

## A Review of Congressional Oversight

James S. Van Wagenen

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Permanent, continuing, day-to-day Congressional oversight of the US Intelligence Community (IC) marked its 20th anniversary in May 1996. Two decades earlier, Senate Resolution 400 established the Senate Select Committee on Intelligence (SSCI) following revelations of “intelligence abuses.” In July 1997, the SSCI’s House counterpart, the House Permanent Select Committee on Intelligence (HPSCI), will celebrate its 20th birthday. During this time, the IC’s missions, responsibilities, capabilities, size, and management have experienced dramatic changes. The Congressional oversight committees have played a significant role in shaping these changes and continue to do so.

Some individuals within the Community have argued, with a certain amount of justification, that Congressional oversight has been intrusive, meddling, short-sighted, and counterproductive; has involved micromanagement on a grand scale; and has served to drag the IC into the political cockpit of partisan politics from which it had previously been immune. Others tend to view Congressional oversight as being, on balance and after a somewhat rocky start in the late 1970s, a decided plus for the Community by providing loci for Congressional advocacy and support for intelligence and by providing rigorous review and questioning of intelligence activities and budgets.

Perhaps, in looking back at what Congressional oversight has and has not been, we will be better able to discern the future of oversight by the

Congress. First, it is important to dispel the popular notion that Congressional oversight started with the establishment of the SSCI and the HPSCI. That notion is not accurate. Before their establishment, however, oversight was certainly not intense or much of an inconvenience to the agencies that carried out intelligence activities.

### The Revolutionary War Experience

It is somewhat ironic that at the beginning of the republic, intelligence operations were conducted by the forebearer of today’s Congress—the Continental Congress. During the Revolutionary War, the Second Continental Congress not only functioned as the government of the 13 rebellious colonies, but also planned, directed, and carried out intelligence activities in support of the war effort. Secret committees of the Congress were formed for this purpose, and covert actions, use of secret writing, codes and ciphers, protection of sources, compartmentation, propaganda, and deception all were in the “bag of tricks” used by these “legislative intelligence officers.” (Thomas Paine, the author of *Common Sense*, was fired from the staff of a secret committee for leaking information on France’s covert assistance to the colonies.) Agents employed by the Continental Congress succeeded in obtaining covert aid for the war effort from France and Spain and, following the Battle of Saratoga, the open entry of those countries into the war against the British.

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Other agents on the Congressional payroll scoured European capitals for intelligence as well as indications and warning of impending events such as the plan by King George III to send German troops (lumped together by the colonists as “Hessians”) to America to put down the rebellion. The Continental Congress was alerted to this plan, and Thomas Jefferson alluded to the use of “Foreign Mercenaries” as part of his indictment of King George contained in the Declaration of Independence.

### Establishing a Secret Fund

At the conclusion of the war, and following a turbulent decade under the weak and ineffective Articles of Confederation, the new United States adopted the Constitution and elected George Washington as its first President. One of the first things he did was to request the Congress to appropriate for his use a “secret fund,” contained in the budget of the Department of State and innocuously called the “Contingency Fund for the Conduct of Foreign Intercourse.” This fund was a pot of money available to the President for clandestine intelligence purposes. By the third year of Washington’s presidency, the fund amounted to 12 percent of the national budget. Expenditure of money from the fund was done on the signature of the President, with no further accounting required. (This practice established the precedent for a similar provision contained in the CIA Act of 1949.)

The secret fund was used for numerous intelligence operations by our early presidents, including:

- Funding negotiations (bribes) with Napoleon Bonaparte to try to get him to coerce Spain into ceding East and West Florida to the United States. Later, when these “negotiations” failed to bear fruit, the fund was used to promote revolution in the Floridas, and this prompted Spain to see the wisdom in such a territorial transaction.
- Funding the Lewis and Clark and the Zebulon Pike expeditions, which in part were intelligence missions with the goal of entering territories of foreign governments with which the United States was at peace, in order to locate and map their fortifications.
- President James Madison used the secret fund to enlist gangsters for intelligence purposes. The pirate Jean Laffite and his men were paid to scout, spy, and sometimes fight for Gen. Andrew Jackson during the War of 1812.

### Early Attempts at Oversight

From time to time during the early years of the republic, members of Congress tried to obtain an accounting of expenditures made from the President’s secret intelligence fund as well as to effect oversight of the activities it was used to finance. In one debate over this issue, Senator John Forsyth, later to become Secretary of State, declared:

*The experience of the Articles of Confederation having shown the necessity of secret confidential agencies in foreign countries, very early in the progress of the Federal Government, a fund was set apart, to be expended at the*

*discretion of the President, on his responsibility only, for all purposes to which a secret service fund should or could be applied to the public benefit. For spies, if the gentleman pleases....*

Later, some opposition members of Congress suspected President James Polk was using the secret fund for agents provocateurs in Mexico and California for the purpose of fomenting “incidents” designed to provoke a war with Mexico and thus ensure that Texas and California would become part of the United States. A Congressional demand was made that Polk surrender to the Congress all accounts of payments from the fund. Polk refused, stating:

*The experience of every nation on earth has demonstrated that emergencies may arise in which it becomes absolutely necessary for the public safety or the public good to make expenditures, the very subject of which would be defeated by publicity. In no nation is the application of such funds to be made public. In time of war or impending danger, the situation of the country will make it necessary to employ individuals for the purpose of obtaining information or rendering other important services who could never be prevailed upon to act if they entertained the least apprehension that their names or their agency would in any contingency be revealed.*

### Period of Benign Neglect

President Polk’s defiant stance regarding Congressional oversight

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*will, to seek information and knowledge on subjects which I personally, as a member of Congress and as a citizen, would rather not have....*

Another member commented several years later that:

*I have found little hesitation on the part of the Congress to support and to finance our intelligence work with all its secrecy.*

This hands-off view of oversight continued to be the accepted modus operandi of the Congressional oversight bodies for over a quarter of a century following the creation of the CIA in 1947. Congressional historians refer to it as an “era of trust” or as the “period of benign neglect.” As the 1970s approached, however, ominous clouds started to appear.

### Getting Tough

By the early years of the 1970s, the unpopular war in Southeast Asia and the unfolding Watergate scandal brought the era of minimal oversight to a screeching halt. The Congress was determined to rein in the Nixon administration and to ascertain the

effectively staved off significant oversight by the legislative branch for more than a century. It was not until after World War II and enactment of the National Security Act of 1947 that the Congress again tried to oversee US intelligence activities.

With the establishment of the CIA as the nation's first permanent, statutory, and national intelligence entity, each house of the Congress assigned oversight responsibility over this new executive branch capability to its respective Armed Services Committee and Appropriations Defense Subcommittee. In actual practice, awareness of CIA's and other intelligence agencies' activities was limited largely to the chairmen and ranking minority members of those committees/subcommittees. Staff cognizance was generally restricted to one or two senior staff members of each of the oversight bodies whose principal job was to make certain that the needs of the intelligence agencies were included in the annual Defense Department budget. Oversight, such as it was, was typically worked out by the Director of Central Intelligence and a few senior members of the Congress, with little involvement of the Congress as a whole.

While occasional proposals were put forth during the 1950s and 1960s to conduct more robust oversight by establishing select intelligence committees, none of these proposals was ever seriously considered. Most members of Congress tended to agree with the view expressed by Senator Leverett Saltonstall, who stated in 1956:

*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*

extent to which the nation's intelligence agencies had been involved in questionable, if not outright illegal, activities.

A series of troubling revelations started to appear in the press concerning intelligence activities. The dam broke on 22 December 1974, when *The New York Times* published a lengthy article by Seymour Hersh detailing operations engaged in by the CIA over the years that had been dubbed the “family jewels.” Covert action programs involving assassination attempts against foreign leaders and covert attempts to subvert foreign governments were reported for the first time. In addition, the article discussed efforts by intelligence agencies to collect information on the political activities of US citizens.

These revelations convinced many Senators and Representatives that the Congress itself had been too lax, trusting, and naive in carrying out its oversight responsibilities. (Many of the so-called family jewels had been briefed to some members on the existing oversight panels, but in the highly charged atmosphere of the Watergate period they tended to opt for selective amnesia when asked if they had known about these activities.)

The first legislative response was enactment in 1974 of the Hughes-Ryan Amendment to the Foreign Assistance Act of 1961. This amendment addressed the question of CIA covert actions and prohibited the use of appropriated funds for their conduct unless and until the President “finds” that each such operation is important to the national security and submits this Finding to the appropriate Congressional

committees—a total of six committees. (This grew to eight committees after the House and Senate intelligence committees were established.)

The following year, Congress actually terminated funding for a covert program—the secret military support of the UNITA faction in the Angolan civil war. In early 1975, additional disclosures surfaced regarding CIA domestic spying operations and the COINTEL program of the FBI to undermine the activities of the civil rights and anti-Vietnam war protest movements.

These further revelations convinced the Congress that it could not rely solely on the presidentially chartered Rockefeller Commission to investigate illegal abuses, both foreign and domestic, committed by US intelligence agencies. Each house of the Congress proceeded to establish its own special investigating committee. In the Senate, this committee became known as the Church committee, named for its chairman, Senator Frank Church of Idaho. The House committee was the Pike committee, after its chairman, Representative Otis Pike of New York.

During 1975 and the first half of 1976, the country was rocked by an almost daily stream of disclosures from these committees documenting a pattern of misconduct by the nation's intelligence agencies. These disclosures concerned fairly widespread abuse of the civil rights of American citizens; activities that violated applicable laws and executive branch policies; and clandestine operations overseas that seemed to conflict with US values. At the same time, however, these investigations served to educate committee members about the valuable contributions

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the intelligence agencies had made in protecting national security and about the significant capabilities they possessed.

As shocked as these members were over the abuses, they were equally impressed by the abilities of the Intelligence Community (IC) and did not want to advocate any action that would remedy the former but destroy the latter. They did, however, want to establish a mechanism to ensure that henceforth the intelligence agencies would have effective Congressional supervision, accountability, and oversight. Consequently, both the Church and Pike committee final reports\* recommended the establishment of new, follow-on, permanent committees in their respective houses of Congress to provide continuing oversight and to consider such additional legislation as might be deemed necessary.

\*The Pike committee never published an official final report because its draft report was leaked to *The Village Voice* newspaper before completing a security review, and the full House disbanded the committee in embarrassment.

These recommendations led to the establishment of the SSCI on 19 May 1976 and the HPSCI on 14 July 1977. The HPSCI was established more than a year after the SSCI because the House of Representatives was so disgusted with the leaking of the Pike committee report that it was not certain it wanted a permanent intelligence committee.

The first few years of the new oversight committees were somewhat rocky as they fought for turf with more established committees, principally the Armed Services and Appropriations Committees, which had previously been responsible for Congressional oversight of intelligence. They also battled the Carter administration over the issue of charter legislation for each of the intelligence agencies. Essentially, this proposed legislation would have defined in law precisely the mission of each intelligence agency and the activities each could and could not undertake. The executive branch opposed such definitive legislation, and it eventually succeeded in preventing its enactment. In 1978, however, the oversight committees did enact the first Intelligence Authorization Act, which gave them the ultimate oversight hammer—control of the IC's purse strings.

### Cooperation and Legislation

In these early years, the committees slowly distanced themselves from the Church and Pike committees to become Congressional advocates for intelligence. The Soviet invasion of Afghanistan and the Iranian seizure of American hostages in Tehran helped persuade the public and the Congress that too tight a rein on the intelligence agencies could be disastrous. As

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a result of this changed outlook, the proposals for intelligence charters died. Congressional oversight, following the landslide victory of Ronald Reagan in the election of 1980, changed gears from trying to control the intelligence agencies to seeking to assist them in carrying out their responsibilities.

Congressional oversight, which had gone from benign neglect in the 1950s, 1960s, and early 1970s to oversight based on suspicion, doubt, and micromanagement in the late 1970s, entered an era of cooperation in the 1980s. In fairly rapid succession, the oversight committees either drafted or assisted other Congressional committees with concurrent jurisdiction in drafting a series of legislative initiatives which, upon becoming law, proved to be of great assistance to the IC.

First came the Foreign Intelligence Surveillance Act, which requires that a court order be obtained from a special court established by the Act for all electronic surveillance for intelligence purposes within the United States. (In 1994, this Act was expanded to impose the same court order procedure for physical surveillance for intelligence purposes.) Next came the Classified Information Procedure Act, which established statutory procedures for the handling of classified information in Federal criminal proceedings. The Intelligence Oversight Act of 1980 amended the Hughes-Ryan Amendment to require notice of covert actions only to the two intelligence committees; the requirement to notify six other committees was eliminated. In 1982, the Intelligence Identities Protection Act became law, making it a crime to reveal the identity of intelligence agents. This

was followed by the enactment in 1984 of the CIA Information Act, which exempted certain CIA operational files from requirements of the Freedom of Information Act.

#### **Renewed Tension**

The spirit of cooperation between the Congressional oversight committees and the IC was sorely tested during the first administration of President Ronald Reagan. The oversight committees, particularly the HPSCI, became increasingly alarmed over the role US intelligence agencies were playing in the implementation of the administration's Central American policy. The issue of greatest concern was the CIA's support to the Contra rebels in Nicaragua. Ultimately, a series of funding restrictions were enacted (the Boland amendments) that put limits on aid to the Contras.

The second Reagan administration produced the so-called Iran-Contra affair, which the oversight committees viewed as the most serious breakdown of the trust between the executive branch and the Congress since the oversight committees were established. In late 1986, the committees learned that a covert action Finding had been approved 10 months earlier authorizing arms sales to Iran in an effort to secure the

release of Americans being held hostage in Lebanon. This Finding had specifically ordered that the oversight committees not be notified. It was then revealed that proceeds from the arms sales were used to provide assistance to the Contras that appeared to violate the Boland amendments. During the course of their investigations, the committees learned that some administration officials and IC personnel had considered the idea of using excess funds from the Iranian arms sales to fund covert action programs, thus completely avoiding the Congressional oversight process.

A special prosecutor was appointed to investigate violations of applicable laws, and the oversight committees tried to enact legislation to force the President to notify the committees of all covert actions within 48 hours. Several legislative attempts were made to achieve this, and, in 1990, such a provision was included in the Intelligence Authorization Bill for fiscal year 1991. President Bush vetoed the bill, principally because it contained this provision. The committees were unable to secure a veto override, and they ended the dispute by agreeing to accept notification "in a timely fashion." But the issue remains far from resolved, and some future incident could easily revive it.

#### **Reorganization**

In January 1990, the chairmen of both intelligence oversight committees introduced far-reaching bills to reorganize the IC. During the first half of 1992, the two committees held extensive public hearings on these proposals. By fall, and after several months of negotiations with the Bush administration, the committees attached "The Intelligence

Organization Act of 1992” to the fiscal year 1992 Intelligence Authorization Act. This new legislation did not represent a radical departure from the status quo. Essentially, it merely enshrined into law what Director of Central Intelligence (DCI) Robert Gates had already accomplished in restructuring the IC. It did, however, represent a significant change in the legal framework for US intelligence activities. In amending the National Security Act of 1947, this new statute:

- Recognized the DCI as the statutory adviser to the National Security Council.
- Established the National Intelligence Council as the highest authority for developing and publishing intelligence analysis.
- Gave the DCI responsibility for establishing priorities for US Government intelligence-gathering and for coordinating all HUMINT collection.
- Gave the DCI approval authority for the budgets of the intelligence agencies.
- Defined the composition of the IC for the first time.

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The Intelligence Organization Act of 1992 represented the first successful effort by the Congress since the National Security Act of 1947 to enact organizational legislation for the IC.

In the Intelligence Authorization Act for fiscal year 1995, the oversight committees included a provision mandating a Presidential Commission to review the roles and missions of US intelligence agencies in the post-Cold War era. This commission, chaired by former Defense Secretary Les Aspin and, after his death, by another former Defense Secretary, Harold Brown, met its charge of producing a report to the President and the Congress by 1 March 1996. The Congressional oversight committees will play a central role in transforming any of the Commission’s recommendations into law in the event it is necessary to amend or replace existing statutes, such as the National Security Act of 1947 and the CIA Act of 1949.

### The Balance Sheet

At this point, no other major legislative initiatives appear to be on the horizon. The two oversight committees continue to exercise oversight and to use their fiscal control to obtain the intelligence agencies’ compliance when necessary. Year in and year out, however, the committees authorize and the appropriations committees appropriate the bulk of the budget requested by the DCI. Changes made by the committees really amount to nibbling at the margins. In addition, the oversight committees have not been at all reluctant to increase funding for programs and capabilities they perceive to be important. In several instances over the years, the committees have actually pushed the IC and the administrations into larger and more expensive programs involving technical collection systems, HUMINT, and certain covert action operations.

Today, Congressional oversight is accepted and recognized as a fact of life. The top echelons of the IC are replete with former professional staffers of the intelligence committees, and the committees themselves continue to draw staff expertise from the Community. While the Congressional oversight committees are among the harshest critics of the intelligence agencies, they are also their strongest defenders.