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A Perspective on Congress's Oversight Function

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Summary

In the wake of the final report of the National Commission on Terrorist Attacks Upon the United States (commonly called the 9/11 Commission), which declared that Congress's oversight of the intelligence community is "dysfunctional," there is heightened interest on Capitol Hill to strengthen legislative review of the intelligence community. This report provides a general overview of the core characteristics of congressional oversight and Congress's changing relationship with the intelligence community. This relationship will take on new importance with enactment of the Intelligence Reform and Terrorism Prevention Act of 2004 (P.L. 108-458) that, among other things, creates a Director of National Intelligence (DNI). The DNI will be responsible for overseeing and coordinating the 15 federal agencies that compose the intelligence community. This report also identifies a number of issues that make oversight of intelligence agencies different from monitoring other federal entities. The report ends with several summary observations.

This report will be updated only if events or new information warrant.

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A Perspective on Congress's Oversight Function

Twenty years ago a lead editorial in *The Washington Post* was titled “A Failing of Oversight.” It highlighted “serious flaws” in Congress’s oversight of the Central Intelligence Agency (CIA).¹ In a replay of that theme, the National Commission on Terrorist Attacks Upon the United States (commonly called the 9/11 Commission) declared that congressional oversight of intelligence and counterterrorism is now “dysfunctional.” Commission members urged Congress to strengthen its oversight of intelligence and homeland security by considering the adoption of a number of reforms (a Joint Committee on Intelligence, for example). They also stated that of “all our recommendations [for revamping the intelligence and homeland security structure], strengthening congressional oversight may be among the most difficult and important.”²

Whether Congress’s general performance of oversight is dysfunctional across-the-board is an issue that people may disagree about, especially given the additional resources (more professional staff), laws (the Inspector Generals acts, for example), or budget procedures (stricter reprogramming requirements, for instance) the legislative branch acquired to monitor and supervise executive agencies and programs. Many individual lawmakers are also diligent and effective overseers. Still, there is significant sentiment today that Congress needs to do much more to improve its capacity to properly oversee the intelligence community — that is, to review, monitor, and supervise the implementation of public policy.

Oversight has long been a topic of concern on Capitol Hill and in other quarters as well. Viewed by many Members as tedious, thankless, and time-consuming, oversight is often given relatively limited attention, despite its critical role in holding federal agencies and officials accountable for their actions and decisions. As former Representative Lee Hamilton, the vice chairman of the 9/11 Commission, pointed out: “Members are very busy now, and they just don’t make oversight that high a

¹Editorial, “A Failing of Oversight,” *Washington Post*, Apr. 18, 1984, p. A26. The editorial addressed the CIA’s involvement in the mining of Nicaraguan harbors, which occurred in the period when the CIA was supporting the “Contras” — a rebel group fighting to overthrow the leftist Sandinista government of Nicaragua.

²*The 9/11 Commission Report* (New York: W. W. Norton & Co., 2004), p. 419. The characterization of Congress’s oversight as “dysfunctional” is found on page 420. The bipartisan National Commission on Terrorist Attacks Upon the United States was created by P.L. 107-306. It issued its final report on July 22, 2004, and ended its operations on Aug. 28, 2004. It was, however, reported that “the panel’s ten members would ... open a small, privately financed office in Washington that would continue to lobby on behalf of the group’s recommendations.” See Philip Shenon, “9/11 Panel to Wrap Up Its 20-Month Inquiry,” *New York Times*, Aug. 21, 2004, p. A8.

priority. Most of them focus on constituent services and legislative work.”³ The term *lawmaker* suggests where many House and Senate members prefer to focus their activity.

Congress’s “watchdog” role is crucial for many reasons. Besides holding public officials accountable, there is another important purpose that merits mention, given the on-going public debate about restructuring the U.S. intelligence community. Oversight shines the spotlight of public attention on many significant issues, allowing the American people to make informed judgments about executive performance, policy success or failure, and the conduct of the officeholders who serve in the nationally elective branches. “The informing function of Congress,” wrote Woodrow Wilson in his classic 1885 study of the legislative branch, “should be preferred even to its legislative function.” As he emphasized:

Unless Congress have and use every means of acquainting itself with the acts and dispositions of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important it should understand and direct.⁴

Another fundamental goal of oversight is to protect Congress’s policymaking role and its place in our constitutional separation of powers system as the “first branch” of government. The huge growth in the size and reach of the executive branch — the “fourth branch” of government — has produced a policymaking rival to the Congress. Administrators do more than simply “faithfully execute” our laws according to the intent (which may be vague) of Congress. Federal agencies are filled with knowledgeable career and noncareer experts who, among other things, write rules and regulations that have the force of law; formulate policy initiatives for the White House and Congress; interpret statutes in ways that may expand their discretionary authority or, conversely, undercut legislative intent; and shape policy development by the Congress, in part by “selling” their ideas to lawmakers and committees via hearings, agency reports, and other means. The large influence of the federal establishment highlights the critical role of oversight in checking unwarranted administrative actions and asserting or reasserting Congress’s authority over executive entities.

Oversight is also crucial to the lawmaking process. Only by investigating how a statute is being administered can Congress discover deficiencies in the original statute and make necessary adjustments and refinements.

The purposes of this report are to provide a summary of the core characteristics of congressional oversight, present a brief overview of Congress’s relationship with the intelligence community, identify several issues unique to legislative review of the

³David Nather, “Congress as Watchdog: Asleep on the Job?,” *CQ Weekly*, vol. 62 (May 22, 2004), p. 1192. Hamilton is a former Democratic member of the U.S. House from Indiana. He served from 1965 to 1999.

⁴Woodrow Wilson, *Congressional Government* (Boston: Houghton Mifflin, 1885), p. 303.

intelligence community, and, finally, offer a few summary observations. A definition of oversight is appropriate at the outset, because it can influence perspectives on the adequacy of the review function. Oversight has two basic meanings. First, it denotes some form of “supervision,” “watchfulness,” or “review” of delegated authority to executive branch entities and officials. Often reactive in nature (it may also be proactive and prospective), oversight is, “properly speaking, an extension of the legislative process.”⁵ Lawmaking implies an obligation to monitor statutory implementation. How much monitoring is done by Congress is not easy to measure quantitatively, because it is subsumed in many hearings, meetings, or informal briefings whose purposes may be secondary to reviewing program and policy administration.⁶

The second meaning of oversight implies a “failure to notice” — something that is overlooked or omitted. A recurrent issue is the extent to which Congress overlooks executive branch activities. Plainly, the view of the 9/11 Commission is that Congress is inadequately organized or motivated to monitor intelligence and homeland security matters in a systematic manner. The sense of the Commission is that Congress has too many committees and subcommittees largely operating independently of one another that collect information on intelligence and homeland security issues. This decentralized and often compartmentalized structure collects huge amounts of disparate information, but no single committee has the responsibility to “connect the dots” and view the bigger picture.⁷ As the commission asserted: “Unity of effort in executive management can be lost if it is fractured by divided congressional oversight.”⁸ On the other hand, the more committees and subcommittees that are engaged in oversight, the greater the chances that important matters will not fall through the cracks or be overlooked by Congress. Competitive and creative oversight can help to ensure that important issues are uncovered, questions pursued to their conclusion, and alternative viewpoints raised to resolve public problems.

⁵David B. Truman, *The Governmental Process*, rev. ed. (New York: Knopf, 1971), p. 439.

⁶Joel D. Aberbach, “What’s Happened to the Watchful Eye?” *Congress & The Presidency*, vol. 29, spring 2002, pp. 3-23. UCLA Professor Aberbach found that oversight in the 1990s “continues to be quite high and that the model developed in” [Aberbach’s book titled *Keeping a Watchful Eye: The Politics of Congressional Oversight*, Washington: Brookings Institution, 1990] remains effective in explaining committee behavior. (p. 3)

⁷On October 9, 2004, the Senate adopted S.Res. 445, which made a number of changes in oversight of homeland security and the intelligence community. For example, the resolution renamed the Governmental Affairs Committee the Homeland Security and Governmental Affairs Committee; eliminated term limits for members of the Senate Intelligence Committee; created in the Senate Intelligence Committee a Subcommittee on Oversight; and established in the Senate Committee on Appropriations a Subcommittee on Intelligence.

⁸*The 9/11 Commission Report*, p. 420.

Several Core Characteristics of Oversight

Oversight is an implicit constitutional obligation of the Congress. According to historian Arthur Schlesinger, Jr., the framers believed it was not necessary to make specific reference to “oversight” in the Constitution. “[I]t was not considered necessary to make an explicit grant of such authority,” wrote Schlesinger. “The power to make laws implied the power to see whether they were faithfully executed.”⁹ Over the years Congress has bolstered its ability to carry out its obligation to oversee the bureaucracy through various laws, amendments to the House and Senate rulebooks, and periodic increases in staff and budgetary resources for its committees, including oversight and investigation subcommittees. A brief overview of several core characteristics of oversight highlights the forces and factors that influence how this activity is carried out on Capitol Hill.

Multiple Overlaps. The traditional rules and practices of the House and Senate make it virtually impossible to eliminate all committee overlaps in the oversight area. (As noted, there are benefits associated with committee redundancy and overlap, such as more “eyes and minds” monitoring administrative activity). The Legislative Reorganization Act of 1946 formalized in law the oversight function of Congress. That act required House and Senate committees to exercise “continuous watchfulness” of the agencies and programs under their jurisdiction. Implicitly, the 1946 law divided oversight among three types of committees. Authorizing committees were assigned “legislative oversight” — reviewing programs and agencies under their jurisdiction; the appropriating committees conducted “fiscal oversight” — scrutinizing agency spending; and the House and Senate governmental affairs panels acquired wide-ranging “investigative oversight” — conducting probes for waste, inefficiency, or corruption in the federal government. To varying degrees, congressional committees conduct each type of oversight.

In addition, House and Senate rules provide certain authorizing committees with oversight authority that stretches beyond their jurisdictional mandate. This authority is called “special oversight” in the House and “comprehensive policy oversight” in the Senate. Both of these 1970s additions to chamber rules are akin to the broad review authority granted the House Government Reform Committee and the Senate Governmental Affairs Committee. The House Education and Workforce Committee, for instance, has the authority (House Rule X, clause 3) “to review, study, and coordinate on a continuing basis laws, programs, and Government activities relating to domestic educational programs and institutions and programs of student assistance within the jurisdiction of other committees.” The Senate Foreign Relations Committee, as an example, has the authority (Senate Rule XXV) to “study and review, on a comprehensive basis, matters relating to the national security policy, foreign policy, and international economic policy as it relates to the foreign policy of the United States, and matters relating to food, hunger, and nutrition in foreign countries, and report thereon from time to time.”

⁹Arthur M. Schlesinger, Jr. and Roger Bruns, eds., *Congress Investigates: A Documented History, 1792-1974*, vol. 1 (New York: Chelsea House, 1975), p. xix.

Multiple Purposes. There are a plethora of goals or purposes associated with congressional oversight. Three were noted above: holding agencies accountable, informing the public, and protecting Congress’s policymaking role. Other objectives include evaluating program administration and performance; eliminating waste, fraud, and abuse; clarifying legislative intent; correcting executive abuses of authority; ensuring that programs are being run in an efficient and cost-effective manner; and eliminating unwanted or unnecessary programs. There are also a number of political purposes associated with oversight, such as protecting favored agencies and programs from public criticism; advocating particular policy preferences; airing administrative failures or achievements; generating favorable publicity for programs; responding to requests from special interests to influence agency decisions; or winning electoral support from constituents or various groups. Oversight, in brief, does not focus only on management and implementation issues. It occurs in a political context where the relationship between Congress and administrative entities can range from cooperation to conflict.

Multiple Incentives and Disincentives. Despite the importance of oversight, “pass it and forget it” lawmaking sometimes occurs on Capitol Hill. This is not to suggest that committees and subcommittees do not hold regular oversight hearings and meetings, often aimed today at rooting out government waste and abuse. Instead, analysts and others suggest that long-term “institutional changes have contributed to the decline [of oversight], such as members’ shorter workweeks, packed schedules, term limits on chairmanships and eroding salaries for investigative staff members.”¹⁰ As further disincentives, oversight requires large investments of time, energy, and staff resources to ferret out administrative inadequacies; the impact of oversight on bureaucratic behavior is often murky; and there is the perception of insufficient electoral, political, or institutional rewards for oversight work. Agencies may also resist congressional probes, forcing committees and subcommittees to persist over a number of years and to use coercive tools at the command of Congress, including subpoenas and holding executive officials in contempt.

On the other hand, there are certain incentives that can stimulate oversight activity. Among them are divided government (Congress — one or both chambers — controlled by one party and the White House by the other); press and media attention; peer recognition as an effective and diligent overseer; public dissatisfaction with government performance; the scarcity of fiscal resources, which may encourage Members and committees to scrutinize federal programs for waste and inefficiency; and electoral support from constituents. Clearly, congressional influence over the executive branch is substantial if committees and subcommittees choose to exercise their review authority, especially in a sustained rather than sporadic manner.

Oversight of the Intelligence Community

Selected Background Information. Since the creation of the Central Intelligence Agency (CIA) in 1947 and other components of the broader intelligence community, including the National Security Agency and the Defense Intelligence Agency,

¹⁰Nather, “Congress as Watchdog: Asleep on the Job?,” pp. 1191-1192.

Congress has oscillated between relative passivity and aggressiveness in monitoring the intelligence community. Passiveness was largely the order of the day from 1947 to the mid-1970s. The chairs of the House and Senate Armed Services and Appropriations Committees ostensibly exercised oversight over the CIA through special subcommittees, but it was minimal at best. The relevant committee chairs — who had few staff resources and no secure space or place to keep classified materials — often used informal meetings as their preferred form of oversight. For example, Allen Dulles, the Director of the CIA (DCI), could have “an afternoon bourbon with [Senate Armed Services Chairman] Richard Russell and a breakfast chat with [House Armed Services Chairman] Carl Vinson [and that] satisfied the need for accountability of activities ranging from the successful coup against President Jacobo Arbenz Guzman of Guatemala in 1954 to the covert funding of international student groups and foundations.”¹¹

Leverett Saltonstall, a member of the Senate Armed Services Committee and the Appropriations Subcommittee on Defense, expressed a widely shared attitude among Members during this period. In 1956, he remarked that “it is not a question of reluctance on the part of CIA officials to speak to us. Instead, it is a question of our reluctance, if you will, to seek information and knowledge on subjects which I personally, as a Member of Congress and as a citizen, would rather not have....”¹² That same year Senator Richard Russell — who chaired either Armed Services or Appropriations for much of the 1950s and 1960s and who headed the CIA subcommittees on both panels from 1969-1971 — expressed a comparable view. Voicing opposition to the creation of a joint intelligence committee, Russell said:

It is difficult for me to foresee that increased staff scrutiny of CIA operations would result in either substantial savings or a significant increase in available intelligence information.... If there is one agency of the government in which we must take some matters on faith, without a constant examination of its methods and sources, I believe this agency is the CIA.¹³

Added Representative Robert Ellsworth: “The political zeitgeist of the time was that the CIA was wonderful.”¹⁴ Or as Representative Albin Norblad said in 1963 about his membership on the CIA subcommittee of House Armed Services: “We met annually — one time a year, for a period of 2 hours in which we accomplished virtually nothing.”¹⁵ (Recent scholarship suggests that there may have been more

¹¹Anne Karalekas, “Intelligence Oversight: Has Anything Changed?” *Washington Quarterly*, vol. 6 (summer 1983), p. 23.

¹²Remarks of Senator Leverett Saltonstall, U.S. Senate, *Congressional Record*, vol. 102 (Apr. 19, 1956), p. 5924.

¹³Frank Smist, *Congress Oversees the United States Intelligence Community, 1947-1994*, 2nd ed. (Knoxville, TN: University of Tennessee Press, 1994), p. 6.

¹⁴*Ibid.*, p. 5.

¹⁵Louis Fisher, *Presidential Spending Power* (Princeton, NJ: Princeton University Press, 1975), p. 218.

congressional oversight of the CIA during this “era of trust” than indicated by these Members’ comments).¹⁶

A limited number of House and Senate chairs and ranking members received secret periodic briefings on CIA operations and budget requests, but most Members had little knowledge of these matters and voted to provide billions of dollars to the intelligence community — hidden in different accounts of the Defense Department and other federal entities — without any inkling as to their amounts or purposes. The Cold War struggle against the communist challenge, which had broad national support, contributed to Congress’s general unwillingness to question the foreign intelligence activities of the CIA. (There were a few exceptions to this pattern of deference, such as the Bay of Pigs debacle and the Vietnam War.) Basically, both chambers deferred to the President and the CIA in nearly all matters involving intelligence policy.

Congressional passivity in overseeing the intelligence community changed significantly by the mid-1970s. A confluence of factors triggered Congress’s willingness to assert its authority over the CIA. For example, the Vietnam War and Watergate weakened confidence in the presidency and encouraged, in that oft-quoted phrase, an “invitation to struggle” between the legislative and executive branches over the direction of intelligence policy. Congress’s trust in the CIA eroded when, contrary to earlier CIA statements, it learned in 1974 that the agency was involved in covert actions to overthrow Chilean President Salvador Allende, who was killed in a military coup. There were also revelations in leading national newspapers about illegal and improper domestic spying activities (illegal wiretaps on dissident groups during the Vietnam War, for instance) and even drug-testing on unwitting subjects that aroused the ire of the public. The combination of these various factors prompted major investigations by the House and Senate as well as by the Administration under Vice President Nelson Rockefeller. These efforts led to the establishment of a permanent Senate Select Committee on Intelligence in May 1976 and the House Permanent Select Intelligence Committee in July 1977. The creation of the two intelligence panels greatly expanded Congress’s ability to exercise continuous oversight of the intelligence community’s activities, budget, and performance.

New laws were enacted that provided Congress with the statutory authority both to acquire intelligence information — thus expanding its expertise in this policy arena — and to be appraised of covert action initiatives. In 1974, in response to disclosures of covert action programs to topple foreign governments, Congress adopted the Hughes-Ryan amendment (named after Senator Harold Hughes and Representative Leo Ryan) to the Foreign Assistance Act. This statutory provision prohibited the use of appropriated funds for “operations in foreign countries, other than activities intended solely for obtaining necessary intelligence unless and until the President finds that each such operation is important to the national security of the United States.” Further, the amendment obligated the President to report “in a

¹⁶David M. Barrett, “An Early ‘Year of Intelligence’: CIA and Congress, 1958,” *International Journal of Intelligence*, vol. 17 (2004), pp. 468-501. The phrase “era of trust” is from Loch K. Johnson, *Secret Agencies: U.S. Intelligence in a Hostile World* (New Haven, CONN.: Yale University Press, 1996), p. x.

timely fashion, a description and scope of such operation” to the appropriate committees of Congress, which came to include the appropriations, armed services, and foreign affairs panels of each chamber.

In 1976, Congress passed legislation “prohibiting the CIA from operating in Angola other than to gather intelligence. It also prohibited the CIA from conducting military or paramilitary operations in Angola and denied any appropriated funds to finance directly or indirectly any type of military assistance to Angola.”¹⁷ This was the first time Congress terminated a covert operation. Four years later Congress enacted the Intelligence Oversight Act, which required the President to “ensure that the [House and Senate] intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity.”¹⁸ The heads of the intelligence agencies were also directed to respond to inquiries from these two panels.

These various changes during the 1970s and 1980s required a new relationship between the intelligence community and Congress. No longer could the CIA deal only with a small number of senior lawmakers.¹⁹ Instead, the CIA now had to provide information and analysis to a larger segment of the House and Senate membership, and to accommodate permanent intelligence panels that had the authority to exercise legislative and budget authority over the intelligence community and to investigate the quality of intelligence provided to policymakers. Informally, the intelligence committees and the intelligence community worked out a number of other arrangements: legislative access to classified materials; the sharing and storing of intelligence; security clearances for staff; and the like. Importantly, the creation of the House and Senate intelligence committees “brought about an intense educational period in which the committees learned how the intelligence community was organized, how it performed its duties, and how intelligence people operated.”²⁰

Congress’s resurgent role in national security affairs meant that appropriate committees and Members expected to receive timely and reliable information and analysis from the intelligence community. And the intelligence community did provide large amounts of information to Capitol Hill via reports, briefings, or hearings. Congress now received “virtually the same intelligence *analysis* [emphasis in original] as the executive.”²¹ Virtually the same, however, did not mean *all*

¹⁷Louis Fisher, “Congressional Checks on Military Initiatives,” *Political Science Quarterly*, vol. 109 (winter 1994-1995), p. 757.

¹⁸The quoted material on the Hughes-Ryan amendment and the 1980 Intelligence Oversight Act are taken from U. S. Congress, Senate Select Committee on Intelligence, *Legislative Oversight of Intelligence Activities: The U.S. Experience*, 103rd Cong., 2nd sess., Oct. 1994 (Washington: GPO, 1994), pp. 4, 42.

¹⁹As a sign of growing CIA involvement with Congress, in 1966 CIA Director Richard Helms established an office of congressional relations to respond to Member and staff inquiries and to conduct briefings for various House and Senate committees.

²⁰Smist, *Congress Oversees the United States Intelligence Community*, p. 331.

²¹Gregory F. Treverton, “Intelligence: Welcome to the American Government,” in Thomas (continued...)

analysis or information. As one intelligence official stated: “None of our customers has a right to all of the intelligence that is produced, not even the Congress. We will give it to them in due course if they need it. But they cannot see everything that is produced. The President has the right, if not the responsibility, to control it.”²² The Senate Select Intelligence Committee, however, noted that as a practical matter, “instances in which committee access [to information] could not be arranged have been extremely rare.”²³

The closer relationship between Congress and the intelligence community did not mean that it was always harmonious. A sharp conflict erupted in the mid-1980s between the intelligence committees and DCI William Casey. The Senate committee, for example, charged that Casey had not kept the panel fully and currently informed about its covert activities in Central America. The CIA counter-charged that committee members and staff failed to ask for pertinent information about their secret operations. As Director Casey told the Senators: “If you don’t ask the right questions, you won’t get the right answers.”²⁴ Or as one Senator put it, explaining that CIA briefers did not provide much detail about specific operations: “Only if you ask precisely the right question will they give you precisely the right information. And even though we’re given things like places, dates, money and the like, Administration goals are often vague and usually evolve.”²⁵

If the right questions are asked by lawmakers and intelligence officials find them difficult to answer, this may send signals to the CIA that they need to rethink their plans; on the other hand, if the right questions are not asked about covert plans, then the CIA may later claim legislative support for secret activities that might go awry. In 1984, Congress adopted the Boland Amendment (after Representative Edward Boland, who chaired the Permanent Select Intelligence Committee) to prohibit assistance of any kind to support the Contras in Nicaragua. Several agencies, including the CIA, were specifically barred from providing assistance to the Contras. The legislative-executive strife engendered by the “covert” war in Central America led to joint hearings by the two intelligence committees into what was called the Iran-Contra affair. This inquiry focused on the secret sale of arms to Iran with profits from the sales used illegally to fund the U.S. backed Contra rebels in Nicaragua. The episode embarrassed the Administration and pointed to the difficulties of controlling covert operations. Yet the Iran-Contra affair also underscored that Congress did hold certain public officials accountable for their misdeeds.

²¹(...continued)

E. Mann, ed., *A Question of Balance: The President and Congress in Foreign Policy* (Washington: Brookings Institution, 1990), p. 71.

²²L. Britt Snider, *Sharing Secrets With Lawmakers: Congress as a User of Intelligence*, An Intelligence Monograph, Center for the Study of Intelligence, Feb. 1997, ch. II, p. 8.

²³*Legislative Oversight of Intelligence Activities: The U.S. Experience*, p. 10.

²⁴Doyle McManus, “Does Congress Oversee or Overlook CIA?,” *Los Angeles Times*, Apr. 19, 1984, p. 10.

²⁵Stephen Engelbert and Leslie Gelb, “Overseeing of C.I.A. by Congress Has Produced Decade of Support,” *New York Times*, July 7, 1986, p. A10.

Other issues aroused lawmakers' concerns about the intelligence community during the 1990s and beyond, such as alleged failures on the part of the CIA to provide advance warning to lawmakers about the collapse of the Soviet Union or accurate assessments of the military intentions of the Iraqi armed forces prior to the 1991 Persian Gulf war. In 1994, the discovery of a spy (Aldrich Ames) in the CIA triggered investigations by the congressional intelligence committees. The Ames episode tarnished the public reputation of the agency. Most recently, the intelligence agency has been criticized for a number of failures, such as its judgment prior to the Iraq war that Saddam Hussein possessed weapons of mass destruction. Notwithstanding these controversies, the Congress-intelligence community relationship generally has been characterized more by cooperation, trust, and accommodation than by conflict or recrimination. Even more important is that Congress, since the mid-1970s, shifted from being a minor to a significant player in intelligence oversight.

Constraints on the Conduct of Intelligence Oversight

Congress has a number of important tools through which it can scrutinize the intelligence community. Among the most important are budget reviews conducted by the two intelligence panels, the relevant appropriations subcommittees, and the armed services panels; studies and reports by the congressional intelligence panels on the timeliness and quality of intelligence collection and analysis; and pertinent laws (requiring the DCI to provide intelligence support to the House and Senate and its committees, for example, along with the CIA Inspector General reports). Of course, the fact that Congress has the authority and obligation to hold the intelligence community accountable does not necessarily mean that it is required to do so in a sustained, systematic, or bipartisan manner.

The 9/11 Commission suggested that the intelligence panels require strengthening, and it proposed a number of recommendations that might achieve this objective, such as consolidating the intelligence appropriation and authorization functions in the existing intelligence authorization committees. The commission also stated that the select intelligence panels could be transformed into standing committees with additional powers. Although the 108th Congress did not approve these two specific recommendations, several of the commission's reform proposals were agreed to, as noted earlier, such as eliminating term limits for members who serve on the Senate Select Intelligence Committee and creating in the Senate panel a Subcommittee on Oversight.²⁶ Despite various proposals for change, there are several constraints that make the conduct of intelligence oversight challenging for Congress.

Secrecy. Congress functions in a largely open environment; intelligence activities and operations are necessarily secret. The tension that exists between the

²⁶Walter Pincus, "Senate Realigns Intelligence Procedures," *Washington Post*, Dec. 23, 2004, p. A21.

legislature's emphasis on "need to share" information — with colleagues, constituents, and many others — and the intelligence community's culture of a limited or compartmentalized "need to know" shapes Congress's oversight of intelligence agencies. The veil of secrecy that usually shrouds intelligence activity means that Congress often finds itself in a "Catch 22" situation. CIA officials, for example, may provide timely notice to appropriate congressional committees and party leaders of planned covert actions, but lawmakers who possess this information are subject to numerous internal rules and other restrictions that inhibit the disclosure of sensitive material even to their colleagues, let alone the media or others.²⁷ It is somewhat paradoxical, though understandable, that the most open of our three national branches of government must conduct most of its intelligence oversight in secret.

The "closed door" oversight of intelligence raises numerous dilemmas that are not easy to resolve. Two questions seem especially prominent. First, can Congress function as an effective surrogate for the public in holding the intelligence community accountable for its actions and decisions when these agencies must function in a highly secret environment? Absent any constitutional "right to know" on the public's part, people may either "accept the reasons for secrecy and the limitations that it imposes on public accountability" or they may doubt the "executive branch's willingness to be forthcoming with Congress" or "Congress's readiness to air disquieting information."²⁸

Second, the safety and security of the nation may depend on collecting and analyzing intelligence gathered through overt and covert means and disseminating it to appropriate decisionmakers. In a dangerous world, a challenge for Congress's intelligence committees is balancing their obligation to hold intelligence agencies accountable for their performance without hindering or harming these agencies' ability to carry out their national security responsibilities. Stated differently, how is Congress "to conduct oversight in a policy area deemed of great importance by both the executive and legislative branches but characterized by legitimate needs for secrecy and security that exist in few other policy areas?"²⁹

To be sure, the issue of secrecy raises a host of other concerns, such as storing and securing classified information; providing access to confidential studies; preventing "leaks" of materials; establishing guidelines for the use of classified studies; and hiring competent staff who can acquire appropriate security clearances from the executive branch.³⁰ The secrecy of the work also limits public recognition

²⁷There are occasions when lawmakers do speak out about classified intelligence plans or programs. See Douglas Jehl, "Debate on Secret Program Bursts Into Open," *New York Times*, Dec. 10, 2004, p. A29.

²⁸Mark M. Lowenthal, *Intelligence: From Secrets to Policy*, 2nd ed. (Washington: CQ Press, 2003), p. 163.

²⁹Smist, *Congress Oversees the United States Intelligence Community, 1947-1994*, p. 13.

³⁰Security investigations of congressional staff requiring clearances are conducted by the executive branch, but not the adjudication or the determination of whether a person is (continued...)

for lawmakers, perhaps reducing the attractiveness of service on the intelligence committees.³¹ A fundamental issue for lawmakers is how to balance their obligation to represent the views and values of their constituents by speaking out on public policies while being bound by an array of secrecy rules and regulations.

Complexity. Intelligence, like other policy domains, is a complex and technically substantive area. “Over the decades,” said the 9/11 Commission, “the agencies and the rules surrounding the intelligence community have accumulated to a depth that practically defies public comprehension.”³² Comprehension is difficult because there are numerous (15) intelligence agencies, all with their own culture, rules and procedures, authority, and capabilities. Multiple intelligence agencies compound the difficulty term-limited Members confront in becoming sufficiently informed to credibly evaluate agency performance and personnel. To develop a sophisticated understanding of intelligence methods, sources, or mandates — the requirements of defense intelligence, tactical intelligence, strategic intelligence, and so on — takes years of study and analysis. On the other hand, limitations of tenure on the intelligence panels permit a wider number of lawmakers to understand intelligence issues and to speak about them knowledgeably. Tenure limits also reduce the chances that the committees will be coopted by the intelligence community, although this contention has been the subject of increasing debate.

Dearth of Outside Assistance. Unless certain events or crises precipitate their involvement, relatively few members of Congress focus intensively or extensively on the intelligence community. Members and staff of the two intelligence panels are the principal consumers of information and analysis generated by the many components of the intelligence community; they are responsible to their colleagues for evaluating its credibility and accuracy. This is a workload assignment of significant proportions. The two committees receive little help from interest groups, constituents, or the media in monitoring and evaluating intelligence agencies simply because security concerns restrict the access of other participants. (Even lawmakers who are not members of the intelligence panels confront various restrictions in reviewing classified materials.) As a member of the House Intelligence Committee said: “There is no outside organization [like the Government Accountability Office] that is providing consistent oversight, and whistle-blowing is not a respected tradition in the intelligence community. There is nobody else to help.”³³ By contrast, a significant incentive for congressional oversight in other

³⁰(...continued)

“trustworthy” and “loyal.” That decision is made by Congress for its employees.

³¹Mark Lowenthal, former staff director of the House Permanent Select Intelligence Committee, suggests five reasons why lawmakers want to serve on the intelligence panels: (1) the chance to perform “public service” within the institution; (2) access to a secret body of information; (3) the ability to shape intelligence policy; (4) the opportunity to attract media attention; and (5) recognition among peers as a “favorite” of party leaders, who select the members of the two panels. Lowenthal, *Intelligence: From Secrets to Policy*, p. 168.

³²*The 9/11 Commission Report*, p. 410.

³³Kevin Whitelaw and David E. Kaplan, “Don’t Ask, Don’t Tell,” *U.S. News & World* (continued...)

policy areas is public visibility, which often galvanizes the press, outside groups, and others to make their own inquiries and investigations of agency and program performance.

Summary Observations

There is no doubt that Congress has significant authority to oversee the intelligence community. Control of the purse strings, enactment of laws, the conduct of investigations, or the Senate's confirmation role are among the principal levers of power available to the legislative branch should it disagree with an administration's intelligence policies. The 9/11 Commission has urged that Congress needs to employ these constitutional tools more assertively, and that its watchdog role requires a stronger and more vigorous bark. The commission advocated a number of changes which, in its judgment, would strengthen congressional oversight of intelligence and homeland security. Several were adopted by the Senate when it agreed to S.Res. 445, such as the aforementioned elimination of term limits for lawmakers who serve on the intelligence panel. Still other commission proposals remain pending, such as forming a joint intelligence committee or converting the select committees into standing committees with authorizing and appropriating powers. In addition, the 9/11 Commission urged each chamber to create a permanent homeland security committee. The Senate did rename the Governmental Affairs Committee the Homeland Security and Governmental Affairs Committee. Speaker Dennis Hastert stated that he supports transforming the temporary Select Homeland Security Committee, which the House established on the opening day of the 108th Congress, into a permanent committee for the 109th Congress.

The commission advised, too, that steps be taken by the White House and Senate to accelerate the confirmation of national security appointees during the change of administrations. Section 7601 of the new law (P.L. 108-458) revamping the intelligence community contains "sense of the Senate" language stating (1) "the President-elect should submit the nominations of candidates for high-level national security positions, through the level of undersecretary of cabinet departments, to the Senate by the date of the inauguration of the President-elect as President," and urging (2) "Senate committees to which these [national security] nominations are referred should, to the fullest extent possible, complete their consideration of these nominations, and, if such nominations are reported by the committees, the full Senate should vote to confirm or reject these nominations, within 30 days of their submission." S.Res. 445 also assigns the Senate Select Intelligence Committee "jurisdiction for reviewing, holding hearings, and reporting nominations of civilian persons nominated by the President to fill all positions within the intelligence community requiring the advice and consent of the Senate."

³³(...continued)

Report, vol. 137 (Sept. 13, 2004), pp. 36-37. In the post-9/11 world, there is more public debate about intelligence and national security affairs, and this change might provide the intelligence panels with reasoned popular judgments useful in their deliberations.

In the 108th Congress, lawmakers introduced a number of measures (H.R. 10 and S. 2845, for example) to implement many of the recommendations of the 9/11 Commission. Various House and Senate committees, including a bipartisan Senate working group, reviewed the commission's proposals. A major overhaul of the intelligence community occurred with enactment of P.L. 108-458, which created the new position of Director of National Intelligence, the National Counterterrorism Center, a Privacy and Civil Liberties Oversight Board, among other changes. As the 109th Congress approaches, various lawmakers are urging the new Congress to take additional steps to strengthen oversight of intelligence and homeland security operations.³⁴ Commission members and other groups are also urging lawmakers to improve their committee oversight structure when the 109th Congress convenes.

The recommendations have their advantages and disadvantages. Consolidating oversight authority in a single committee pinpoints responsibility and accountability and limits the problem of leaks. On the other hand, unlike the current arrangement which permits multiple committees to review intelligence issues each from their unique vantage point, consolidation might reduce oversight of the intelligence community. Reorganizations sometimes exchange one set of problems for another, or produce unintended and unwanted consequences.

Ultimately, Congress will decide how it can best pursue its oversight responsibility. Much will depend on the context of the times, the willingness of Members to watch and analyze the intelligence community, and Congress's relationship with the executive branch. This relationship may range from cooperative to confrontational, but it is principally Congress that can ensure that intelligence policies reflect the values of the American people, anticipate long-range trends, and meet the challenges of a changed world. President Harry Truman underscored the importance of intelligence in making right decisions for the nation in comments that apply equally well to the legislative branch: "I think it is fairly obvious that by and large a President's [or Congress's] performance ... is as effective as the information he has and the information he gets."³⁵

³⁴Christopher Shays and Carolyn Maloney, "Congress, Reorganize Thyself," *Washington Post*, Dec. 22, 2004, p. A27.

³⁵Remarks of Senator Alan Cranston, U.S. Senate, *Congressional Record*, vol. 121 (Jan. 23, 1975), p. 1125.