

NPEC’s National Security Classification & Clearance Policy Reform Working Group
Meeting #12: How Should Congress Manage Staff Access to Secrets?
Read-ahead for January 26, 2022

“[A] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it.” – Justice Willis Van Devanter¹

NPEC’s National Security Classification and Clearance Policy Reform Working Group has focused on how the United States government has reflexively over-classified national security-related information to the detriment of its own national security and the defense of its allies. Over-classification and over-reliance on secrecy has inhibited its ability to secure the best people and contractors, slowed critical innovation rates and lengthening acquisition timelines, denied key U.S. allies of vital information, foster distrust and hindered interoperability efforts, deprived military planners and diplomats of the tools needed to defend and deter against adversaries or negotiate from a position of strength; stifled public discourse and debate on some of the most critical issues facing the United States and its allies, and prevented Congress from exercising fully its constitutional oversight role.²

The Working Group has not argued to eliminate secrecy, but to maintain the right amount at the appropriate levels with appropriate access to those not just in the Executive Branch, but the Legislative Branch as well. And therein lies the problem: there is both a disparate level of access to classified information between similarly cleared Legislative and Executive Branch staff but also a dearth of available clearances for the Legislative Branch. This latter issue is not one entirely of the Executive Branch’s making – there are severe limitations, both internal and external, placed on the Legislative Branch for obtaining the requisite clearances. However, in order for legislators to make informed decisions on national security policy matters, it is vital that they – and their staff – have access to the necessary information and have robust conversations to inform policymaking.

History: This is not a new phenomenon. There are ebbs and flows in the level of attention these issues get from the public, think tanks, new media, or advocacy groups, which coincidentally, tends to match the level of attention Congress has afforded in response. However, there has generally always been tension between the Executive – with the President the “owner” of national intelligence – and the Legislative Branches. From the time the National Security Act was passed and the CIA was established in 1947, there has always been a struggle over Congressional access to intelligence. It was not until the 1970s when Congress began investigating the Intelligence Committee that the Executive Branch would start to increase access to intelligence. These investigations revealed “widespread abuses in the IC and concluded that effective

¹ *McGrain v. Daugherty*, 273 U.S. 135, 174–175 (1927). Justice Van Devanter writing for the Majority (8-0; Chief Justice Taft and Associate Justices Holmes, McReynolds, Brandeis, Sutherland, Butler and Sanford joined in the opinion – Justice Stone did not take part in the consideration of the case).

² Particularly in the space domain, where even the senior-most U.S. officials have taken aim at over-classification and excessive secrecy and its impact on the mission and have decried it as ‘unbelievably ridiculous,’ or “[it] really erodes your ability to deter conflict...you have to be able to talk about it.” For more on this, see Dennis Blair and Robert Work “Stovepipes in space: How the US can overcome bureaucracy to improve capabilities.”

congressional oversight was lacking.”³ The Senate would go on to establish its Select Committee on Intelligence (1976) and the House would follow a year later with its Permanent Select Committee on Intelligence (HPSCI). Even then, the Executive sought, and came to an agreement with Senate Leadership, to limit the number of compartmented clearances that would be granted – an agreement that has in principle remained to this day: SCI clearances for “the Vice President, the President Pro-Tempore, the Majority and Minority Leaders, and to regular staff members of the Senate Committees with clear need-to-know.”⁴ In recent years, and perhaps even more recently, there have been Congressional efforts to expand this. It has been reported that there was a bi-partisan majority of Senators who wrote a letter asking that each office be granted one TS/SCI clearance and that Senate Leadership was considering granting this request. On the House side, however, it has been rumored that Speaker Pelosi adamantly opposes altering the clearance policy.

The Executive Branch has not routinely provided Congress with four general types of intelligence information:

1. Identities of intelligence sources;
2. “Methods” used in collecting and analyzing intelligence;
3. “Raw” or “lightly” evaluated intelligence; and
4. Written products tailored to the specific needs of the President or other high-level officials⁵

Executive Branch officials have commonly cited a need to protect against “leaks” as one of the top reasons for limited Congressional access to intelligence. This, of course, raises several questions: why are similarly cleared (or in the case of elected officials – constitutionally entrusted) individuals in the Legislative Branch considered more likely to leak information than their counterparts in the Executive Branch? Does the Executive Branch abuse this power by over-classifying otherwise non-classified information to avoid scrutiny or public debate? How reliable are the background investigations that ultimately assess whether an individual is trustworthy and can protect sensitive national security information?

Other reasons cited for restricting Congressional access to intelligence: it would be “dangerous” for Members and their staff to gain access to “raw” intelligence and make policy decisions based upon that, and Congress lacks the capacity to securely store intelligence.⁶ The latter seems to be a procedural hurdle that the Congress could overcome by acquiring more secure space. The former remains a matter of contention. A corollary issue to the former that has been raised is the matter of “finished” intelligence products. What Members and staff see then, if not allowed access to “raw” intelligence is a final product – but what they are generally not given is the level of confidence in which the IC supports its conclusions, nor are they made aware of differing levels of confidence or assessments made by the individual components of the IC. The argument has been made that it

³ For a more detailed discussion, see CRS Reports R40136, *Congress as a Consumer of Intelligence Information*, by Alfred Cumming and Richard A. Best Jr. CRS Report RL32525, *Congressional Oversight of Intelligence: Current Structure and Alternatives*, by Frederick M. Kaise; etc.

⁴ In 1978, Senators Byrd and Baker (then Majority and Minority Leaders, respectively) had an exchange of letters with CIA Director Turner in which they arrived at this agreement. The Senators went on to request an additional four compartmented clearances and also established the terms in which the requests for clearances would be made. An internal memo dated 9 August 1978 regarding the push for more compartmented access for Congressional staff, was appears to be talking points meant to be deployed in a meeting with Congressional staff on the subject provides two interesting points: that the Director was willing to grant such clearances but that they “have to draw the line somewhere; if we grant one Senator’s personal staff man a compartmented clearance we will be forced to do so for all 100 Senators.”

⁵ *Congress as a Consumer of Intelligence Information*, by Alfred Cumming and Richard A. Best Jr. CRS Report R40136.

⁶ *Ibid.*

would be important for policymakers to have access to the array of assessments so that they are aware of other analyses when making their policy decisions.

Current situation: According to a 2020 Project on Government Oversight (POGO) [report](#), there is no public accounting for the number of clearances held in the House of Representatives.⁷ However, in 2019, the Senate was reported to have 637 staff with active security clearances (353 Secret/Top Secret; 284 Top Secret/SCI).⁸ It would be fair to assume that the House of Representatives would have two-to-three times more cleared staff as the Senate, leaving an estimated 2,000-2,500 cleared Congressional staff (though for reasons to be addressed later, it is likely that the number of TS/SI-cleared staff on the House side is in parity with those on the Senate side). This number likely includes the number of cleared individuals at [the eight legislative](#) branch agencies and entities (GAO, LOC, CRS, GPO, AOC, USCP, CBO and OCWR).⁹ The number does not include the Members of Congress themselves, who by virtue of being constitutional officers and “by tradition and practice, United States officials who hold positions prescribed by the Constitution...are deemed to meet the standards of trustworthiness for eligibility for access to classified information.”¹⁰ A key distinction to note here is that even Members of Congress are not exempt from the “need-to-know” requirement, and thus do not have unlimited access to classified information.

In the House, each Member is allowed no more than two staff from their personal office to possess security clearances. Each office varies, but often one of these two slots is taken by the Member’s Chief of Staff, leaving only one remaining slot for the legislative staff. There have been concerns raised that some view having the clearance as a status symbol and do not use it in a substantive manner. Regardless of how it is used by offices, neither of these two slots dedicated to Member offices can receive TS/SCI clearances. These clearances are generally set aside for Committee and Leadership staff.

In the Senate, each Senator is afforded two cleared staffers in their personal offices, though not at the TS/SCI level. A Senator gets an additional cleared staffer (eligible to access compartmented information) if they sit on one of the standing national security committees (Armed Services; Appropriations subcommittees on Defense and State, Foreign Operations, and Related Programs; Foreign Relations; and, Homeland Security and Governmental Affairs) – sometimes referred to as a Personal Representative of the Member (PRM). This number can vary, but generally represents slightly more than one-third of the Senate. Each Senator is also

⁷ In June 2021, the National Security Counselors organization sent a letter to the House Sergeant at Arms requesting copies of the House Security Policy Manual and the FY2019 and FY2020 reports on legislative branch security clearances under the common law right of access. On [July 12, 2021](#), Douglas N. Letter, General Counsel for the United States House of Representatives issued a response letter denying the request, stating that the common law of access does not entitle their client to the documents requested, arguing the documents are not public records subject to the law and are not “records of any official government action,” that they are “absolutely protected by the Speech or Debate Clause,” and that Congress makes its own determinations as to which of its materials shall be made public.

⁸ <https://www.pogo.org/report/2020/02/a-primer-on-congressional-staff-clearances/>

⁹ A September 1978 memo, declassified in 2001, from the Under Secretary of Defense to the Director of the CIA reported that the DoD’s review of security clearances granted to Congressional staffers was “presently 431 staffers, including GAO, who have compartmented security clearances recognized by DoD...in addition, there are 591 staffers, including the Library of Congress and Congressional Budget Office, who have Top Secret or Secret clearances recognized by the Department.” The review was the result of an exchange of letters between then Speaker of the House, Tip O’Neil, and then CIA Director, Stansfield Turner.

¹⁰ The author of Congressional Research Service report R43216, “Security Clearance Process: Answers to Frequently Asked Questions” (Updated October 7, 2016) quotes this from the Information Security Oversight Office (ISOO), Classified Information Nondisclosure Agreement (Standard Form 312) Briefing Booklet, Spring 2001, p. 66, at <http://www.archives.gov/isoo/training/standard-form-312.pdf>. I

afforded a slot for an additional Executive Branch fellow or detailee who may carry a clearance by virtue of their position with their home agency and a slot for a system administrator with a Secret clearance.

Though the numbers vary from year-to-year (and the transparency in public reporting also varies), the number of individuals holding U.S. security clearances has hovered over 4 million for at least the last 7 years.¹¹ This number is fairly evenly split among federal employees and contractors. POGO also reports that there may be tens of thousands of foreign politicians, civilians, military members and contractors that have been granted access to SCI information under bilateral agreements.¹² The number of individuals eligible to access compartmented information is estimated to be in the hundreds of thousands, if not a million or more.

Even if the number of eligible Congressional staff doubled or tripled, it would still represent a fraction of a percent of the total number of cleared individuals. Since the shift toward electronic communications and electronic storage, the number of classified products has exploded. Whether this is a result of over-classification is debatable, but Congress has been ill-suited (out of a combination of lack of access and its own inability to properly address the situation) to keep pace with such rapid proliferation of classified information.¹³

Solutions: So how should Congress manage staff access to secrets? Congress has the constitutional right to conduct oversight and to legislate public policy. It is both necessary and proper to request, and be granted, access to classified information in order to help formulate policies. There are a series of steps Congress can take in the short, medium, and long term in order to ensure Members and their staff receive the requisite access to information.

Short term: If reports are accurate, the Senate Leadership should agree to the request from a bi-partisan majority of its members to allow for (at least) one TS/SCI-cleared individual per office. As we have discussed, only about a third of the Senators sit on Committees that would allow them to have such a cleared individual on staff. This is untenable as most Senators are left relying on Committee staff, or no one, to read all necessary information and brief them. Personal office staff know their Senators the best – having a staffer that can access the materials and then brief the Senator on the issues they know will be most relevant to them is important. The House should follow suit. If Leadership is resistant, his might help foster interest in creating a bi-partisan, bi-cameral Classification and Security Clearance Reform caucus — something interested Members of Congress need to create if they wish to act on this and other Congressional classification and clearance policy issues.

At a minimum, Congress should mandate further reporting on clearances. As noted above, there have been reports requested, but those reports have not, and will not be made public. Congress should mandate additional GAO reviews – to be unclassified and publicly available - on the number of clearances disaggregated by security level, by committee/office (including support offices), and the amount of resources needed to ensure

¹¹ The POGO report cites a number “in excess of 4 million,” referencing the ODNI’s Fiscal Year 2017 Annual Report on Security Clearance Determinations. In FY2015, the ODNI reported a total of 4,249,053 individuals eligible to hold a clearance, which was down from 4,514,576 from a year earlier. For the FY2019 report, there were 4,243,937 individuals eligible compared to 4,074,815 a year earlier.

¹² POGO footnote 31: See “British-U.S. Communications Intelligence Agreement,” National Security Agency (March 5, 1946), available at https://www.nsa.gov/Portals/70/documents/news-features/declassified-documents/ukusa/agreement_outline_5mar46.pdf. For more background, see “Not so secret: deal at the heart of UK-US intelligence,” The Guardian (June 25, 2010), available at <https://www.theguardian.com/world/2010/jun/25/intelligence-deal-uk-us-released>.

¹³ In its 2017 Report to the President, the Information Security Oversight Office reported that in the last 10 years, there has been a 250% increase in the amount of classified information and over a 370% increase in the amount of Top Secret and Top/Secret/SCI-eligible information.

appropriate access (this could include a study on the amount of secure space that would be needed in order to ensure Congress can secure and store a growing amount of classified material; a feasibility study on interoperability between communications systems; vulnerability studies; etc.). They should also expand the review to the Executive Branch, to also include the number of special access program (SAPs) and how many billets or slots are afforded read-ins to each at any given time. The report should examine how these are determined, how they fluctuate over time, and why.

Medium term: Proposals for a Joint Intelligence Committee began to arise almost immediately after the National Security Act established the CIA. In the aftermath of 9/11, the 9/11 Commission's report noted Congressional oversight of intelligence was "dysfunctional" (some would argue this is still true today) and one recommendation as the creation of a new Joint Committee on Intelligence.¹⁴ But this approach still fails to meet the fundamental problem Congress faces, namely this would still result in a consolidation of cleared staff rather than an expansion. Instead, Congress should consider either a dedicated joint or select committees for declassification and security clearance issues that is separate and distinct from the intelligence committees. This way, the committee would have broad jurisdiction over all of the agencies in the matters of classified information and access. As we know, it isn't just the intelligence agencies with classification authority. This committee would also provide ample secure workspace from which appropriately cleared staff can access materials they request, use secure email and other communications, and brief their respective Member, who many not be on a national security committee, but may still need access to information to make informed policy decisions.

Long term: Having the requisite clearance is a necessary first step from which all others will emanate. But even then, Members and staff are still subject to the limitations placed by the Executive Branch and suffer a lack of access. It is not uncommon for cleared staff in the Executive Branch to have access to three systems (unclassified, Secret, TS/SCI) at their workstation, in their office, or in a shared secure space. This gives them instantaneous, or near-instantaneous access to classified products. It also allows them to share information on a so-designated communications system across the inter-agency in real time. Not only is access to such information sparse in Congress, but the Legislative and Executive Branch operate on different communications systems. Congress should be integrated into the same systems used by the Executive Branch. This would still be predicated upon the "need-to-know" so that staff are not accessing information beyond the scope of their jurisdiction, but would ensure that staff are able to access products at will. This would also require Congress to create additional secure space.

These are just some high-level examples of what Congress can do in the short, medium, and long term. Ultimately, it will depend on Congress to decide how important access to this information is and how to best ensure it can safely and securely protect that information. We know it is going to have an uphill battle with the Executive Branch and Intelligence Community on expanding its access to classified information. But as a matter of national security, it is imperative that the policymakers and their staff have access to the information they need to best inform their decisions. This should not be a confrontational issue between the branches, it should be a collaborative effort. As we have seen time and again in the past, siloing information has often led to disastrous results.

¹⁴ U.S. National Commission on Terrorist Attacks Upon the United States, The 9/11 Commission Report: Final Report (Washington: GPO, 2004), p. 420