

# Building Checks and Balances for National Security Policy: The Role of Congress

---

Suzanne E. Spaulding\*

Congress is generally viewed as having two key roles in our system of government: conducting oversight and enacting legislation. It also has a third important role: informing and leading public discussion and debate. Each of these roles is interdependent and all are important to preserving checks and balances. Unfortunately, all three of these roles have suffered in the current national security climate.

There are many factors contributing to the failure of Congress in recent years to exercise a robust and effective check on the executive branch in the area of national security. Certainly the incentive for challenging executive assertions of power was reduced when Congress and the White House were controlled by the same party. Moreover, national security is traditionally an area in which both Congress and the courts tend to be more deferential to the President, particularly during wartime. Perhaps most significant, then, is the effect of the attacks of 9/11 and the constant reminders that we are engaged in a “Global War on Terrorism” (“GWOT”). This climate of fear puts tremendous pressure on Congress to be “tough” on national security; describing the threat as a “war” implies that Congress can only be tough on national security by deferring to the President as Commander in Chief.

The current Administration argues that with regard to this GWOT, the President’s authority cannot be constrained by Congress. His lawyers maintain that the President is free to ignore laws that he decides infringe upon his Article II power, particularly his power as Commander in Chief during wartime. This constitutional argument, most clearly articulated in the now infamous August 2002 Department of Justice memo on torture,<sup>1</sup> has never been repudiated and has been repeated often since then.

The August 2002 memo asserts that, “Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe [the U.S. law prohibiting torture] to avoid this constitutional difficulty, and conclude that it does not apply to the President’s detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority.” Similar arguments were made in the Justice Department memo written after the National Security Agency (“NSA”) warrantless surveillance program was revealed.

---

\* Formerly Minority Staff Director for the House Permanent Select Committee on Intelligence, General Counsel for the Senate Select Committee on Intelligence, and Assistant General Counsel at the Central Intelligence Agency.

<sup>1</sup> Memorandum from Deputy Assistant Attorney General John Yoo to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

The potential scope of this Commander-in-Chief authority to do whatever the President believes necessary to protect the nation is breathtaking, particularly in the context of the Global War on Terrorism (“GWOT”). The GWOT extends, by definition, worldwide. The battlefield is wherever the terrorists are, or—for purposes of “preparing the battlefield”—wherever they might be in the future, including inside the United States (U.S.). And, of course, the “enemy” against which this unchecked authority can be exercised includes not just foreign terrorist suspects, but U.S. citizens as well.

Until very recently, the Administration used signing statements to signal its determination to ignore the laws that Congress passed if the President decided they were inconsistent with his authority. This growing practice has generated significant criticism. Thus, when Congress hurriedly passed a bill in 2007 to expand the Foreign Intelligence Surveillance Act (“FISA”) just before leaving town for the August recess, the President’s signing statement contained no such qualification. Nevertheless, officials have made it clear that the President still maintains the prerogative to ignore this law if he decides it impermissibly interferes with his authority. The only thing that has changed, apparently, is that the President’s lawyers no longer feel the need to express this in the signing statement.

So much for Congress’s legislative authority acting as a check on executive authority.

Congressional oversight has not fared much better. In the debate over the bill to expand FISA, it was clear that most Members of Congress still had not been briefed on the details of the surveillance activities undertaken since 9/11. For example, most Members did not seem to know exactly what surveillance issues prompted the threatened resignation of the Acting Attorney General and the Director of the FBI.<sup>2</sup> It took many months, and the threat of subpoenas, before the intelligence and judiciary oversight committees received the documents they had requested on the legal underpinnings for the program. The clearest indication that Congress was legislating before the members fully understood the facts was that the new FISA law included a section requiring the Inspectors General (“IGs”) of the relevant intelligence agencies and the Department of Justice IG to collaborate on an inquiry designed to uncover these facts over the course of the following year. Sen. Arlen Specter (R-PA) complained on the floor that Congress was “buying a pig in a poke.”<sup>3</sup>

Without effective oversight, Congress is legislating in the dark. Unless Congress knows what happened in the area of surveillance after 9/11—what pressure those attacks and their aftermath put on the system and how the system responded—it cannot effectively adjust the legal framework both to provide the needed authority to the President and national security professionals to meet the challenges ahead and to ensure the necessary safeguards against abuse in the event of a future crisis.

Yet, despite not having the information it has requested regarding surveillance activities since 9/11, Congress moved ahead and enacted legislation to expand FISA significantly and to grant immunity to communication carriers that may have assisted with the warrantless surveillance. Their ability to insist that the expansion of authority be appropriately limited and safeguarded was significantly hampered by their concern that the U.S. public would view them as “soft” on national security. This reflects a failure to exercise effectively the third function of Congress: to inform and lead public discussion and debate.

---

<sup>2</sup> JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007).

<sup>3</sup> 154 CONG. REC. S6454, 6462 (daily ed. July 9, 2008) (statement of Sen. Specter).

Ultimately, Congress derives its power from the people. Our elected officials at both ends of Pennsylvania Avenue are, by design, political creatures sensitive to public opinion. But they also have the ability and responsibility to inform that opinion. The President has the “bully pulpit” and can more easily shape public opinion. It is more difficult for 535 Members of Congress to have their individual voices heard in a coherent and compelling way. Nevertheless, Congress needs to work harder at reshaping the discussion about how best to address the long term threat of terrorism. It needs to clearly explain the ways in which policies that mock the rule of law and undermine our carefully constructed system of checks and balances make it more likely, rather than less likely, that we will be attacked again.

The public needs to better understand the nature of the long-term threat from international terrorism; one that both military and civilian experts agree is not going to be defeated militarily. Just as important as eliminating the terrorists’ leadership is reducing their ability to recruit new young people to join their cause and to generate and maintain support within communities around the world. This is a struggle for hearts and minds; a competition among competing narratives. The jihadist narrative is undeniably compelling to many young Muslim men. The narrative of democracy and the rule of law can be equally compelling, but its credibility is dramatically undermined if the greatest democracy is not clearly committed to live that narrative and not just mouth the words.

We have to demonstrate that we believe what our founders believed: that this system of checks and balances and respect for civil liberties is not a luxury of peace and tranquility, but it was created in a time of great peril as the best hope for keeping this nation strong and resilient. It was a system developed not by fuzzy-headed idealists, but by individuals who had just fought a war and who knew that they faced an uncertain and dangerous time.

The wisdom of this system and the importance of remaining true to it even in times of peril can perhaps best be understood with regard to fears of home-grown terrorism. The best hope for detecting and preventing this threat lies not in intrusive intelligence methods, which are better suited to monitoring a known target than in finding out who might be a target. Instead, our best hope lies in working with communities, particularly Muslim-American communities. Yet, many of our policies and practices since 9/11 that compromise civil liberties or seem to reflect a lack of respect for the rule of law risk alienating those very communities.

Congress must continue to try to convey this message. Nonetheless, the ultimate obligation to ensure checks and balances in the area of national security is on us. We have a responsibility to become informed and to contribute to an informed public discussion and debate. As Justice Potter Stewart wrote in the *Pentagon Papers* case, “In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.”<sup>4</sup>

## I. CONGRESSIONAL OVERSIGHT OF INTELLIGENCE

Maintaining this kind of informed public discussion and debate is particularly difficult with regard to intelligence activities. Yet, in no area are congressional checks and balances more important.

---

<sup>4</sup> *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971).

### A. PURPOSE OF CONGRESSIONAL INTELLIGENCE OVERSIGHT

The House and Senate intelligence oversight committees were established in the 1970s in the wake of special congressional committees investigating a series of scandals involving the intelligence community (“IC”). In addition to finding problems within the IC, these committees determined that a more formal structure was needed to ensure more consistent and rigorous oversight by the Congress.

The resolution establishing the Senate Select Committee on Intelligence (“SSCI”), S.Res. 400, 94<sup>th</sup> Cong. (1976), provides that the committee is “to oversee and make continuing studies of the intelligence activities and programs of the United States Government,” report to the full Senate, and propose appropriate legislation.<sup>5</sup> In carrying out this purpose, the committee is to “make every effort to assure that the appropriate agencies and departments of the United States provide informed and timely intelligence necessary for the executive and legislative branches to make sound decisions affecting the security and vital interests of the Nation.” In addition, the committee is to provide “vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States.”

Simply put, the goal is to ensure that the IC is providing the best intelligence possible in a manner consistent with the Constitution and U.S. laws. In order to ensure effective intelligence, the oversight committees must authorize appropriate resources, allocate them among the various programs and activities, monitor the expenditure of those resources, and evaluate the effectiveness and appropriateness of the activities undertaken with those funds. When this oversight identifies a need for additional legislative authority and safeguards, the process should be as transparent as possible, consistent with the need to protect sources and methods.

### B. ENHANCING PUBLIC AND IC TRUST IN THE COMMITTEES

Congressional oversight of intelligence plays a key role in trying to reconcile the imperatives of intelligence and the requirements of democracy. The admonition in the Senate committee’s charters to assure “conformity with the Constitution” can be read not just as ensuring activities do not violate the Bill of Rights, but also in the broader sense of trying to address the potential tension between the secrecy required for clandestine intelligence activities and the participatory nature of the democratic republic described in that founding document. Since the normal mechanisms for relying upon an informed public are constrained in this context, the oversight committees bear a unique burden to act as intermediaries between the intelligence community and the public. The public and, often, the members of Congress who do not sit on the oversight committees, are uniquely dependent upon the intelligence committees to monitor and evaluate the activities of the IC. In the same way, the intelligence community is constrained in its ability to convince the American public that it can be trusted and deserves their support. In order to mediate this relationship, the oversight committees must earn the trust of both the public and the IC.

Because the public cannot be told about much of what the intelligence community does, they are most likely to hear about the scandals and failures that make it into the media reports. Successes are rarely publicized. The public is unable to make its own assessment of the value of intelligence or the degree to which intelligence personnel

---

<sup>5</sup> The House does not have a corresponding resolution establishing the House Permanent Select Committee on Intelligence. Instead, House Rule X sets forth its jurisdiction and procedures.

are acting appropriately. The committees must be their eyes and ears, and the public must trust that they are doing their jobs effectively.

The committees are also dependent to a large extent upon the IC to provide the information that they need to conduct effective oversight. Over the years, the committees have worked to develop a relationship of trust in which the IC understands that the committees will act responsibly, safeguarding sensitive information and avoiding the kind of partisanship that appears to put politics ahead of security. Similarly, the committees must be able to trust that the IC is not trying to “hide the ball,” forcing the members to play “20 Questions” in the hope of getting the information they need. This mutual trust has been tested at times, but must continue to be a high priority for the committees and the IC.

### C. GREATER TRANSPARENCY

To the extent that any of the reforms discussed here improve the effectiveness of congressional oversight, they should help to enhance the credibility of the committees in the eyes of both the public and the IC. However, the impact of such reforms will be limited if the public is not aware of it. To improve public trust in congressional oversight, there must be greater transparency in the work of the committees.

For example, while the budget numbers authorized by the committees are classified, the legislative portion of the annual authorization bill is entirely unclassified. In fact, as the President emphasized in his signing statement for the Intelligence Authorization bill for fiscal year (“FY”) 2005, there can be no such thing as secret laws in our democracy.<sup>6</sup> Yet, for years the oversight committees have marked up the public portion of the bill in secret session. When combined with stringent rules in the House that prohibit staff from discussing committee business with other committees, or Members not on the committee, this practice prevents even members of Congress, as well as the public, from knowing what is in the public part of the bill until it is filed. This has sometimes created the impression that the committees are trying to sneak provisions past the public and non-committee members. Moreover, the result is often, inevitably, either little or no public or congressional debate, or debate that is based more on emotion than on facts. This does not build confidence in our intelligence laws or in Congress’s role.

Legislative mark ups should take place in open session. If there are sensitive issues that must be discussed regarding the public bill, the committees can reserve that discussion for executive session. The presumption should be in favor of a public mark up, however. At a minimum, the bill should be introduced or otherwise made public prior to committee mark up so that outsiders, including Members not on the committee, can review it and comment in a thoughtful and informed way.

Additional open hearings would also provide the public with greater insight into the way in which the Congress is overseeing the IC. The annual Worldwide Threat briefing by the Director of Central Intelligence is usually held in open session without compromising national security. The House Permanent Select Committee on Intelligence (“HPSCI”) has held a number of other open hearings in recent years without jeopardizing sources and methods.

---

<sup>6</sup> GEORGE W. BUSH, STATEMENT ON SIGNING THE INTELLIGENCE AUTHORIZATION ACT FOR FISCAL YEAR 2005 (2004), available at <http://www.whitehouse.gov/news/releases/2004/12/20041223-6.html>.

#### D. DETERRING UNAUTHORIZED DISCLOSURES

Greater transparency in the unclassified aspects of the committees' oversight must be accompanied by a corresponding commitment to protect sensitive information from unauthorized disclosure. There is a general consensus that most leaks come from the executive branch rather than Congress, if only because of the vastly greater number of executive branch officials with access to classified information. Though the consequences of any disclosure are severe, however, the cost of disclosures that appear to emanate from Congress is particularly high in terms of degrading the trust that is so essential to making oversight work.

Some years ago, the executive branch undertook an effort to assess current laws regarding leaks and concluded that better enforcement was the answer, rather than new laws. Similarly, the House and the Senate each have rules to protect sensitive information and a process for investigating and penalizing those who violate those rules. In both chambers, members have been kicked off the oversight committees for violating those rules. Unfortunately, it is also the case that some instances of unauthorized disclosure have either been ignored or treated lightly.

Congressional leadership should make clear that unauthorized disclosures of classified information will be referred to the ethics committees. Members and staff of the oversight committees should be held to a particularly high standard, but no member or staffer on the Hill should be able to disclose classified information with impunity.

Respect for this process, however, will be diminished if it is seen as being used for partisan political purposes, with tit-for-tat accusations of leaks or investigations that appear to be aimed at intimidation or retaliation.

#### E. REDUCING PARTISAN POLITICS IN THE COMMITTEES

The political process is inherent in our democratic republic and ideological differences will often break down along party lines, but it is generally understood that politics should never be allowed to threaten national security. Ensuring an effective and appropriate intelligence capability is vital to our national security. Thus, it is particularly important that partisan politics not interfere with effective oversight or the effectiveness of our intelligence efforts. Moreover, consistent with the discussion above regarding the importance of public trust in the process, even the perception that partisanship is interfering with national security is damaging.

There is a general sense that Congress as a whole has become more partisan and the intelligence committees, while generally operating in a more bipartisan manner than most other committees, have not been immune from that trend. Reversing this trend within the committees is a formidable challenge, but one that Congress must undertake.

The most important factor in enhancing bipartisanship within the committees is the commitment of the committee leadership. If these leaders are determined to be partisan, there is little that structure or processes can do to prevent it. Thus, it is essential that the House and Senate leaders choose the membership of these committees wisely, particularly ensuring that they select as chairs and vice chairs/ranking members individuals who bring a commitment to, and record of, bipartisanship.

Having established the critical role of choosing the right leadership, there are other ways to reduce the tendency toward partisanship. For example, the Senate included in S.Res. 400 a number of provisions aimed at enhancing bipartisanship on the SSCI. The most significant may be the decision to designate the ranking member as the Vice Chairman of the committee. This means that, unlike in any other committee, if the

Chair is not present, the Vice Chair presides rather than the next ranking majority member. Aside from the practical implications, this sends a clear signal that both parties share in the responsibility for careful and effective oversight. This is further reinforced by the requirement, endorsed by the 9/11 Commission, that the majority maintain no more than a one member advantage in membership. The Senate rules also provide that the majority and minority will have equal access to information held by the committee. While not sufficient in themselves, these provisions have increased the imperative for the majority on the SSCI to work with the minority more closely than might be the case on other committees. The HPSCI should consider incorporating these aspects of S.Res. 400.

The committees must maintain a focus on the intelligence process and strive to avoid becoming entangled in policy debates. The nuts and bolts of intelligence are far less susceptible to partisan politics than are the policies that intelligence informs. Separating these two realms is increasingly difficult, given the role of intelligence as a key factor informing assessments of the success or failure of national security policies. Nevertheless, the committees should try, as much as possible, to focus on the effectiveness of our intelligence efforts and leave the policy implications of the resulting intelligence assessments to policy committees.

Another issue often considered in this context is whether the committee staff should be unified, with all staffers working for the entire committee, or split along party lines. As with the other structural recommendations, neither staff structure is likely to overcome the tone set by the committee leadership. If the leaders are committed to working on a bipartisan basis, a unified staff can support that commitment, enhance mutual trust, and provide greater efficiency. However, when partisan pressures infiltrate the committee, a unified staff cannot prevent partisanship and can become dysfunctional. Moreover, a unified staff can significantly undermine the ability of the minority to serve the function of bringing potentially alternative viewpoints that we value in our two-party system. Conversely, if the leadership is committed to bipartisanship, a split staff is not likely to undermine that commitment.

Ultimately, the structure of the staff is not likely to be a significant factor in increasing or reducing the partisanship of the committees. As noted above, however, in some circumstances a unified staff may undermine effective oversight by silencing the minority viewpoints. Thus, a split staff may be preferable overall. Steps should be taken to reinforce a close, cooperative working relationship among the entire staff. For example, regular joint staff meetings, particularly among the senior staff, could be encouraged or even required. Access to information or IC personnel should be open to both sides of the aisle equally. Perhaps most importantly, the staff should consist of national security professionals who are focused on the objectives and priorities of the committee.

#### F. “GANG OF EIGHT” BRIEFINGS

Title V of the National Security Act of 1947 codified what had earlier been articulated in the congressional charters for the intelligence oversight committees, that the IC must keep the committees “fully and currently informed” of all intelligence activities. The only situation in which the law provides for reporting only to the committee and chamber leadership—the “Gang of Eight”—is with respect to certain findings for covert actions “[i]f the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United

States.”<sup>7</sup> Even then, the law requires that the President inform the full committee “in a timely fashion.”<sup>8</sup>

Long-time observers in Congress have indicated that there seem to be an increasing number of these “Gang of Eight” briefings. While these briefings have the advantage of severely limiting the number of people with access to very sensitive information, they seriously undermine the effectiveness of Congressional oversight. Members cannot bring staff or share with staff any of the information they receive. They typically do not take any notes and there is no paper record of the briefing other than whatever the executive branch might prepare—and that is not provided to Congress. Members will not always have the institutional memory or familiarity with details to recognize potential problems or areas for further inquiry. They cannot rely upon their staff for any follow up, either to clarify issues or to check on the status of the activities about which they were briefed. The leadership cannot take advantage of the expertise or alternative viewpoints of other members of the committee. Moreover, when full committee hearings are held on issues related to those that are briefed only to the leadership, there is the potential that the other members of the committee will get a misleading picture because significant facts are left out. And when the committee leadership leaves the committee, there is no record or institutional memory of the briefings unless they have subsequently been briefed to the full committee.<sup>9</sup>

Explicit criteria should be established for “Gang of Eight” briefings. Consistent with the law, they should be limited only to the most sensitive covert actions where operational activity is about to be undertaken and lives are at risk. Once the operation has been undertaken, or the highest risk period has passed, the full membership should be briefed. In addition, the committee staff directors for the majority and minority should be included in the briefing. One option might be to brief only the “Gang of Four” (committee leadership) and the four committee staff directors, leaving to the committee leadership the decision of when to brief the House and Senate leaders. Another option might be to include subcommittee chairs in the briefings. Finally, there should be a paper record of the briefing in the possession of the committees.

In addition to establishing these procedures in consultation with the executive branch, the congressional leadership should develop its own procedures to enhance their ability to serve as an appropriate check on the executive branch in this area. For example, Members of Congress who are briefed should routinely meet after the briefing to discuss what they heard and their reactions to it.

---

<sup>7</sup> 50 U.S.C. § 413(b) (2006).

<sup>8</sup> Any discussion of the reporting requirements contained in Title V of the National Security Act of 1947 should be caveated with a reference to the potential dispute between the executive and legislative branches regarding the scope of the President’s constitutional authority to ignore these requirements. In signing statements and comments on various bills over the years, the White House has consistently indicated that they will interpret these provisions consistent with the President’s authority to withhold information from Congress pursuant to his constitutional responsibilities as the Chief Executive and Commander in Chief. Given the wide scope of the GWOT, and the broad interpretation of the commander in chief powers as articulated in recent Justice and Defense Department documents, this could have a significant impact on Congressional oversight.

<sup>9</sup> For further background on the development of “Gang of Eight” briefings, see discussion in L. BRITT SNIDER, CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: SOME REFLECTIONS ON THE LAST 25 YEARS (The Center on Law, Ethics & National Security 2003), available at <http://www.law.duke.edu/lens/downloads/snider.pdf>.



## II. OVERSIGHT REFORM EFFORTS

The *Final Report of the National Commission on Terrorist Attacks Upon the United States* (the “9/11 Commission Report”) concluded that congressional oversight of intelligence is “dysfunctional.”<sup>10</sup> Specifically, the Commission found that the intelligence committees “lack the power, influence, and sustained capability” necessary to meet the future challenges of America’s intelligence agencies. The Report made two major recommendations for restructuring the intelligence committees: (1) creating a bicameral committee, modeled on the Joint Committee on Atomic Energy; or (2) combining the authorizing and appropriating authorities into a single committee in each chamber. Neither of these options was adopted by either the House or the Senate.

In addition, the Report listed some key attributes they recommended for the restructured committee(s). Some of these suggestions were already reflected in the rules governing one or both of the committees (S.Res. 400 for the SSCI and Rule X for the HPSCI). Others were included in a resolution adopted by the Senate in October 2004, S.Res. 445<sup>11</sup>, and in H.Res. 35 adopted by the House in 2007.

The Commission’s suggestions included:

- A subcommittee specifically dedicated to oversight, “freed from the consuming responsibility of working on the budget.”<sup>12</sup>
  - S.Res. 445, adopted by the Senate on October 9, 2004, includes this provision, but no subcommittee has been established. The House has established a subcommittee on oversight.
- Subpoena authority.
  - S.Res. 400 provides this authority already. HPSCI has authority derived from the rules applicable to all House committees.<sup>13</sup>
- Majority advantage in representation not exceeding the minority’s representation by more than one member.
  - This is already provided for in S.Res. 400. The House rule allows for a two-member majority advantage.
- Cross-over members from key committees (Armed Services, Foreign Relations/International Relations, Judiciary, and Defense Appropriations)
  - S.Res. 400 already requires two crossovers from each of the key committees, one from each party. The House rules call for one cross-over from each committee.
  - S.Res. 445 added a provision making the Chair and Ranking Member of the Armed Services Committee *ex officio* members of the SSCI.

<sup>10</sup> THE 9/11 COMM’N, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 420 (2004), available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf>.

<sup>11</sup> The Senate resolution was the product of a working group of 22 Members, chaired by Senators Mitch McConnell (R-KY) and Harry Reid (D-Nev), established by the Senate leadership to consider ways of improving oversight of intelligence and homeland security. S.Res. 445 included a number of changes to the original resolution, S.Res. 400, which had established the SSCI and governed its structure and process since 1976. S. Res. 445, 108th Cong. (2004) (enacted).

<sup>12</sup> THE 9/11 COMM’N, *supra* note 10, at 421.

<sup>13</sup> H.R. Doc. No. Rule XI(m)(1)(B).

- No term limits
  - S.Res. 445 eliminated term limits for SSCI. HPSCI retains term limits of not more than four Congresses in a period of six consecutive Congresses. HPSCI Chair and Ranking Member are exempt from the term limits.
- Fewer members on the committee
  - S.Res. 445 actually added two additional *ex officio* members (see above).
- Finally, the Report comments that the staff of the committee should be non-partisan and work for the entire committee and not for individual members.
  - The Senate has traditionally had a nonpartisan, or “unified,” staff. The HPSCI has a split staff, but the committee rules are written as if there were a single staff governed by the Chair.
  - S.Res. 445 formalizes the split funding for personnel, 60% for the majority and 40% for the minority. Funding is also split on the HPSCI, 2/3-1/3.
  - Contrary to the 9/11 Commission recommendation, S.Res. 445 returned to the practice of having staff on the SSCI who work for individual members as their designees. This practice had been stopped in 1995.

In addition to the changes mentioned above, S.Res. 445 requires quarterly reports to the full Senate; strengthens the role of the Senate leaders, particularly with regard to the appointment of the Chair and Vice Chair of the SSCI; gives SSCI jurisdiction for reporting on all civilian nominees within the IC; and reduces the time for referrals to or from other committees from 30 days to 10 days.

S.Res. 445 also calls for the creation of an Appropriations Subcommittee on Intelligence. This change would require eliminating an existing subcommittee to maintain the current total of 13 subcommittees on Appropriations. This provision has not yet been implemented. The House resolution created a Select Intelligence Oversight Panel on the Appropriations Committee, although it is merely advisory.

### III. EVALUATING ADDITIONAL OPTIONS FOR REFORM

There are many other options for improving congressional oversight of intelligence. The following discussion examines the major advantages and disadvantages of some of these proposals.

#### A. PROPOSALS OF THE 9/11 COMMISSION

##### 1. *Joint Committee*

The creation of a joint House/Senate committee for intelligence oversight, as recommended by the 9/11 Commission, was proposed as early as 1948. Proponents of this recommendation cite the successes of the Joint Committee on Atomic Energy (“JCAE”). It is not clear, however, that the factors that contributed to the strength of that committee would apply today or in the future to a joint intelligence committee.<sup>14</sup> For example, the Supreme Court has since ruled that congressional vetoes are unconstitutional, there are more committees and members today with an interest and asserted expertise in issues related to intelligence, and the JCAE never had to deal with

---

<sup>14</sup> See CHRISTOPHER M. DAVID, CONG. RESEARCH SERV., 9/11 COMMISSION RECOMMENDATIONS: JOINT COMMITTEE ON ATOMIC ENERGY — A MODEL FOR CONGRESSIONAL OVERSIGHT? (2004), available at <http://www.fas.org/irp/crs/RL32538.pdf>.

split control of Congress—something a joint intelligence committee might someday encounter. Moreover, even the JCAE lost its power over time as circumstances changed.

A joint committee might improve the coordination of oversight, reduce the burden on the IC and the duplication of effort within the Congress, and potentially reduce the number of staffers with access to sensitive information. But it may also reduce the effectiveness of oversight, given the difficulty in managing House and Senate member schedules, the potential diffusion of accountability and unclear chain of command, and fewer sources of competing ideas. At any rate, there does not seem to be a political consensus in favor of this approach.

Alternatives may include encouraging or even requiring bicameral hearings/briefings on topics of general interest, such as the Worldwide Threat hearing or budget briefings. The Joint Inquiry into the attacks of 9/11 may also serve as a model for future bicameral investigations into high-profile issues. Additionally, the burden on IC witnesses could be reduced by holding more joint hearings with other relevant committees within each chamber.

## 2. *Combine Authorizing and Appropriating Functions*

The 9/11 Commission recommendation to combine authorizing and appropriating functions in the oversight committees has the greatest promise for increasing the influence of the oversight committees and aligning the expertise gained through oversight with the decisions about allocation of resources. The IC has gotten particularly adept at going around the authorizing committees to the committees that actually control the funding. Yet, the appropriation committees do not even have dedicated intelligence subcommittees and certainly do not have the staff to conduct the kind of comprehensive oversight that is necessary to make informed funding decisions. Congress recognized this problem and enacted Section 504 of the National Security Act of 1947 to prohibit expenditures of funds unless the funds were also specifically authorized.<sup>15</sup> However, this has been undermined for years because the appropriations bills now have boilerplate language stating that, “notwithstanding Section 504,” the funds appropriated are deemed to be authorized.

Combining authorizing and appropriating in one committee would address these problems and strengthen oversight. Nonetheless, this proposal was apparently rejected by both the House and Senate. The appropriations committee chairs were unwilling to give up that jurisdiction, worried about the precedent for other issues, and argued that more eyes and ears, as well as viewpoints, were beneficial. Others were also concerned that such a committee would be too powerful relative to other committees.

## B. RECOMMENDATIONS OF THE WEAPONS OF MASS DESTRUCTION COMMISSION<sup>16</sup>

### 1. *Intelligence Appropriations Subcommittee*

Intelligence subcommittees on Appropriations could help to align more closely the appropriations and authorization authorities and processes. Currently, the intelli-

---

<sup>15</sup> 50 U.S.C. § 414 (2006).

<sup>16</sup> The following proposals were developed by the author of this paper for the Commission on the Intelligence of the United States Regarding Weapons of Mass Destruction and were included in its Report. COMM’N ON THE INTELLIGENCE OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT (2005), available at <http://www.wmd.gov/report/report.html>.

gence appropriations are included in the Defense appropriations bill and, thus, handled by the Defense Appropriations Subcommittee. This was designed primarily so that funding levels for classified programs and activities could be hidden in the large Department of Defense (“DOD”) budget. Traditionally, however, there is only a very small staff looking at the intelligence budget, precisely because it is such a small percentage of the overall DOD appropriation and not the principal focus of the Defense Appropriations Subcommittee. As noted earlier, the Senate has voted to establish a new appropriations subcommittee specifically on intelligence but it has never actually been stood up. In addition, the House has established an Intelligence panel, which has no legislative authority but makes recommendations to the Defense subcommittee and the full Appropriations committee. While the pros and cons of this will be discussed below, it could provide an easier mechanism for coordination.

For example, the chair and vice chair/ranking member of the intelligence committees could also serve as the chair and ranking member of the intelligence authorization subcommittee, increasing coordination between committees. Potential problems with this approach include concern that the time spent running the appropriations subcommittee will detract from the other responsibilities of oversight; reduced flexibility for the leadership and the caucus in allocating committee leadership posts; and, again, the potential loss of diverse viewpoints. Alternatively, the chairs and ranking members of the authorizing committee could serve as *members* of the appropriations subcommittee, and visa versa. The most modest proposal would be to simply add the intelligence appropriations subcommittee to the list of committees required to have cross-over members on the intelligence committees.

Making intelligence the sole focus of a subcommittee, rather than a relatively minor focus of the Defense Appropriations subcommittee, as it now stands, should result in more careful consideration of the intelligence appropriation.

## 2. *Removing or Adjusting Term Limits*

The 9/11 Commission recommended eliminating term limits for membership on the intelligence oversight committees. S.Res. 445 implements that recommendation for the Senate. The HPSCI currently has eight year term limits for all but the chair and ranking member.

Term limits on each committee were initially put in place for several reasons. There was a concern that overseers with long tenures would become co-opted by the entities they were to oversee. In addition, rotation through the committees provided more members with some understanding of intelligence issues and the workings of the committee, something that is otherwise hard to come by given the imperative for secrecy.

Over time, however, there has been a growing concern that term limits may weaken the committees. Because so much of the workings of intelligence are classified, most members come onto the committees knowing very little about the complex issues involved. There is a sense that, just as members finally acquire the expertise needed to independently evaluate and challenge the IC, they are rotated off the committee. Moreover, temporary membership may undermine a member’s commitment to the committee relative to other committees on which their tenure is likely to be much longer.

A compromise between these pros and cons might be to lengthen the terms or to eliminate term limits for *some* of the committee slots rather than for all of the slots. It has always been understood that the leadership could waive the term limits. However, this is rarely done. One option is to make the authority to waive the term limits ex-

plicit in the rules. Further, the rules could state either a preference or a requirement that a specified number of slots should have either longer or no term limits. In all likelihood, there would be a self-selection process in which members who are most committed to the work of the committee would ask to be kept on.

### 3. *Reducing the Reliance Upon Supplemental Funding*

In the normal course of events, the President sends his budget each year to Congress and it goes through a formal process that includes consideration by authorizing committees and appropriations committees. However, occasionally—and increasingly since 9/11—the President sends up a supplemental request for more funding before the end of the fiscal year. Because supplemental budget requests do not go through the authorizing committees, the dramatic rise in supplemental funding for intelligence has undermined the oversight committees, as well as undermined the intelligence activities themselves. The Administration likes supplementals primarily because they can do an end-run around the authorizing committee and it does not appear in the bottom line of the President's budget, making the budget look smaller.

The problem of supplemental funding has been particularly severe since the attacks of September 11, 2001. There were good reasons that the dramatic increase in intelligence funding following those attacks was accomplished through supplemental requests. However, by 2004, it had reached a point where less than 1/3 of the key counterterrorism intelligence needs were included in the President's budget request. The rest was sought later in the form of supplemental budget requests. For FY 2005, for example, the President's budget only included 20% of the funds that the CIA's Counterterrorism Center had determined it would need for the year. This has a devastating effect on the ability of the IC to plan operations and build programs. But it also has a significant impact on the relevance of the authorizing committees, since they have a formal role only in the initial budget request, not in supplemental requests.

Congress can address this problem by: (1) pressing the Administration to dramatically reduce the use of supplemental budget requests; (2) having the oversight committees authorize the full year funding even without the benefit of the President's specific allocation requests; or, (3) requiring that supplemental requests be authorized as well as appropriated. The most preferable approach, from the standpoint of the IC as well as the oversight committees, would be for the President's budget to reflect the IC's needs for the entire year, rather than just the first quarter as was done for FY 2005 counterterrorism operations.

The issue of supplemental funding for the IC became the subject of a largely party-line vote in the House during consideration of the FY 2005 intelligence authorization bill. Still, there is a bipartisan consensus that funding by supplemental requests has gotten out of control and is detrimental.

### 4. *Adjust Budget Jurisdiction*

Currently, the House and Senate oversight committees have different jurisdiction over the various components of the intelligence budget. Both committees have jurisdiction over the National Intelligence Program, previously called the National Foreign Intelligence Program. The HPSCI also shares with the Armed Services Committee jurisdiction over the Military Intelligence Program ("MIP") budget, which covers DOD-specific intelligence programs and activities. SSCI has no jurisdiction over the MIP, although it provides advice to the Armed Services Committee on both budgets. This complicates conference on the intelligence authorization bill and reduces the number

of intelligence oversight voices participating in the Armed Services Committee conference on the MIP.

In addition, the trend toward independent intelligence capabilities within DOD, particularly in the context of Special Operations Command, raises serious questions with regard to potential gaps in congressional oversight. For example, the law requires that Congress be kept “fully and currently” informed of intelligence activities, but “traditional military activities” are exempt from key reporting requirements. To the extent that DOD intelligence activities undertaken around the world as part of the GWOT are considered to fall within this exemption, they are not subject to those oversight provisions. Presumably they receive some scrutiny by the Armed Services committees but those committees do not bring the same depth of intelligence expertise to bear on that oversight.

Broadening the SSCI’s budget jurisdiction expressly to include intelligence programs located within DOD could enhance efforts reflected in the intelligence reform law, as well as efforts long underway at DOD, to better integrate intelligence efforts from the tactical programs through to the national programs and visa-versa.

#### 5. *Mission-based Budget Displays*

Another impediment to congressional evaluation of the effectiveness of budget allocations and expenditures is the way the budget is presented. Because the line items track specific technologies or programs rather than mission areas, it is nearly impossible for Congress—or the executive branch—to determine how much money is being spent on priority targets such as terrorism or proliferation. This is a problem with which the IC and Congress have wrestled for years with very little progress.

Another consequence of the way the budget is presented to, and handled by, the committees is that it generates the same kind of stovepiping along agency lines within the committee staff that has been so problematic in the IC. Thus, when it comes to the budget the staff is likely to be assigned along agency lines rather than mission areas because that is how the budget is presented. The intelligence reform efforts aimed at breaking down those stovepipes in the IC so as to bring greater unity of effort against priority targets should be matched in the oversight committees.

Congress should strongly support efforts by the Director of National Intelligence to use his or her enhanced budget authority to require greater transparency into budget expenditures, with a concomitant requirement to track those expenditures by mission to the greatest extent feasible. This would provide the data necessary to allow the budget to be presented to Congress by mission as well as by traditional programs and activities, which would enhance the ability of oversight committees to conduct cross-cutting evaluations of intelligence efforts against specific targets such as terrorism and proliferation.

#### 6. *Subcommittee on Oversight*

As noted above, the Senate has adopted a resolution calling for the establishment of a SSCI subcommittee on oversight, but currently the SSCI has no subcommittees. The House has established a subcommittee on oversight. Telling the oversight committees to create a subcommittee on oversight may seem odd, but the 9/11 Commission recommended such a subcommittee because it would be “specifically dedicated to oversight, freed from the consuming responsibility of working on the budget.”<sup>17</sup>

---

<sup>17</sup> THE 9/11 COMM’N, *supra* note 10, at 421.

Because authorizing the budget is such a time-consuming task, programs and activities that do not have significant budget implications often do not receive adequate scrutiny unless and until there is a public scandal. Thus, the oversight agenda is often driven by big budget items and the scandals of the day, rather than a careful consideration of oversight priorities. Moreover, the distraction of responding to media reports undermines the kind of persistent, long-term oversight that is necessary to adequately evaluate ongoing intelligence activities.

A subcommittee on oversight could be valuable if its jurisdiction were defined as “ongoing oversight,” as opposed to the big investigations prompted by media stories or the review of the budget. This subcommittee should set an agenda at the start of the year or session of Congress, based on enduring oversight priorities, and stick to that agenda.

For example, the oversight subcommittee could conduct “deep dives” on key issues such as nuclear programs in North Korea and Iran. Ordinarily, the committees do not probe too deeply into the intelligence underlying analytic assessments. There is an implicit understanding that Congress will not inquire as to specifics regarding sources, for example. In the aftermath of the intelligence shortcomings on Iraq’s weapons programs, however, there is a sense that more careful scrutiny may be warranted. Rather than having the entire committee get into sensitive details related to underlying intelligence, the oversight subcommittee could conduct these kinds of inquiries. Alternatively, the subcommittee could do a deep dive to evaluate the effectiveness of the “red team” process. Once assured of the effectiveness of these internal efforts to challenge intelligence analyses, the subcommittee might feel less compelled to second-guess analysis—a task for which almost no members and few staff are really qualified.

#### 7. *Interaction with Policymakers*

Oversight committees could better evaluate the effectiveness of intelligence by having greater interaction with the consumers of the IC’s products, executive branch policy makers. The committees rarely hear from officials at the State or Homeland Security departments, for example. More regular interaction could help the committees determine how well the IC is meeting policymaker needs and could also provide another potential barometer of the accuracy of the IC’s analysis. If policymakers evaluate a situation in a way that is significantly different from the IC’s analysis, it may not be a sign that the IC is wrong, but it may warrant closer scrutiny. At the same time, the committees must use this approach with caution. Policy-maker assessments must be taken with a grain of salt and filtered for bias based on preferred policy outcomes.

#### 8. *Effective Use of Other Oversight Mechanisms*

The committees could also expand their reach by making more effective use of existing oversight mechanisms such as the IGs, the General Accounting Office (“GAO”), and the Congressional Budget Office. Historically, the CIA has not permitted the GAO to examine any of its activities, claiming justification in certain statutory and congressional provisions. Congress should consider fixing this.

Over-reliance on the executive branch oversight mechanisms, such as the IGs, is clearly not advisable and the committees should generally do their own independent investigations into important issues. However, instances that involve intensive fact-

finding could start with an IG investigation and Congress could use the results of that effort to guide its own probe.<sup>18</sup>

#### IV. CONCLUSION

Congress must find ways to improve its oversight of intelligence. This is essential both to enhance public confidence and to ensure that we have the very best intelligence capabilities to meet today's deadly challenges. Robust oversight reflects the values inherent in our system of checks and balances: it not only prevents the accumulation of power in one branch of government, but improves decision making, thereby increasing our national security. Similarly, congressional oversight must ensure and reflect compliance with the rule of law. Demonstrating a commitment to our core democratic values becomes another national security imperative as we wage a battle with terrorists for hearts and minds. Those who care about our nation's national security should be among the most vocal proponents of effective congressional oversight.

---

<sup>18</sup> SNIDER, *supra* note 9.