Obama and Bush Administration policies toward disclosing intelligence-related information to Congress.¹⁵

To make such a comparison, one would ideally compare the quantity and quality of intelligence information that each Administration *actually* disclosed to Congress. But when the executive branch discloses this information to Congress, it generally provides it only to the intelligence committees in secret, and the committees keep that information secret.¹⁶ The lack of publicly available data about the *actual* information disclosed to Congress makes it impossible to perform that kind of comparison.

opinion/greenwald/2009/02/10/obama/.

13. Schwartz, *supra* note 12.

14. For a discussion of various accountability mechanisms, see Kathleen Clark, *The Architecture of Accountability: The Case of Warrantless Surveillance*, 2010 BYU L. REV. (forthcoming).

15. Confidential disclosure of information to congressional intelligence committees does not, of course, constitute "openness." Yet widening the circle of disclosure, even within government, may help achieve accountability through the checking function of elected representatives, if not through the involvement of the public, at large. Conversely, restricting disclosures, even within government, can and does hinder accountability. The facially inadequate Justice Department legal memoranda justifying torture and warrantless surveillance could remain viable only through tightly limiting their distribution, even within government. See Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SECURITY L. & POL'Y 455, 462 (2005) [hereinafter Clark, *Ethical Issues*]; Clark, *supra* note 14.

16. See L. BRITT SNIDER, *THE AGENCY AND THE HILL: CIA'S RELATIONSHIP WITH CONGRESS, 1946-2004*, at 115 (2008).

What is publicly available, however, is information about the Bush and Obama Administrations' *positions* on proposed legislation that would require increased intelligence disclosure to Congress. In every year since the *New York Times*'s December 2005 revelation that the Bush Administration had engaged in warrantless surveillance,¹⁷ members of Congress have introduced legislation to increase intelligence disclosures to Congress, and the executive branch has expressed a position on that legislation. By looking in detail at those proposed legislative measures and the executive branch's positions on them, it becomes apparent that the Obama Administration has, to a significant degree, continued the Bush Administration secrecy regime.

II. DISCLOSING INTELLIGENCE TO CONGRESS

Up until the mid-1970s, the executive branch disclosed to Congress little information about intelligence operations, and Congress performed little oversight of the intelligence agencies.¹⁸ In 1975, the Senate and House convened ad hoc investigatory committees to examine intelligence abuses.¹⁹ Those committees held extensive hearings and wrote reports about the intelligence agencies.²⁰ As a result of those ad hoc investigations, both Chambers established permanent committees tasked with intelligence oversight.²¹ In 1980, Congress passed legislation requiring the executive branch to keep the congressional intelligence committees "fully and currently informed" of intelligence activities.²²

17. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

18. FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY, 1947-1994 (2d ed. 1994); SNIDER, *supra* note 16, at 94-103; LOCH K. JOHNSON, SEASON OF INQUIRY: THE SENATE INTELLIGENCE INVESTIGATION (1985).

19. The Senate created a Select Committee to Study Governmental Operations with Respect to Intelligence Activities and the House Select Intelligence Committee. In February 1975, the House created a committee chaired by Rep. Lucien Nedzi, but that committee was beset with problems. In July 1975, the House disbanded that committee and created a new committee chaired by Rep. Otis Pike. CECIL V. CRABB & PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT & FOREIGN POLICY 172-75 (2d ed. 1984).

20. *Id.*

21. The Senate created the Senate Select Committee on Intelligence in 1976. S. Res. 400, 94th Cong., 94 CONG. REC. 4754 (1976). The House created the House Permanent Select Committee on Intelligence in 1977. H. Res. 658, 95th Cong., 95 CONG. REC. 22,932 (1977).

22. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, § 407, 94 Stat. 1975, 1981 (codified as amended at 50 U.S.C. § 413 (2006)).

Congress enacted a special—more limited—notification process for covert actions (defined as government activities intended “to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly”²³). For covert actions, Congress permitted prior notice to be limited to just eight members of Congress (rather than the full intelligence committees) where “the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States.”²⁴ This small subset of legislators is referred to as the “gang of eight,” the chairs and ranking members²⁵ of the intelligence committees, the Speaker and Minority Leader of the House of Representatives, and the Majority and Minority Leaders of the Senate.²⁶ Since 1980, Presidents have used this “gang of eight” procedure to notify Congress of covert actions.²⁷

While the statutory “gang of eight” procedure applies only to covert actions (as opposed to other intelligence activities, such as intelligence collection), the George W. Bush Administration

23. Congress enacted this statutory definition of “covert action” in 1991. Intelligence Authorization Act for Fiscal Year 1991, Pub. L. 102-88, § 503(e), 105 Stat. 429, 442 (codified as amended at 50 U.S.C. § 413b(e) (2006)). The statutory definition of “covert activities” specifically excludes “activities the primary purpose of which is to acquire intelligence.” *Id.*

24. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450 § 501(a)(1)(B), 94 Stat. 1975, 1981 (1980). The Act does not explicitly require the executive branch to provide the intelligence committees with *prior* notification of covert actions, but refers to covert actions as “significant *anticipated* intelligence activity,” *id.* § 501(a)(1) (emphasis added), and the Act’s two mentions of “prior notice” seem to assume that prior notice is generally required, *id.* See also S. REP. NO. 96-730, at 4 (1980), reprinted in 1980 U.S.C.C.A.N. 4192, 4194 (noting that the legislation repeals the Hughes-Ryan Amendment’s requirement that the executive branch report covert actions to Congress “in a timely fashion,” and asserting that it replaced that provision with a requirement that the intelligence committees be given prior notice of covert actions); SNIDER, *supra* note 16, at 59–60 (noting that the legislation “contemplated [that the intelligence committees] would be advised in advance” of covert actions).

25. On the Senate Intelligence Committee, the ranking member (i.e., minority member with the most seniority) serves as Vice-Chair of the Committee. S. Res. 400, 94th Cong., 94 CONG. REC. 4754 (1976).

26. Alfred Cumming, Cong. Research Serv., “Gang of Four” Congressional Intelligence Notifications (2010), available at [http:// assets.opencrs.com/rpts/R40698_20100129.pdf](http://assets.opencrs.com/rpts/R40698_20100129.pdf).

27. *But see* HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN & SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN/CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, at 4–5 (1987). (President Reagan failed to notify even the “gang of eight” of the covert action to sell arms to Iran, and Congress learned of the sale only after it was revealed in a Lebanese newspaper).

used the “gang of eight” procedure to inform Congress of its warrantless surveillance and torture programs.²⁸ After the program was disclosed in the *New York Times*, some members of the intelligence committees who had not been part of the “gang of eight” expressed anger that they had not been informed.²⁹ Democratic members of the “gang of eight” were put on the defensive for not having done more to oppose the program, but protested that secrecy prevented them from taking any action to oppose the program.³⁰

Of particular concern was whether the surveillance program was even legal. Prior to disclosure of the program in the *New York Times*, at least one member of the “gang of eight” privately expressed concern about its legality.³¹ After its disclosure, several congressional committees sought—but were denied—access to the Justice Department memoranda that provided the legal justification for the program.³²

In response to these controversial Bush Administration intelligence policies and its practice of notifying only the “gang of eight,” some members of Congress proposed legislation to ensure broader intelligence disclosure to the intelligence committees. In each of the four years following the *New York Times* disclosure of the surveillance program, members of Congress introduced intelligence authorization bills that would have increased intelligence disclosure to Congress. The next

28. Pamela Hess, *Michael Hayden: Congress Was Informed About Surveillance Program*, HUFFINGTON POST, July 11, 2009, http://www.huffingtonpost.com/2009/07/11/michael-hayden-congress-w_n_230066.html; Cumming, *supra* note 26.

29. Sen. Russell Feingold introduced a resolution to censure President Bush for “his failure to inform the full congressional intelligence committees as required by law.” S. Res. 398, 109th Cong., 109 CONG. REC. S2041 (2006).

30. Nancy Pelosi, Op-Ed., *The Gap in Intelligence Oversight*, WASH. POST, Jan. 15, 2006, at B7 (defending her failure to object to warrantless surveillance); Glenn Thrush & John Bresnahan, *Pelosi Defense: Couldn't Object in '03*, POLITICO, May 11, 2009, <http://www.politico.com/news/stories/0509/22401.html> (providing Pelosi's defense for her failure to object to torture); Rep. Jane Harman, *Jane Harman Comments on the Release of Bush's Law by Eric Lichtblau*, TPM, Mar. 31, 2008, http://tpmcafe.talkingpointsmemo.com/2008/03/31/jane_harman_comments_on_the_re/; Shane Harris, *The CIA Briefing Game*, NAT'L. J., June 6, 2009, http://www.nationaljournal.com/njmagazine/nj_20090606_4885.php.

31. Letter from Senator Jay Rockefeller, Vice Chairman, Senate Select Comm. on Intelligence, to Vice President Cheney (July 17, 2003), *available at* <http://www.globalsecurity.org/intell/library/news/2005/intell-051219-rockefeller01.pdf>.

32. *See, e.g.*, Letter from Representative John Conyers, Jr., Chairman, House Comm. on the Judiciary, to Fred Fielding, Counsel to the President, Office of the Counsel to the President (Feb. 12, 2008), *available at* <http://www.themediaconsortium.com/reporting/wp-content/uploads/2008/02/conyers080212.pdf> (seeking access to legal memoranda relating to the warrantless surveillance program).

Section identifies the intelligence disclosure provisions of the intelligence authorization bills for fiscal years (“FY”) 2007 to 2010, and examines the Bush and Obama Administration positions on those provisions.

To make this comparison, I reviewed the official Bush and Obama Administration positions on the intelligence authorization bills from FY 2007 to 2010,³³ identified executive branch objections to requirements for intelligence disclosure to Congress, determined whether that provision had been proposed during both the Bush Administration (FY 2007, 2008 or 2009) and the Obama Administration (FY 2010),³⁴ and then examined

33. *E.g.*, OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2701-INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2010 (July 8, 2009), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=86389> [hereinafter FY 2010 SAP].

This approach—examining Statements of Administration Policy and veto messages regarding intelligence authorization bills—is under-inclusive in two ways. First, it does not reach intelligence-related provisions that were included in other legislation, but not the intelligence authorization bills. *See, e.g.*, S. Res. 3501, 110th Cong., 110 CONG. REC. S8861 (2008) (requiring the executive branch to report to Congress if it issues an opinion indicating that a statute does not constrain executive branch action). Second, it does not reach other communications of administration position, such as official testimony or informal statements regarding pending legislation. *See, e.g.*, Letter from Michael Mukasey, Attorney Gen., to Senator Harry Reid, Majority Leader, U.S. Senate (Nov. 14, 2008), *available at* <http://www.justice.gov/olc/2008/olc-reporting-act.pdf>.

34. Information disclosure provisions that appeared during only the Bush Administration or only the Obama Administration could not become the basis for comparison between the two Administrations. Examples of provisions that were proposed during either the Bush or Obama Administrations, but not both, include provisions that would:

- require a report to Congress on “intelligence activities related to the overthrow of a democratically elected government” in the previous ten years, Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, 110th Cong. § 503 (2007); OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 2082 – INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2008 (2007), *available at* http://www.fas.org/irp/news/2007/12/sap121_107.pdf [hereinafter FY 2008 SAP];
- allow the disclosure of non-covert action-related information to the full committees if the Chair and ranking member agree, Intelligence Authorization Act for Fiscal Year 2009, H.R. 5959, 110th Cong. § 502 (2008); OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 5959 – INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2009 (2008), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=77656> [hereinafter FY 2009 SAP];
- require that each member of the intelligence committees be notified of the fact that only the Chair and ranking member were given full information regarding non-covert action-related information, Intelligence Authorization Act for Fiscal Year 2007, S. 372, 110th Cong. § 304 (2007); OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 372 – INTELLIGENCE AUTHORIZATION ACT OF FY 2007 (2007), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25593&st=>

whether the Bush and Obama Administrations took the same position on the intelligence disclosure provisions that had been proposed during both Administrations. While none of these provisions has been enacted into law,³⁵ the debate over them lays bare the executive branch's position on intelligence disclosures to Congress, and shows substantial similarities—though not identity—between the Bush and Obama positions.

III. PROPOSALS FOR INCREASED INTELLIGENCE DISCLOSURE

Each of the intelligence authorization bills from FY 2007 to 2010 includes provisions for increased intelligence disclosure to Congress. There were repeated attempts to require disclosure of legal advice related to intelligence activities and disclosure of covert actions beyond the chair and ranking members of the intelligence committees.³⁶

A. DISCLOSURE OF EXECUTIVE BRANCH LEGAL OPINIONS

Perhaps due to the controversy surrounding the Bush Administration's legal memoranda supporting torture,³⁷ in every year since 2005, Congress included in its intelligence authorization bills provisions requiring the executive branch to disclose its legal opinions to Congress.³⁸ The Bush and Obama Administrations consistently opposed these provisions.

&st1= [hereinafter FY 2007 SAP];

- require disclosure of intelligence information to the Government Accountability Office, Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, 111th Cong. § 335 (2009); FY 2010 SAP, *supra* note 33.

See infra Appendix B.

35. The last intelligence authorization bill to become law was for FY 2005. *See* Intelligence Authorization Act for FY 2005, Pub. L. No. 108-487, 118 Stat. 3939 (2004). Congress passed an intelligence authorization bill for FY 2008, but President Bush vetoed the bill. INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2008—VETO MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. Doc. No. 110-100), 154 CONG. REC. H1419-20 (2008).

36. For a summary of the information disclosure provisions and the Bush and Obama Administrations' positions on these provisions, see *infra* Appendix A.

37. The Bush Administration's August 1, 2002 legal opinion was leaked in *The Washington Post* in June 2004. David Ignatius, Op-Ed., *Small Comfort*, WASH. POST, June 15, 2004, at A23. For a discussion of the ensuing ethical controversies, see Clark, *Ethical Issues*, *supra* note 15.

38. A review of the intelligence authorization bills from FY 2001 to FY 2010 indicates that the requirement to disclose legal opinions appeared for the first time in 2005 (the year after revelation of the torture opinion) in the FY 2006 bill. Intelligence Authorization Act for Fiscal Year 2006, S. 1803, 109th Cong. § 107 (2005). This same provision reappeared in identical form in the FY 2007 bill. S. 372, § 108.

A provision in the FY 2007 intelligence authorization bill would have required disclosure of intelligence-related legal opinions to Congress, but permitted the executive branch to avoid disclosure, as long as the President asserted a constitutional privilege.³⁹ This provision was rather modest, permitting nondisclosure upon mere invocation of a constitutional privilege (rather than adjudication of its applicability). But the Bush Administration opposed it, arguing that it “would foster political gamesmanship and elevate routine disagreements to the level of constitutional crises.”⁴⁰

Another provision, requiring disclosure to Congress of legal advice regarding the meaning of the Detainee Treatment Act of 2005, as applied to interrogation techniques, was narrower in scope, but did not include an automatic exception upon invocation of a privilege.⁴¹ The Bush Administration opposed this disclosure requirement, contending that it “rais[es] grave constitutional issues.”⁴² President Bush referred to this provision when he vetoed the FY 2008 intelligence authorization bill, contending that “questions concerning access to such information are best addressed through the customary practices and arrangements between the executive and legislative branches on such matters, rather than through the enactment of legislation.”⁴³

39. S. 372, § 508 (requiring the disclosure of information “unless the President certifies that such document or information is not being provided because the President is asserting a privilege pursuant to the Constitution of the United States”). While the bill did not define “privilege pursuant to the Constitution,” it presumably would include the state secrets privilege.

40. FY 2007 SAP, *supra* note 34.

41. Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, 110th Cong. § 326 (2007); S. 372, § 313. The FY 2008 bill also required disclosure of legal advice related to the meaning of the Military Commissions Act of 2006, as applied to interrogation techniques. H.R. 2082, § 326.

42. FY 2007 SAP, *supra* note 34, at 2.

43. INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2008—VETO MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. Doc. No. 110-100), 154 CONG. REC. H1419, 1420 (2008); *see also* FY 2008 SAP, *supra* note 34. The Statement of Administration Policy (“SAP”) for FY 2007 made a similar policy argument regarding this provision: that this is a “matter[] . . . appropriately left to sensitive handling in the normal course between the intelligence committees and the executive branch and should not be the subject of detailed statutory reporting requirements.” FY 2007 SAP, *supra* note 34.

The Obama Administration has not been faced with this particular legislative proposal, and so it is not clear what its position on it would be. On the one hand, in April 2009, the Obama Administration released to the public several Bush Administration legal opinions regarding interrogation techniques. *See* Mazzetti & Shane, *supra* note 6. (These released opinions would not have been covered by the FY 2007 and FY 2008 bills because they were issued before enactment of the Detainee Treatment Act of 2005.) On

A broader provision, requiring the disclosure to Congress of information about the legal status of intelligence and operations, including dissenting views, appeared in the FY 2009 and FY 2010 bills.⁴⁴ Both the Bush and Obama Administrations opposed this provision,⁴⁵ and the Obama Administration even issued a veto threat based on this disclosure requirement.⁴⁶ While the Obama Administration has been willing to disclose some of the controversial Bush Administration legal opinions justifying torture,⁴⁷ it, like the Bush Administration before it, has chafed at the prospect of a statutory requirement to disclose its legal opinions.

B. DISCLOSURE OF COVERT ACTIONS BEYOND THE “GANG OF EIGHT”

The Bush and Obama Administrations also both opposed disclosure of covert actions to the full intelligence committees. The FY 2007 bill required the executive branch to notify the full intelligence committees of covert actions, or at least notify the full committees of the fact that they were not being fully informed and why.⁴⁸ That bill would also withhold all funding for any intelligence activity (including covert actions) on which the executive branch had not followed that mandate.⁴⁹ The Bush Administration objected to these provisions, noting that they “may require broader dissemination of the very facts that require limited access.”⁵⁰ The Administration also contended

the other hand, the Obama Administration opposes legislation that would require the disclosure of information about the legal status of intelligence collection operations and covert actions, including dissenting views. *See* Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, 111th Cong. § 321 (2009).

44. H.R. 2701, § 321; Intelligence Authorization Act for Fiscal Year 2009, H.R. 5959, 110th Cong. § 502 (2008).

45. The Bush Administration indicated that this provision “would undermine long-standing arrangements between Congress and the President regarding reporting of sensitive intelligence matters.” FY 2009 SAP, *supra* note 34, at 2. The Obama Administration also opposed this provision. FY 2010 SAP, *supra* note 33, at 1 (“[This provision] raises serious constitutional concerns by amending sections 501-503 of the National Security Act of 1947 in ways that would raise significant executive privilege concerns by purporting to require the disclosure of internal Executive branch legal advice and deliberations. Administrations of both political parties have long recognized the importance of protecting the confidentiality of the Executive Branch’s legal advice and deliberations.”).

46. FY 2010 SAP, *supra* note 33, at 1.

47. *See* Mazzetti & Shane, *supra* note 6.

48. Intelligence Authorization Act for Fiscal Year 2007, S. 372, 110th Cong. § 304 (2007).

49. *Id.* § 307.

50. FY 2007 SAP, *supra* note 34, at 2.

that this “all-or-nothing approach to executive branch notification to the intelligence committees . . . would discourage, rather than encourage, the sharing of extraordinarily sensitive information.”⁵¹

The FY 2009 intelligence authorization bill did not directly require such disclosure, but used Congress’s control over appropriations as a lever to pressure the executive branch to make such disclosure. It would have withheld funding of 75% of the intelligence budget until covert actions are reported to the full intelligence committees.⁵² The Bush Administration opposed this provision, arguing that it

would undermine the fundamental compact between the Congress and the President on reporting highly sensitive intelligence matters—an arrangement that for decades has balanced congressional oversight responsibility with the need to protect intelligence information. Questions concerning access to such information are best addressed through the customary practices and arrangements, rather than through enactment of contradictory legislation.⁵³

The FY 2010 bill would delete the statutory “gang of eight” notification procedure for covert actions, and create a default rule that the President must notify the full intelligence committees of covert actions.⁵⁴ Narrower notification would be permitted only if the intelligence committees establish written procedures indicating that not all members of the committees must be notified.⁵⁵ This new default position would have the effect of transferring power that is now in the hands of the intelligence committee chairs and ranking members over to the full committee membership, who for decades have been excluded from information about covert actions (and, during the Bush Administration, were excluded from information about questionable intelligence policies). Only if the full committee establishes a new written rule for more limited disclosure would the full committee be excluded from notifications of covert actions. The Obama Administration opposes this new default rule for covert action notification, threatening a veto of a bill

51. FY 2007 SAP, *supra* note 34, at 2.

52. Intelligence Authorization Act for Fiscal Year 2009, H.R. 5959, 110th Cong. § 105 (2008) (proposing to withhold funding for 75% of the National Intelligence Program).

53. FY 2009 SAP, *supra* note 34, at 2.

54. Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, 111th Cong. § 321 (2009).

55. *Id.*

containing it.⁵⁶ In explaining its opposition, the Obama Administration invokes some of the same arguments—and language—used by the Bush Administration: the proposed changes would undermine what the executive branch refers to as a “fundamental compact between the Congress and the President” regarding the reporting of intelligence activities, “an arrangement that for decades has balanced congressional oversight responsibilities with the President’s responsibility to protect sensitive national security information.”⁵⁷

C. OTHER DISCLOSURE-RELATED PROVISIONS

Regarding several other disclosure requirements, the Obama Administration position is different from that of the Bush Administration. The Bush Administration consistently opposed the creation of an Inspector General (“IG”) for the intelligence community,⁵⁸ arguing that such a position was unnecessary⁵⁹ and “inconsistent with the preservation of the authority of heads of departments and agencies over their respective departments and agencies” established in the post-9/11 intelligence reform legislation.⁶⁰ The Obama Administration’s stance on the creation of this new IG is ambivalent. While not opposing it as such, the Administration indicated that some provisions may need to be changed.⁶¹

The legislative provision that would create a new IG would also set out specific procedures for intelligence community employees who blow the whistle on wrongdoing.⁶² As indicated

56. FY 2010 SAP, *supra* note 33, at 1.

57. FY 2010 SAP, *supra* note 33, at 1. The FY 2009 SAP similarly contended that a provision for disclosure of covert actions to the full committees “would *undermine the fundamental compact between the Congress and the President* on reporting highly sensitive intelligence matters—*an arrangement that for decades has balanced congressional oversight responsibility with the need to protect intelligence information.*” FY 2009 SAP, *supra* note 34, at 2 (emphasis added).

58. FY 2009 SAP, *supra* note 34, at 1 (“The Administration has consistently opposed the creation of an IG/IC in prior bills.”).

59. FY 2008 SAP, *supra* note 34, at 1 (“The existing inspectors general of the departments with elements in the IC, and the Central Intelligence Agency, are best suited to perform the necessary investigative, inspection, and audit functions. There is no need to spend additional taxpayer resources to provide for two inspectors general with competing jurisdiction over the same intelligence elements.”).

60. FY 2007 SAP, *supra* note 34.

61. FY 2010 SAP, *supra* note 33, at 2 (indicating that the Administration “supports the important work undertaken by Inspectors General . . . and would like to work with the Congress on the optimal approach and authorities for carrying out the important functions of Inspectors General in the context of the IC”).

62. Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, 111th Cong. § 406 (2009); Intelligence Authorization Act for Fiscal Year 2009, H.R. 5959, 110th Cong.

above, the Bush Administration opposed the larger IG provision. By implication, the Bush Administration may have also opposed this whistleblower provision, but its public statements of opposition did not focus on whistleblowing.⁶³ The Obama Administration has taken an explicit—if somewhat ambivalent—position on this whistleblower provision. It supports the expansion of protections for intelligence whistleblowers, but expresses concern that the bill could be interpreted “to constrain the President’s constitutional authority to review and, if appropriate, control disclosure of certain classified information.”⁶⁴ The Obama Administration has pledged to “work[] closely with Senate and House staff to craft appropriate whistleblower enhancement protections for intelligence community whistleblowers [so that these provisions] address constitutional and other concerns.”⁶⁵

The Bush Administration also opposed a requirement that the CIA IG audit covert actions every three years and report to Congress on his findings. Its objections were two-fold: it “would interfere with the independent judgment of the CIA Inspector General or Director of the CIA as to what activities should be audited and when the audits should be conducted,”⁶⁶ and “conflict[] with the President’s authority to control the dissemination of classified information.”⁶⁷ When this same provision appeared in the FY 2010 bill, the Obama Administration did not object to it.⁶⁸

Finally, the Bush Administration also objected to a requirement that the executive branch report to the intelligence committees on “the use of personal service contracts across the

§ 408 (2008); Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, 110th Cong. § 413 (2007); Intelligence Authorization Act for Fiscal Year 2007, S. 372, 110th Cong. § 408 (2007).

63. The FY 2008 SAP expressed opposition to the IG provision, which included specific procedures for intelligence whistleblowers. FY 2008 SAP, *supra* note 34. But its stated opposition to this provision did not mention whistleblowing. See FY 2008 SAP, *supra* note 34.

64. FY 2010 SAP, *supra* note 33, at 2.

65. FY 2010 SAP, *supra* note 33, at 2.

66. FY 2009 SAP, *supra* note 34, at 2.

67. FY 2009 SAP, *supra* note 34, at 2; see also FY 2008 SAP, *supra* note 34 (same objection). The Bush Administration also indicated that the disclosure requirement conflicts with other statutory provisions allowing the CIA Director to prevent disclosures from the CIA IG to Congress, and runs counter to “long-standing arrangements between the Executive and Legislative branches regarding the transmittal of information about sensitive intelligence programs.” FY 2009 SAP, *supra* note 34, at 2.

68. Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, 111th Cong. § 411 (2009).

intelligence community,” including a comparison of their compensation levels with government employees performing similar functions, and their use in covert actions, rendition, detention and interrogation.⁶⁹ The Bush Administration contended that this provision would “violate[] long-standing arrangements regarding the release of classified information concerning highly sensitive national security matters such as intelligence collection, analysis, and covert actions.”⁷⁰ The Obama Administration expressed no objection to this contractor report requirement in the FY 2010 bill.⁷¹

IV. CONCLUSION

To a limited degree, the Obama Administration has broken from the Bush Administration’s practice of opposing nearly all requirements to disclose intelligence to Congress. Unlike the Bush Administration, the Obama Administration does not object to reporting on intelligence contractors, regular audits of covert actions, or the creation of an Inspector General for the intelligence community.

But the Obama Administration has continued the Bush Administration practice of resisting robust intelligence disclosure to Congress. It objects to whistleblower protections that “could be understood to constrain the President’s constitutional authority to . . . control disclosure of certain classified information.”⁷² Even more significantly, it opposes requirements to disclose legal advice and to disclose covert actions beyond the “gang of eight.”⁷³

From a historical perspective, the Obama Administration’s opposition to these measures is nothing new. For decades, Presidents have claimed the right to control classified

69. Intelligence Authorization Act for Fiscal Year 2009, H.R. 5959, 110th Cong. § 306 (2008); *see also* Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, 110th Cong. § 307 (2007) (containing similar language).

70. FY 2009 SAP, *supra* note 34. The FY 2008 SAP also objected to this provision, but only because “there [was] insufficient time to prepare and coordinate the report by the . . . due date.” FY 2008 SAP, *supra* note 34, at 3.

71. H.R. 2701, § 338; FY 2010 SAP, *supra* note 33.

72. FY 2010 SAP, *supra* note 33, at 2.

73. The Obama Administration has also objected to a new provision that would require disclosure to Congress’s investigative arm, the Government Accountability Office. H.R. 2701, § 335; Letter from Peter R. Orszag, Dir., Office of Mgmt. and Budget, to Senator Diane Feinstein, Chairwoman, Select Comm. on Intelligence (Mar. 15, 2010), available at <http://www.fas.org/irp/news/2010/03/omb031610.pdf> [hereinafter Letter from Peter R. Orszag].

information and internal legal advice. They have also resisted the disclosure of covert actions. In fact, when Congress enacted the statutory “gang of eight” procedure in 1980, that provision had the effect of narrowing (rather than expanding) the disclosure of covert action because the predecessor Hughes-Ryan Amendment required disclosure of covert actions to eight congressional committees, rather than eight members of Congress.⁷⁴

Obama’s vehement opposition to disclosing covert actions beyond the “gang of eight”—even threatening a veto—is particularly troubling because the “gang of eight” procedure provides only the appearance—rather than the reality—of a congressional check on covert actions. Congress is a collective body, and eight members cannot, by themselves, pass any legislation to stop or limit particular covert actions. “Gang of eight” notification inoculates the executive branch from later political backlash because the executive branch can—and does—point to Congress’s inaction as congressional endorsement of the covert action.⁷⁵

It is heartening that the Obama Administration has not made the same extreme claims of executive secrecy as its immediate predecessor. But on two issues that are key to retaining executive power—keeping its internal legal advice secret and limiting disclosure of covert actions to only eight members of Congress—the Obama Administration not only expressed opposition, but issued a rare veto threat to a Congress controlled by its own party.⁷⁶

74. Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804–05 (codified as amended at 22 U.S.C. § 2422 (1982)) (requiring disclosure of covert actions to “the appropriate committees of the Congress,” which included the House and Senate Intelligence, Foreign Relations, Armed Services, and Appropriations Committees); see William E. Conner, *Congressional Reform of Covert Action Oversight Following the Iran-Contra Affair*, 2 DEF. INTELLIGENCE J. 35, 41 (1993).

75. Kathleen Clark, *Congress’s Right To Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. (forthcoming 2011); SNIDER, *supra* note 16, at 311 (stating that if a covert action “is disclosed or ends in disaster, the administration will want to have had Congress on board”); see also Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1058–59 (2008).

76. President Obama has also threatened a veto regarding another provision that is aimed at increasing the effectiveness of congressional intelligence oversight: the requirement to disclose intelligence information to the Government Accountability Office in support of congressional intelligence oversight. H.R. 2701, § 335. The Obama Administration objects to this provision, contending that it would “undermine th[e] special relationship between the IC [intelligence community] and the congressional intelligence committees.” Letter from Peter R. Orszag, *supra* note 73.

Candidate Barack Obama's rhetoric led to high expectations for a "new era of openness." But his Administration's response to proposed intelligence legislation tells a different story. We will see increased disclosure to Congress on the most sensitive intelligence issues only over the objection of President Barack Obama.

APPENDIX A

INTELLIGENCE DISCLOSURE PROVISIONS PROPOSED
DURING BOTH THE BUSH AND OBAMA
ADMINISTRATIONS

| Provision | FY 2007 | FY 2008 | FY 2009 | FY 2010 | Bush | Obama |
|--|----------------------|---------------------|--------------|--------------|-----------------|-------------------|
| | S. 372 | H.R. 2082 | H.R. 5959 | H.R. 2701 | | |
| Disclosure of legal advice: | | | | | | |
| Disclose legal opinions to intelligence committees, or any other committee with jurisdiction over the subject matter, unless President asserts a constitutional privilege. | § 108 ⁱ | N | N | N | O ⁱⁱ | |
| Disclose legal advice regarding the meaning of the Detainee Treatment Act of 2005, as applied to interrogation techniques. | § 313 ⁱⁱⁱ | § 326 ^{iv} | N | N | O ^v | |
| Disclose information about the legal status of intelligence operations, including dissenting views. | N | N | § 502 | § 321 | O ^{vi} | O ^{vii} |
| Disclose information about the legal status of covert actions, including dissenting views. | N | N | N | § 321 | | O ^{viii} |
| Covert action disclosures beyond chair & ranking member: | | | | | | |
| If full information is not given to the full committees, then, at least, notify each member of that fact & why. | § 304 | N | N | N | O ^{ix} | |

| Provision | FY 2007 | FY 2008 | FY 2009 | FY 2010 | Bush | Obama |
|---|------------|--------------|--------------|--------------|-------------------|--------------------|
| | S. 372 | H.R. 2082 | H.R. 5959 | H.R. 2701 | | |
| Deny funding for any intelligence activity, unless full committees have been informed of it, or have, at least, been notified that they were not informed. | § 307 | N | N | N | O ^x | |
| Deny funding for 75% of the "National Intelligence Program" until covert actions are reported to full committees. | N | N | § 105 | N | O ^{xi} | |
| Delete the statutory "gang of eight" notification for covert actions. The President can notify less than the full committee of covert actions only if that committee's written procedures indicate that the committee "determines that not all members of that committee are required to have access to a finding." | N | N | N | § 321 | | O ^{xii} |
| Other provisions: | | | | | | |
| Create Inspector General for the intelligence community. | § 408 | § 413 | § 408 | § 406 | O ^{xiii} | xiv |
| Create specific procedures for whistleblowers who reveal information to intelligence committees. | § 408 | § 413 | § 408 | § 406 | O ^{xv} | O+S ^{xvi} |

| Provision | FY 2007 | FY 2008 | FY 2009 | FY 2010 | Bush | Obama |
|--|------------|--------------|--------------|--------------|-------------------|-------|
| | S. 372 | H.R. 2082 | H.R. 5959 | H.R. 2701 | | |
| Require audit of covert actions every 3 years and report to Congress. | N | § 423 | § 421 | § 411 | O ^{vii} | -- |
| Require extensive report on use of personal service contractors in Intelligence Community. | N | § 307 | § 306 | § 328 | O ^{viii} | -- |

N = no equivalent provision in this bill

O = administration opposed this provision

S = administration supported this provision

-- = administration silent on this provision

APPENDIX B

INTELLIGENCE DISCLOSURE PROVISIONS PROPOSED
DURING EITHER BUSH OR OBAMA
ADMINISTRATIONS (BUT NOT BOTH)

| Provision | FY 2007 | FY 2008 | FY 2009 | FY 2010 | Bush | Obama |
|--|------------|--------------|--------------|--------------|-------------------|-------|
| | S. 372 | H.R. 2082 | H.R. 5959 | H.R. 2701 | | |
| Non-covert action disclosure beyond chair & ranking member: | | | | | | |
| If full information is not given to the full committees, then, at least, notify each member of that fact & why. | § 304 | N | N | N | O ^{xxix} | |
| Deny funding for any intelligence activity, unless full committees have been informed of it, or have at least been notified that they were not informed. | § 307 | N | N | N | O ^{xx} | |
| Deny 70% of funding for particular intelligence program until executive branch "fully and currently" informs full intelligence committees regarding a September 6, 2007 Israeli military action against Syria. | N | § 328 | N | N | O ^{xxi} | |
| Disclose to the full intelligence committees if chair & ranking member agree. | N | N | § 502 | N | O ^{xxii} | |

| Provision | FY 2007 | FY 2008 | FY 2009 | FY 2010 | Bush | Obama |
|---|------------|--------------|--------------|--------------|--------------------|-------------------|
| | S. 372 | H.R. 2082 | H.R. 5959 | H.R. 2701 | | |
| Other provisions: | | | | | | |
| Report on “intelligence activities related to the overthrow of a democratically elected government” in previous 10 years. | N | § 502 | N | N | O ^{xxiii} | |
| Disclose intelligence information to the Government Accountability Office in support of congressional intelligence oversight. | N | N | N | § 335 | | O ^{xxiv} |

NOTES FOR APPENDICES

i. This provision also was found in the Intelligence Authorization Act for Fiscal Year 2006, S. 1803, 109th Cong. § 107 (2005); *see also* S. REP. NO. 109-142 (2005).

ii. FY 2007 SAP, *supra* note 34, at 2 (“[The provision] would foster political gamesmanship and elevate routine disagreements to the level of constitutional crises.”).

iii. Section 313 of S. 372 would require disclosure of “all legal opinions” provided by the Department of Justice regarding the “meaning or application of the Detainee Treatment Act of 2005 with respect to the detention and interrogation activities” undertaken by any element of the intelligence community. Intelligence Authorization Act for Fiscal Year 2007, S. 372, 110th Cong. § 313 (2007).

iv. Section 326 of H.R. 2082 requires the executive branch to disclose to the congressional intelligence committee: “the legal justifications of any office of the Department of Justice about the meaning or application of the Detainee Treatment Act of 2005 or related provisions of the Military Commissions Act of 2006 with respect to the detention or interrogation activities, if any, of any element of the intelligence community.” Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, 110th Cong. § 326 (2007).

v. This provision “includes no exception for applicable legal privileges. . . . [and] rais[es] grave constitutional issues.” FY 2007 SAP, *supra* note 34, at 1. This is a “matter[] . . . appropriately left to sensitive handling in the normal course between the intelligence committees and the executive branch and should not be the subject of detailed statutory reporting requirements.” FY 2007 SAP, *supra* note 34, at 2–3; *see also* INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2008—VETO MESSAGE FROM THE PRESIDENT OF THE UNITED STATES (H. Doc. No. 110-100), 154 CONG. REC. H1419–20 (2008); FY 2008 SAP, *supra* note 34, at 2 (“[Q]uestions concerning access to such information are best addressed through the customary practices and arrangements between the executive and legislative branches on such matters, rather than through the enactment of legislation.”).

vi. FY 2009 SAP, *supra* note 34, at 2 (“[T]his section would undermine longstanding arrangements between Congress and the President regarding reporting of sensitive intelligence matters.”).

vii. FY 2010 SAP, *supra* note 33, at 1 (“[This] section raises serious constitutional concerns by amending sections 501-503 of the National Security Act of 1947 in ways that would raise significant executive privilege concerns by purporting to require the disclosure of internal Executive branch legal advice and deliberations. Administrations of both political parties have long recognized the importance of protecting the confidentiality of the Executive Branch’s legal advice and deliberations. *If the final bill presented to the President contains this provision, the President’s senior advisors would recommend a veto.*”) (emphasis in original).

viii. See FY 2010 SAP, *supra* note 33.

ix. FY 2007 SAP, *supra* note 34, at 2 (“These reporting requirements themselves may require broader dissemination of the very facts that require limited access.”).

x. FY 2007 SAP, *supra* note 34, at 2 (“These provisions establish an all-or-nothing approach to executive branch notification to the intelligence committees that could delay actions needed to meet urgent national security requirements and would discourage, rather than encourage, the sharing of extraordinarily sensitive information needed for effective legislative-executive relations with respect to the most sensitive intelligence matters. This provision, in practice, would seek to compel the disclosure to multiple additional persons of sensitive national security information as to which the President has determined that special protection must be provided.”).

xi. FY 2009 SAP, *supra* note 34, at 2 (“Such a provision is inconsistent with the statute that expressly authorizes limited notice to Congress in exceptional cases and would undermine the fundamental compact between the Congress and the President on reporting highly sensitive intelligence matters—an arrangement that for decades has

balanced congressional oversight responsibility with the need to protect intelligence information. Questions concerning access to such information are best addressed through the customary practices and arrangements, rather than through enactment of contradictory legislation.”).

xii. FY 2010 SAP, *supra* note 33, at 1 (“[This provision] undermines this fundamental compact between the Congress and the President as embodied in Title V of the National Security Act regarding the reporting of sensitive intelligence matters—an arrangement that for decades has balanced congressional oversight responsibilities with the President’s responsibility to protect sensitive national security information.”).

xiii. FY 2009 SAP, *supra* note 34, at 1 (“The Administration has consistently opposed the creation of an IG/IC in prior bills.”); FY 2008 SAP, *supra* note 34, at 1 (“The existing inspectors general of the departments with elements in the IC, and the Central Intelligence Agency, are best suited to perform the necessary investigative, inspection, and audit functions. There is no need to spend additional taxpayer resources to provide for two inspectors general with competing jurisdiction over the same intelligence elements.”); FY 2007 SAP, *supra* note 34, at 3 (“The existing IGs of all the IC elements are best suited to performing the investigation, inspection, and audit functions, without the organizationally dysfunctional interference of an outside entity like the proposed new IG. This provision also is inconsistent with the preservation of the authority of heads of departments and agencies over their respective departments and agencies so carefully preserved by the chain of command provision in the IRTPA.”).

xiv. The FY 2010 SAP stated that the Obama Administration “supports the important work undertaken by Inspectors General . . . and would like to work with the Congress on the optimal approach and authorities for carrying out the important functions of Inspectors General in the context of the IC.” FY 2010 SAP, *supra* note 33, at 2.

xv. FY 2008 SAP, *supra* note 34, at 2 (“Other provisions . . . purport to require the President to submit information that may be constitutionally protected from disclosure, including information the disclosure of which could impair foreign relations, national security, deliberative processes of the Executive, or performance of the Executive’s constitutional duties. Questions concerning access to such information are best addressed through the customary practices and arrangements between the executive and legislative branches on such matters, rather than through the enactment of legislation.”). It is not clear that this language refers to the whistleblower provision. It may refer to IC/IG provision, in general.

xvi. FY 2010 SAP, *supra* note 33, at 2 (“Although the Administration supports section 406’s expansion of the protections and limitations of the Intelligence Community Whistleblower Protection Act, the Administration is concerned that the bill as drafted could be understood to constrain the President’s constitutional authority to review and, if appropriate, control disclosure of certain classified information. Administration officials are working closely with Senate and House staff to craft appropriate whistleblower enhancement protections for intelligence community whistleblowers through separate legislative vehicles, H.R. 1507 and S. 372, and urge that the whistleblower enhancement provision in this bill account for Administration proposals offered in those contexts to address constitutional and other concerns with the current formulation.”).

xvii. FY 2008 SAP, *supra* note 34 (“[This provision] raise[s] constitutional concerns with regard to the President’s exclusive authority to control access to national security information.”); FY 2009 SAP, *supra* note 34, at 2 (“This provision would interfere with the independent judgment of the CIA Inspector General or Director of the CIA as to what activities should be audited and when the audits should be conducted. Further, this provision conflicts with the President’s authority to control the dissemination of classified information, provisions in the CIA Act concerning IG activities affecting vital national security interests, and long-standing arrangements between the Executive and Legislative branches regarding the transmittal of information about sensitive intelligence programs.”).

xviii. FY 2009 SAP, *supra* note 34. The FY 2008 SAP also objected to this provision, but only because “there [was] insufficient time to prepare and coordinate the report by

the . . . due date.” FY 2008 SAP, *supra* note 34, at 3.

xix. FY 2007 SAP, *supra* note 34, at 2 (“These reporting requirements themselves may require broader dissemination of the very facts that require limited access.”).

xx. FY 2007 SAP, *supra* note 34, at 2 (“These provisions establish an all-or-nothing approach to executive branch notification to the intelligence committees that could delay actions needed to meet urgent national security requirements and would discourage, rather than encourage, the sharing of extraordinarily sensitive information needed for effective legislative-executive relations with respect to the most sensitive intelligence matters. This provision, in practice, would seek to compel the disclosure to multiple additional persons of sensitive national security information as to which the President has determined that special protection must be provided.”).

xxi. The FY 2008 SAP objected to this “attempt[] to use Congress’ power of the purse to circumvent the authority of the Executive Branch to control access to extraordinarily sensitive information,” and noted that “[i]n their conference report, the conferees stated that reporting to the full committee is required under” 50 U.S.C. § 413a, which requires reports of intelligence activities other than covert actions. FY 2008 SAP, *supra* note 34, at 2. “The Administration respectfully disagrees with this view and urges the Senate and the House to reject this provision.” FY 2008 SAP, *supra* note 34, at 2.

xxii. This provision “would undermine long-standing arrangements between Congress and the President regarding reporting of sensitive intelligence matters.” FY 2009 SAP, *supra* note 34, at 2 (criticizing § 502 of H.R. 5959).

xxiii. The FY 2008 SAP asserted that “[r]eporting on any such activities, if any, is governed by Title V of the National Security Act.” FY 2008 SAP, *supra* note 34, at 3.

xxiv. Letter from Peter R. Orszag, *supra* note 73.