

PART II

WHAT THE RELATIONSHIP PRODUCED

CHAPTER 5

LEGISLATION

This chapter primarily deals with the statutes Congress enacted between 1946 and 2004 that affected the CIA's mission, authorities, and organization. It does not include statutes that merely authorized or appropriated funds for the Agency, imposed funding or operational restrictions, or established oversight requirements vis-à-vis the Congress. The actions of Congress with respect to the Agency's funding, as well as the imposition of operational restrictions, are covered in subsequent chapters, whereas chapters 1 and 2 dealt with the laws concerning oversight.

From the creation of the Agency in 1947 until the establishment of the permanent select committees on intelligence in the mid-1970s, there was relatively little legislation in this area. Only three statutes, in fact, fell into the aforementioned categories, and all were developed largely by the Agency and supported by the administration in power. With the advent of the select committees, however, Congress began to develop and enact more legislation affecting the Agency's mission, authorities, and organization. Not only did the annual authorization bills for intelligence developed by the select committees offer new opportunities to bring legislation affecting the CIA to the floor, but the committees themselves increasingly took the initiative to propose such legislation. This chapter will highlight the most significant enactments during the 58-year period covered by the study.

The reader should also appreciate that a considerable part of the Agency's legislative efforts over this period has been to keep laws from being enacted that it did not want. While the Agency has had mixed success in dealing with legislation of this kind, it is beyond the purview of this study to deal with these episodes. Instead, the body of this chapter, apart from the author's commentary at the end, deals only with laws that came to fruition.

The Agency's Original Charter: Section 202 of the National Security Act of 1947

As described in chapter 1, the first DCI, Sidney Souers, at the end of his short tenure as head of the CIG, recommended that CIG seek independent stat-

utory authority from the Congress. His successor, Hoyt Vandenberg, agreed and in the fall of 1946 set his legal staff to drafting a bill modeled on the Truman directive establishing the CIG. In addition to setting out functions for the Agency, the bill would include special enabling provisions (for example, the right to hire and fire personnel and the authority to protect sensitive information and the sources and methods used to collect it) to allow the agency to carry out its mission.¹ In late 1946, Vandenberg submitted the draft legislation to the White House for inclusion in the “merger” bill that was being drafted to unify the armed services.

While the White House was amenable to including language in the bill to establish a “central intelligence agency,” Vandenberg was advised that the enabling provisions he had proposed would have to wait. “All but the slightest reference” to CIA had to be removed from the merger bill,” the White House advised, “because the topic of intelligence and who should control it was too controversial.”² The White House wanted nothing in the bill “which might in any way hamper the successful passage of the Act.” Before the bill was sent over, CIG contacted members of Congress whose committees would likely handle the legislation and also advised them this was sound strategy.³

The draft legislation sent to the Congress by the Truman administration on 26 February 1947 contained a short section providing for the establishment of a central intelligence agency (hereafter, the CIA provision) that would operate under the supervision of the National Security Council, also created by the proposed law. It would be headed by a director of central intelligence, selected from the military or civilian sectors, and would inherit the “functions, personnel, property, and records” of the CIG.⁴

The bill was referred to the Armed Services Committee in the Senate and to the Committee on Expenditures in the House, which had jurisdiction over reorganizations within the executive branch. CIG immediately began working behind the scenes with friendly members of both committees to ensure passage of the legislation.⁵

For the most part, the proposal received a positive reaction from the Congress. Uncertainty and concern about Soviet expansionism in Eastern Europe and the Middle East were growing, and an organization like the CIA was seen as necessary to containing it. But passage of the CIA provision was far from

¹ CIA draft study, Vol. I, 9.

² *Ibid.*, 10.

³ *Ibid.*, 11. Also see Pforzheimer interview, 9 July 1996, 94, referring to his conversation with Senator Gurney, then chairman of the SASC.

⁴ CIA draft study, Vol. I, 11.

⁵ *Ibid.*, 11–12.

certain, as various elements worked behind the scenes to scuttle it. Even former OSS Director William Donovan, who had promoted the idea of a civilian intelligence agency to President Roosevelt but was left out of the postwar planning for such an organization, told Congress that responsibility for intelligence was best assigned to the Pentagon.⁶ The State Department and heads of military intelligence organizations, fearing Congress might end or curtail their own capabilities if the new agency was created, also worked behind the scenes to oppose the CIA provision.⁷

In the end, however, their objections did not carry the day. Donovan's proposal was offered in the Senate but rejected, and under pressure from the White House, the Secretaries of State, War, and the Navy sent a letter to the Congress assuring it that they did not see the creation of CIA as impinging upon their own departmental intelligence capabilities. Indeed, Congress ultimately added language to the Truman proposal making clear that other departments and agencies could "continue to collect, evaluate, correlate, and disseminate departmental intelligence."⁸

Congress also made other changes to the bill submitted by the Truman administration, although none altered the original proposal significantly.

The Truman proposal had provided that the DCI could be appointed from the civilian or military sectors. Congress agreed with this but provided that the appointment be made with the "advice and consent" of the Senate. It also provided that any DCI selected from the military would have to sever all ties to the military, albeit without giving up commission, rank, or benefits.⁹

In the interest of minimizing controversy about the functions of the new agency, the Truman proposal had simply incorporated by reference the functions ascribed for CIG as they had been printed in the Federal Register of 22 January 1946. This prompted a specific objection, as well as more generalized concern, from various members. The specific objection involved the new agency's domestic activities. The CIG directive had prohibited it from exercising "police, law enforcement, or internal security powers," and certain members, some fearing the creation of "an American Gestapo," believed it was important to spell out this restriction into the statute rather than leaving it to an executive directive that might later be changed. Vandenberg readily agreed, and the House added language to the administration's proposal providing that "the Agency shall have no policy, subpoena, law-enforcement powers, or internal security functions."

⁶ *Ibid.*, 12.

⁷ *Ibid.*; Barrett, *CIA and Congress*, 10–19.

⁸ *Ibid.*, 14.

⁹ *Ibid.*, 16.

Congress throughout the deliberation continued to raise general concerns about relying on executive directive to spell out CIA's functions. "It should not be necessary," as one senator argued, "to go to an Executive order to interpret a statute." Another congressman warned that it would be dangerous to create an organization like the CIA on the basis of an executive directive "which could be changed, amended, or revoked or anything else at any time."¹⁰ In the end, Congress set out the functions of the CIA within the statute itself, albeit without significantly altering the wording of the Truman directive.

The Agency would be charged by the law with advising the National Security Council (established pursuant to the Act) on intelligence matters and making recommendations with respect to the coordination of national intelligence activities. It would "correlate and evaluate" intelligence and ensure its "appropriate dissemination" within the government. The DCI would also be responsible for "protecting intelligence sources and methods from unauthorized disclosure."

Furthermore, the law authorized CIA to perform "such additional services of common concern as the National Security Council determines can be more efficiently accomplished centrally." At least the committees that handled the legislation understood this to mean that the CIA was authorized to engage in espionage activity abroad pursuant to extant NSC directives. CIA legislative liaison, Walter Pforzheimer later explained that the committees

didn't want the word "espionage" or "spy" or something on that order to appear in the law. They wanted us to do it quietly. They expected it to be done. . . . But they didn't want it in the law, or mentioned, or even breathed, in public. That's the way the atmosphere was then.¹¹

In other words, expressly authorizing CIA to conduct espionage was considered too impolitic at the time to place in a public statute.

The last function listed in the law gave CIA authority "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." While there is no indication in the records of the Agency or from the proceedings in Congress that this language, at the time it was adopted, was intended to authorize what became known as "covert action," it later became the statutory basis for the Agency's undertaking such activity (see chapter 9).

¹⁰ Ibid., 18.

¹¹ Pforzheimer interview, 9 July 1996, 117–18.

Congress ultimately enacted section 202 as part of the National Security Act of 1947 by voice vote, and President Truman delayed a trip to Missouri to visit his dying mother in order to sign it into law on 26 July 1947.¹²

The CIA Act of 1949

Almost immediately after passage of the law, CIA began seeking the “enabling” legislation that had earlier been put off to avoid controversy. In the fall of 1947, it presented the proposal to the Bureau of the Budget, which coordinated the administration’s position on proposed legislation.¹³

Getting administration approval, however, took several months and thus limited the time for the bill’s consideration during the next session of Congress. The Agency was able to get the SASC and HASC to hold closed hearings on the bill in the spring of 1948, where DCI Hillenkoetter, who had replaced Vandenberg, explained the need for the legislation:

It was thought, when we started back in 1946, that at least we would have time to develop this mature service over a period of years. . . . Unfortunately, the international situation has not allowed us the breathing space we might have liked, and, so, we present this bill, we find ourselves in operations up to our necks, and we need the authorities contained herein as a matter of urgency. . . . It is necessary to use funds for various covert or semi-covert operations and other purposes where it is impossible to conform with existing government procedures and regulations. . . . In many instances, it is necessary to make specific payments or reimbursements on a project basis where the background information is of such a sensitive nature from a security standpoint that only a general certificate, signed by the Director of the CIA, should be processed through even restricted channels.¹⁴

The authority Hillenkoetter described as “urgent” was, in fact, the key feature of the proposed bill: the Agency would be able to expend funds without regard to the laws and regulations that governed the expenditure of government funds and, indeed, could account for those funds based solely on the certificate of the DCI. The administration’s proposal would also allow the DCI,

¹² Barrett, *CIA and Congress*, 24. For a detailed account of the legislative process that led to the enactment of the CIA provisions of the National Security Act of 1947, see Troy, *Donovan and the CIA*, 365–402.

¹³ CIA draft study, Vol. I, 20.

¹⁴ Quoted in Barrett, *CIA and Congress*, 41.

“in furtherance of the national intelligence mission,” to bring up to 50 aliens into the country and provide them with permanent resident status, as well as provide CIA with a number of other significant administrative authorities.

While CIA was able to get approval from the HASC for the bill in May 1948 and a favorable vote in the Senate in June, Congress adjourned for the political conventions in August without a vote in the full House.¹⁵

Determined to obtain the authority he deemed crucial to the Agency’s operations, Hillenkoetter resubmitted the bill to Congress in February 1949. This time, the Agency prepared a detailed justification for each provision in the bill for its SASC and HASC subcommittees and was prepared to go into such detail as might be necessary to obtain their approval. Its concern proved unfounded, however, as the bill received prompt and favorable consideration from both committees. Indeed, CIA records do not indicate that either committee added amendments to the bill. Moreover, because the justification for the bill necessarily involved discussion of the Agency’s operational needs, floor debate on the measure was minimal. While the chairmen of both the House and Senate Judiciary Committees raised an objection on the floor of each house, questioning the provision allowing the DCI to bring (now up to a 100) aliens into the country for permanent residence, neither of their objections proved decisive.¹⁶ The Senate passed the bill unanimously; the House passed it 348–4.

Despite the limited consideration Congress gave to what became known as the CIA Act of 1949, it provided the Agency with significant authority to execute and protect its activities. In addition to the authority to bring up to 100 aliens into the country each year, the Agency was authorized to expend appropriated funds “for purposes necessary to carry out its functions . . . notwithstanding any other provision of law.” This provision essentially exempted CIA from compliance with the myriad of “housekeeping” statutes that applied to other departments and agencies of the federal government and allowed it to establish its own personnel and pay systems. CIA could also now expend funds “for objects of a confidential, extraordinary, or emergency nature . . . solely on the certificate of the Director,” allowing it to use its funds for espionage operations and covert action without having to account (to external auditors) for the expenditure of such funds other than having the DCI certify to their use for such purposes—again, authority not available to other departments and agencies. The Agency was also authorized to transfer and receive funds from other government agencies, allowing it, among other things, to hide its annual appropriation in the appropriations of other agencies. It was

¹⁵ CIA draft study, Vol. I, 21–23.

¹⁶ *Ibid*, 23–26; Barrett, *CIA and Congress*, 40–48.

also granted special procurement authority and exempted from laws that might require the disclosure of its organization, functions, or personnel.¹⁷

Additional Legislation: 1949–64

Not all of CIA's administrative needs were apparent at the time Congress considered the 1949 Act. In 1953, the Agency persuaded Congress to amend the 1947 statute to establish the post of deputy director of central intelligence and repeal a provision of the 1949 Act that had hindered its ability to pay salaries high enough to attract scientists to its employ.¹⁸

Then, in 1964, the Agency sought congressional approval for a special retirement system for employees with at least five years of service in overseas posts where their duties were considered hazardous. This initiative grew out of an Agency-conducted career development study, which had concluded CIA employees serving in such circumstances deserved at least the same benefits as their colleagues in the Foreign Service. Working virtually on his own, CIA legislative counsel John S. Warner managed to overcome the administration's resistance to the proposal and offered it to the CIA subcommittees of the SASC and HASC. After receiving a negative reaction by the SASC staffer assigned the legislation, Warner elevated the matter to DCI McCone, who met personally with the staffer to convince him of its importance to the Agency. This alone proved enough to overcome the staffer's opposition. On the HASC, the staff worried that Agency officers could qualify for the additional benefits, having served only in "plush" assignments, but Warner assured them this was not what was intended. To obtain their agreement, he offered to share with them the Agency's implementing regulations. On this basis, the proposal went through, without hearings or debate in either house. "It was trust," Warner later explained. "I really don't think [the committees] understood it, but they believed in us."¹⁹ The law became known as the CIA Retirement Act of 1964, and authorized the creation of the CIA Retirement and Disability System (CIARDS).

The Foreign Intelligence Surveillance Act of 1978

Soon after its creation in 1976, the SSCI began developing detailed legislation to implement the Church Committee's recommendations to set forth for

¹⁷ See 50 U.S.C. 403a *et seq.*

¹⁸ CIA draft study, Vol. I, 39.

¹⁹ Warner interviews, 2 November 1999, 83-87, and 9 October 1987, 5.

the first time in law what, in the words of a White House press release, intelligence agencies “may do and what they may not do.”²⁰ Initially, CIA, as well as the newly installed Carter administration, endorsed the committee’s effort and worked with it to develop a bill that both branches could support. In time, however, as the legislation became increasingly restrictive and burdensome to implement, CIA’s concerns grew and the administration withdrew its support for key sections of the bill. By 1980, it was clear that the committee’s effort to enact statutory “charters” for the intelligence agencies, including CIA, had failed.²¹

Earlier in the course of this three-year process, however, the SSCI and the Carter administration were able to reach agreement in principle on a particular aspect of the committee’s legislative agenda: legislation to deal with the practice of warrantless electronic surveillances undertaken within the United States for foreign intelligence purposes. Rather than waiting for the denouement of the “charters” bill, the committee introduced the legislation in 1977 (largely developed by the Carter Justice Department) that embodied this agreement. Although responsibility for handling the bill in Congress ultimately passed to the Judiciary Committees on both sides (which had jurisdiction over wiretapping, as well as criminal statutes generally), what became the Foreign Intelligence Surveillance Act of 1978, or FISA, passed both houses with ease.

The new law purported to provide the exclusive procedure for conducting electronic surveillance within the United States for foreign intelligence purposes. It established a special court located at the Department of Justice, whose proceedings would be secret, to hear applications for warrants in such cases and established standards and criteria upon which such applications would be granted.

The law did not mention CIA *per se* and, given the limitations upon its activities within the United States, did not directly affect its activities. There was, however, an indirect effect. If the Agency wanted electronic surveillances to be carried out in the United States for foreign intelligence purposes—which it typically requested the FBI to conduct—from here on, any such request would have to meet the standards and criteria of the FISA. Notwithstanding, Agency records reflect its contentment with, and support for, the new law.²²

²⁰ CIA draft study, Vol. II, 167.

²¹ *Ibid*, 164–78; Smist, *Congress Oversees*, 123–27.

²² CIA draft study, Vol. II, 168.

The Classified Information Procedures Act of 1980

The SSCI also developed legislation in conjunction with the Carter administration to address the problem the government had often encountered in prosecuting espionage cases. In dealing with what was known as the “gray-mail” problem, the government occasionally had to forgo prosecution of an espionage case because it did not want to reveal in open court the classified information that had allegedly been passed to an unauthorized person. The legislation Congress passed in 1980 provided a statutory procedure to govern the use of classified information by courts that were considering such prosecutions. From here on, the government would have the option of redacting sensitive information and/or substituting new characterizations of the information of concern, so long as the court agreed that a defendant’s rights were sufficiently protected by the process.²³

While the CIA was not specifically mentioned in this statute, it benefited from the legislation. From time to time the Agency had not prosecuted an employee under the espionage laws because of the “graymail” problem. Accordingly, it supported the committee’s bill.

The Intelligence Identities Protection Act of 1982

More directly tied to the Agency’s operations was the legislation passed in 1982 to make it a crime to expose its covert agents. In 1975, Richard Welch, the Agency’s chief of station in Athens, was assassinated, his identity having been revealed by a former Agency officer, Philip Agee, in his magazine, *Counter Spy*. In the ensuing years, the Agency estimated that Agee and Louis Wolf, editor of a publication called the *Covert Action Information Bulletin*, had revealed the identity of more than a thousand CIA officers, endangering their lives and severely hampering Agency operations. Then-presidential candidate Ronald Reagan had made passage of legislation to deal with this intolerable situation a priority before his election. Once Reagan was elected, his choice for DCI, William Casey, worked with both intelligence committees to develop and pass such legislation.²⁴

The new law made it a crime for persons having authorized access to information identifying a covert agent to deliberately disclose such information to an unauthorized person, if the person making the disclosure knew that the US government had taken “affirmative measures” to protect the identity of such

²³ *Classified Information Procedures Act*, Public Law 96-456, 15 October 1980.

²⁴ CIA draft study, Vol. III, 18–21.

covert agents. Persons violating the law were made subject to fines and/or imprisonment up to 10 years.²⁵

Although some in the media criticized the legislation as violating the First Amendment guarantee of a free press, the bill passed both houses of Congress by overwhelming majorities. Agency records reflect that a ceremony was held at CIA Headquarters on 23 June 1982, where President Reagan signed the bill into law.²⁶

Exemption from the Freedom of Information Act for CIA: 1984

In 1974, Congress had passed amendments to the Freedom of Information Act (FOIA) of 1967 that required agencies to search their records in response to a request from a member of the public, to identify such documents as may be responsive to the request and to provide such documents to the requestor so long as they did not fall into one of the nine categories exempted from disclosure. Although “properly classified” documents was one of the exemption categories, intelligence agencies, including the CIA, were not exempt from the Act per se and thus had to search their records, identify relevant documents, and determine whether they were “properly classified.” Only then could they be withheld from the requestor.²⁷ President Ford vetoed these amendments at the urging of CIA and other agencies on the grounds that they interfered with his constitutional responsibilities, but Congress overrode his veto.

The Reagan administration, as part of its efforts to rebuild the Intelligence Community, had made relief from the FOIA a priority. In 1981, DDCI Bobby Inman appealed to Congress for a total exemption for the Agency. Casey went even further and asked for an exemption for all US intelligence agencies, noting that there was an inherent contradiction involved in applying a law designed to ensure openness to agencies whose work was necessarily secret. He went on to tell senators that CIA officers spent as much as 5 percent of their day on FOIA requests, often more time than they spent on any other single problem central to the Agency’s mission.²⁸

Both intelligence committees were receptive to providing the Agency with relief from the FOIA, but the idea of exempting it altogether drew severe opposition from historians, journalists, and the ACLU. This caused the Agency’s legislative staff to begin looking, along with the staffs of the two committees, at

²⁵ See §601 of the *National Security Act of 1947*, as amended.

²⁶ CIA draft study, Vol. III, 21.

²⁷ See 5 U.S.C. 552.

²⁸ CIA draft study, Vol. III, 21–22.

ways acceptable legislation might be structured. Casey, however, continued to hold out for a total exemption for all intelligence agencies, contending the Act had harmed their relations with foreign intelligence services.²⁹

By 1983, the likelihood of Casey getting the total exemption he sought for the CIA and other intelligence agencies appeared dim. To obtain something out of the long negotiations, CIA lawyers attempted to work out a compromise. Arguing that its operational records were rarely released because they were almost always found to be “properly classified” after review, the Agency’s lawyers convinced the committees, as well as the ACLU, that if such records were exempt from review altogether, it would speed the processing of other, “nonoperational” records, such as analytical products, that were more likely to be disclosed in response to a request from the public. The elements of this compromise were incorporated into a bill that SSCI Chairman Goldwater introduced in June 1983 and ultimately became the basis for the CIA Information Act that was passed the following year, albeit after several bumps along the way.³⁰

The CIA Inspector General Act of 1989

CIA, since 1952, had had an inspector general (IG) who was appointed by the DCI and served under his direction and supervision. When Congress passed the Inspector General Act of 1978 creating “independent” inspectors general in most departments and agencies, appointed by the president with special reporting obligations vis-à-vis the Congress, CIA had been exempted from the law.

Although the Church and Pike Committees, as well as the Rockefeller Commission, criticized the investigative competence of the Agency’s IG in the mid-1970s, it was not until the 1987 report of the congressional committees investigating the Iran-contra affair that Congress was motivated to take up the issue. Noting that the CIA IG “did not appear to have the manpower, resources or tenacity to acquire key facts uncovered by other investigations,” the Iran-contra committees recommended that CIA have an “independent,” statutory IG like other departments and agencies of the executive branch.³¹

²⁹ Ibid.

³⁰ The House Government Operations Committee held up the bill for several months in the spring of 1984. The bill also encountered delays because of problems the Department of Justice and the Senate Judiciary Committee raised.

³¹ *Report of the Congressional Committees Investigating the Iran-Contra Affair*, 425.

Although the leadership of both oversight committees (who were also members of the Iran-contra committee) had endorsed the IG recommendation as part of the Iran-contra committee's final report, none immediately moved to legislate on the subject. A member of the SSCI at the time, however, Arlen Specter introduced legislation calling for a statutory IG at the CIA and pressed for its consideration by the committee.

The DCI at the time, William Webster, adamantly opposed the idea, believing that an IG operating outside his control had the potential for wrecking the Agency. To head off possible legislation, Webster appointed a senior steering group to find ways to strengthen the capabilities of the existing IG. Later, in what was subsequently described as an effort to hold Senator Specter "at bay," the SSCI imposed a requirement that the IG provide semiannual reports of its activities to the committees in order that they might better evaluate the need for a "statutory" IG.³²

In the fall of 1988, however, the chairman of the Senate Governmental Affairs Committee, John Glenn (D-OH), indicated he planned to offer legislation during the next session of Congress to bring the CIA IG under the Inspector General Act of 1978. If enacted, it would not only create greater independence from the DCI, it would also make the IG responsible to the governmental affairs committees of the Congress rather than the intelligence committees.

Fearing that such legislation would easily pass, the chairman of the SSCI, David L. Boren, offered legislation of his own in the spring of 1989. Under the Boren proposal, the Agency's "statutory" IG would have less independence from the DCI than IGs appointed under the 1978 Act had vis-à-vis their agency heads. Moreover, Boren's IG would report to the intelligence committees, not the governmental affairs committees in each house.

Glenn decided to support the Boren proposal rather than introduce his own on the condition that Boren would in good faith move the bill through the legislative process. Boren agreed and garnered enough support within the committee to report his legislation. On the Senate floor, it survived a motion to table it by a vote of 64 to 34.³³

Obtaining the support of the HPSCI for the IG legislation in conference, however, was contingent upon obtaining assurance from the administration that the president would not veto the bill. This reportedly came in the form of

³² For a detailed description of the background of this legislation, see Snider, "Creating a Statutory Inspector General at the CIA," 15–21.

³³ *Ibid.*

a telephone call from President Bush to Boren.³⁴ Although Webster had urged Bush to veto the bill, the president chose to sign the legislation.

The CIA would now have an IG appointed by the president and confirmed by the Senate, and who could only be removed by the president. The IG would report to, and be under the “general supervision” of, the DCI but would have authority to carry out investigations, audits, and inspections of his or her choosing. While the DCI, in order to “protect vital security interests of the United States,” could stop the IG from undertaking any of these activities, the intelligence committees would be advised when this occurred. Moreover, the IG would make semiannual reports of his or her activities to the two committees and provide copies of other IG reports to the committees upon request.³⁵

From the creation of the “statutory IG” in 1989 until 2004, on no occasion did a DCI block the IG from undertaking a proposed activity, thus triggering notice to the committees. The committees, however, often conducted follow-up inquiries into the reports they received from the IG and, on occasion, would request the IG to undertake investigations that exceeded their own capabilities.

The Intelligence Reorganization Act of 1992

With the Cold War drawing to a close and some in Congress—notably, former SSCI Vice Chairman Daniel P. Moynihan (D-NY)—suggesting that the Agency may no longer be needed, Boren believed the time was ripe for Congress to review the organization of the Intelligence Community in terms of meeting the demands of the post-Cold War environment. After an extended staff study in 1990–91, Boren and new HPSCI Chairman Dave McCurdy (D-OK) jointly offered a bill in early 1992 that, among other things, would have created a director of national intelligence (DNI), who would be separate from the director of the CIA and would have program and budget authority over the entire Intelligence Community. Analysis at the national level would be centralized in the National Intelligence Center under the DNI and would also have responsibility for coordinating intelligence-gathering across the board. Under the bill, CIA would have been confined to human intelligence-gathering and covert action.³⁶ In introducing the legislation, Boren acknowledged that the bill was meant to provoke discussion and that he was prepared to modify it in response to administration concerns.

³⁴ Smist, *Congress Oversees*, 277.

³⁵ §17 of the *CIA Act of 1949*.

³⁶ Smist, *Congress Oversees*, 286.

In April 1992, DCI Gates testified that the Bush administration could not support the Boren-McCurdy bill but was willing to work with the committees in terms of revising existing law (essentially the National Security Act of 1947) to reflect changes that had been made within the Intelligence Community.

Responding to this invitation, the SSCI dropped the more controversial, far-reaching elements of the original bill and produced a revised bill that set forth not only the responsibilities and authorities of the DCI vis-à-vis the rest of the Intelligence Community but also did the same for individual agencies within the Community, including the CIA. While the revised bill, for the most part, only reflected the organizational arrangements that had been instituted pursuant to executive orders and other executive branch policy, it nonetheless amplified and clarified these arrangements in far greater detail than existing law. The mission of the CIA, for example, would at last explicitly include gathering human intelligence and coordinating such collection within the executive branch. The DCI would also be responsible by law for foreign liaison in the intelligence area. Covert action would also be defined for the first time, and CIA's preeminent role in this area recognized. The DCI would also be given enhanced authority over the Community in the program and budget area, and the existence and functions of the National Reconnaissance Office (NRO) would, for the first time ever, be disclosed.

In late summer 1992, Gates advised the committees that with minor changes, the revised bill was acceptable to the Bush administration. Agreement was reached on these changes, and the Intelligence Reorganization Act of 1992 was enacted as part of the FY 1993 Intelligence Authorization Act without significant challenge in either house. In its report accompanying the bill, the SSCI described the new legislation as "providing, for the first time in law, a comprehensive statement of the responsibilities and authorities of the agencies and officials of the US Intelligence Community."³⁷

Naming of the Headquarters Compound: 1998

In August 1998, the House passed freestanding legislation introduced by a congressman from Ohio who was not a member of the HPSCI, Rob Portman, to name the CIA headquarters compound after former President George H.W. Bush. The SSCI, in turn, incorporated a slightly modified version of the House bill into its mark-up of the Intelligence Authorization Act for Fiscal Year 1999, which was subsequently agreed to in conference with the HPSCI. Officially, the Agency took no position with respect to the proposal, leaving it

³⁷ See Title VII of the *Intelligence Authorization Act for Fiscal Year 1993*.

to Congress to decide. While several Democratic senators on the SSCI questioned the propriety of naming a nonpartisan institution after a politician (albeit a former DCI), their objections did not carry the day. With the enactment of the authorization bill, the Headquarters compound officially became known as the George Bush Center for Intelligence.³⁸ In a ceremony held at Agency Headquarters on 26 April 1999, with the former president in attendance, the compound was formally dedicated.

The Intelligence Reform and Terrorism Prevention Act of 2004

While Congress enacted minor changes to the CIA's mission and authorities in the aftermath of the 9/11 terrorist attacks,³⁹ it was not until 2004 that significant legislative change came about in response to the recommendations of the National Commission on Terrorist Attacks Upon the United States (the 9/11 Commission).

In its final report, issued in July 2004, the 9/11 Commission had made more than 40 recommendations to strengthen the ability of the United States to prevent future terrorist attacks. Principal among them were recommendations to reorganize the US Intelligence Community by creating a director of national intelligence (DNI) with expanded authority over the Community and a national counterterrorism center that would operate under his control. The DNI would assume two of the DCI's three functions under existing law: (1) head of the Intelligence Community (overseeing and directing the implementation of the National Intelligence Program) and (2) principal intelligence adviser to the president.⁴⁰

The Agency, like the Bush administration itself, initially opposed these recommendations but soon found itself caught up in a fast-moving political process. The presidential election campaign of 2004 was in high gear. The Democratic nominee, Senator John Kerry of Massachusetts, had endorsed the 9/11 Commission's recommendations in toto and made them a key issue in the campaign. Families of the victims of 9/11 were pressing the administration and Congress to act on the commission's recommendations as a tribute to their loved ones.

³⁸ §309 of the *Intelligence Authorization Act for Fiscal Year 1999*.

³⁹ In 2002, for example, Congress mandated the creation of the Foreign Terrorist Asset Tracking Center within CIA to conduct all-source analysis relating to the financial capabilities, resources, and activities of international terrorists, as well as the creation of a master list of known or suspected terrorists for use within the Intelligence Community.

⁴⁰ 9/11 Commission Report, 399–413.

To inflame the political situation further, reports criticizing the Agency's performance with respect to the prewar intelligence assessments on Iraq emerged at roughly the same time as the 9/11 Commission report (see chapter 7). Coping with these criticisms (and demands for reform) was made doubly difficult for the Agency because its leadership was in flux at the time. DCI Tenet had resigned on 11 July; his replacement, Porter Goss, was not confirmed until 24 September 2004. As chairman of the HPSCI, in fact, Goss had previously been on record as supporting the creation of a DNI.⁴¹

In any event, the congressional leadership responded to the mounting pressure for intelligence reform by instituting a process in the fall of 2004 designed to develop legislation to implement the 9/11 Commission's recommendations. While the leaders of both intelligence committees had offered their own reform bills, the House and Senate leadership gave responsibility for developing this legislation to their respective governmental affairs committees. Even though the resolutions creating the intelligence committees specifically gave them jurisdiction over intelligence reorganizations⁴² and both committees had exercised this role over their history, when it came time to produce a bill to implement the 9/11 Commission's recommendations, both committees were so torn by partisanship that it seemed doubtful they could work together to accomplish the objective (see the author's commentary at the end of chapter 2). The leadership in each house thus turned to other committees to produce the bill.⁴³ While the leaders of the HPSCI did eventually play instrumental roles, ultimately control of the House process rested with Speaker Dennis Hastert (R-IL). On the Senate side, the leaders of the SSCI offered suggestions to their colleagues on governmental affairs, but were relegated to minor roles in the legislative process.

Within the Bush administration, the White House itself served as focal point for dealing with the committees developing the legislation. "It soon became clear where things were going," former OCA deputy director, George Jameson, later recalled. "Our objective changed from trying to stop it [the reform bill] from happening to trying to salvage what we could get from the process."⁴⁴ While the Agency was able to obtain language in the bill preserving its key functional responsibilities, the political momentum for creating a director of national intelligence was not to be overcome. With its oversight committees in political disarray and disillusioned with the CIA's performance

⁴¹ See the Report of the Joint Inquiry into the Terrorist Attacks of September 11, 2001, By the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence, 2002.

⁴² See §11(b)(1) of Rule XXV of the House of Representatives and §3(a)(3) of S. Res. 400.

⁴³ Snider, "Congressional Oversight of Intelligence after September 11."

⁴⁴ Jameson interview, 28 December 2006.

on Iraq, the Agency lacked an effective defender—or even a sympathetic ear—in the congressional process. After Bush won a second term in November 2004, pundits speculated that he might have second thoughts about the intelligence reorganization bill, but several weeks after the election he intervened to break the congressional stalemate over the bill⁴⁵ and, in the waning days of 2004, signed into law what became known as the Intelligence Reform and Terrorism Prevention Act.

With its enactment, the position of DCI, established 58 years earlier, ceased to exist. The director of the Agency would now report to the DNI rather than the president. As far as the Agency’s mission was concerned, the changes were minor. The new law carried over the language from existing law that pertained to its analytical and collection functions. The only substantive change was to combine the two general provisions pertaining to the Agency’s functions into a single provision. Thus, the provisions in prior law authorizing the CIA “to perform such additional services . . . of common concern” as the DCI may determine, and “to perform such other functions and duties . . . as the President or National Security Council may direct” were replaced by a single provision authorizing the CIA to “perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct.”⁴⁶ The new law made no change to the CIA Act of 1949 or the Agency’s other statutory authorities.

AUTHOR’S COMMENTARY

Legislating Missions and Authorities for the CIA

At the time CIA was created, members of Congress never seriously questioned the need for it or the need to set forth its missions and authorities in law. Except during the American Revolution, when the Continental Congress established three committees that ran intelligence operations, this had never happened before. Intelligence services of this and other countries had been creatures of their respective executive authorities, never their legislatures.

One of the difficulties in legislating the mission and authorities of an intelligence agency is, first of all, acknowledging to the rest of the world that your government is engaging in these kinds of activities. Hence, Congress was reluctant to acknowledge in 1947 that the CIA was being established to carry

⁴⁵ Sheenon, “Bush Says He’ll Seek to Revive Intelligence Bill House Blocked.”

⁴⁶ §104A(c) (4) of the *National Security Act of 1947*, as amended.

out espionage operations abroad. Rather it was authorized to perform “such services of common concern” as the National Security Council may direct. No mention at all was made in the law of CIA’s covert action function until 1992, 44 years after the Agency undertook its first one.

Because it is difficult for Congress to deal with the missions and authorities of the Agency in public, historically it has been left to the committees that oversee the Agency to sort out behind closed doors what authorities it needs to carry out its functions. Moreover, when such authorities are agreed to, they are often expressed in such broad legislative language that their effect is unclear. Section 8 of the CIA Act of 1949, for example, authorized the Agency to spend its appropriated funds “for purposes necessary to carry out its functions . . . notwithstanding any other provision of law.” Any member of Congress who read this language before his or her vote could only have wondered what this was meant to do. The accompanying reports rarely offered much clarification, nor could members expect to learn more in the floor debate. Typically, if such bills were debated at all, debate was limited to procedural points or “non-sensitive” aspects of the legislation. If members were truly concerned and intent upon knowing the reasons for the legislation, they might try confronting the sponsors of the bill off the floor, but in all likelihood, they would not be told a great deal, unless their support were crucial to passage of the bill.

This is why, from the Agency’s standpoint, it is important that the parent bodies of the Congress—the House and Senate—have confidence in the Agency’s oversight committees. If there is trust in the committees, their legislative recommendations will usually be supported when they are brought to the floor, regardless of the limited justification that usually can be provided

During the early period, from 1947 until the creation of the select committees, only the Agency’s charter, embodied in a short section of the National Security Act of 1947, received much attention. Even here the principal interest was not so much in defining in law what the Agency was meant to do but in defining what it was not meant to do: engaging in domestic activities, usurping the departmental roles of other intelligence agencies, and so on. The legislation pertaining to the Agency that followed, including the CIA Act of 1949, passed virtually unnoticed by most of Congress and the public. It was handled in the CIA subcommittees, sometimes only by their staffs. While both sides were willing to make adjustments to the law to facilitate the Agency’s work, neither side embarked on such a course without assessing the risks as well as the potential gains.

When the select committees were created in the mid-1970s, this dynamic changed somewhat. Both committees were given authority to report bills to the floor, and both were prepared to exercise this authority, not only to demonstrate

to the intelligence agencies what they were capable of achieving but also to show they were reliable partners in the oversight process. Moreover, the annual intelligence authorization bills being developed and reported each year provided vehicles for legislative proposals that had not been there before. Getting free-standing bills through the congressional process was uncertain at best. Authorization bills, on the other hand, had to be put through. Not only did the bill give the committees an opportunity to legislate each year, it gave intelligence agencies an opportunity to request legislation if they chose to do so.

As the oversight committees began to mature in the early 1980s, the Agency, under DCI Casey, took advantage of these opportunities by persuading the committees to put through bills to protect the identity of its covert agents and provide relief from the FOIA. At the same time, the committees, with greater frequency, began legislating restrictions the Agency did not want, for example the two Boland amendments (see chapter 9).

As more legislation involving the Agency was put through, other lessons were learned. First, it may not be possible to control legislation once it is introduced and referred to committee. Deals may have to be struck and more may have to be said to explain the reasons for the bill than the Agency or the committees were prepared to offer, and at some juncture, it may not be worth the price. Both sides need to be prepared for such contingencies.

Second, if special treatment is sought for the CIA, such as perquisites and benefits not available to other departments and agencies, more objection is likely to be heard. Congress does not favor such proposals. Similarly, if other committees object to the bill, the harder it will be to put through the congressional mill. On the other hand, in following what Congress is doing for other departments and agencies, the Agency may sometimes see an opportunity to tack something on for itself. After 30 years of experience with the legislative process, the level of sophistication in the Agency as well as the oversight committees has grown. Both appreciate its opportunities and its pitfalls and adapt their strategies accordingly.

The President and Intelligence Legislation

The president occupies a unique position where intelligence legislation is concerned. Because intelligence lies so close to the exercise of the president's constitutional authorities as commander-in-chief and executor of US foreign policy, it is unlikely that there would ever be a two-thirds majority in both houses of Congress, necessary under the Constitution to override a presidential veto of an intelligence bill.

Over the 58-year period covered by this study, the president has vetoed an intelligence bill only twice and neither time was his veto overridden. The first occurred in 1991 when President Bush “pocket vetoed” the annual authorization bill because he became concerned that lawyers might read the bill’s definition of “covert action” as precluding legitimate diplomatic activity, specifically, efforts to have other countries undertake actions in secret on behalf of the United States. The second occurred in 1998 when President Clinton, largely responding to press criticism, vetoed the intelligence authorization bill because it incorporated a provision criminalizing leaks of classified information whether or not intent to damage the national security could be proved.

In both cases, the intelligence committees had been assured before the bills were passed that the president would sign them. The reservations surfaced only after the bills were enacted. In neither case did the committees choose to bring the bills up for a vote to override the veto. In the case of the Bush veto, the committees modified the bill to remove the offending language and passed it the following year. In the case of the Clinton veto, there was still time in the session for the committees to drop the offending provision and put the authorization bill back through both houses.

The intelligence committees recognize, as a political fact of life, that no intelligence bill is apt to become law if the president objects. Thus, they do not normally include proposals in the annual authorization bill or attempt to move freestanding legislation that they know the president objects to. Occasionally, they might report such legislation to send a message to the administration, knowing that the provision is not likely to survive in conference. At other times they might be tempted to bundle what they know is an objectionable proposal with things they know a particular president wants, in order to make the veto decision more difficult. This has rarely been a compelling strategy, however, since there is usually little in intelligence bills that a president really wants.

Thus, for the Agency, the president has always represented something of a safety valve, where legislation is concerned. It knows the committees are reluctant to add provisions to their bills that the president objects to, and if such a thing does happen, there is always the possibility of a veto. But what the Agency cannot be sure of is whether a president’s position necessarily will coincide with its own.

In the two cases mentioned above, when presidents exercised their veto power over intelligence legislation, it was not the Agency’s objections that motivated them to act, but rather concerns raised in the White House after a bill was passed or outside the government.

There have also been at least three occasions when presidents signed legislation that the Agency objected to. In 1974, in order to obtain the financial

assistance he wanted for Greece and Turkey, President Ford signed legislation containing the Hughes-Ryan Amendment, despite the Agency's strenuous objection to it.⁴⁷ In 1989, President Bush also signed legislation creating a statutory inspector general for the CIA over the Agency's objection. In 2004, the second President Bush signed the Intelligence Reform and Terrorism Prevention Act, also over the Agency's objection.

So, history shows that, depending upon the circumstances, intelligence legislation that the Agency does not object to can be vetoed and legislation that it does object to can be passed. The position of the president will always be pivotal.

What Never Made It Through the Congressional Mill

As far as the Agency is concerned, what never made it through the congressional mill may be just as important as what did make it through.

Over the years both the Agency and its congressional overseers—members and staff—have made a significant but largely unappreciated effort to keep legislation harmful to the Agency's interests from becoming law. Although both sides are mindful of the problem, the oversight committees have historically relied upon the Agency itself—whatever office is charged with handling congressional affairs—to monitor the legislation in both houses and alert the committees to bills, or amendments, that pose potential problems.

Once the Agency has identified a problem, a decision must be made on how it will be handled. If the oversight committee concerned is sympathetic, its staff (usually its legal counsel) will go the committee or member sponsoring the legislation, explain the problem, and request relief for the Agency in some form. This might entail specifically exempting the Agency from the reach of the legislation or modifying it to cure the problem of concern. Not infrequently, however, the Agency will find the oversight committees unsympathetic and unwilling to "use up their chips" with other committees or members, especially if they think the Agency is overreacting. If this happens, the Agency must decide whether to approach the other committee, or member, on its own or enlist the support of friendly members to take up its cause. Obviously, the Agency's case is stronger if one of its oversight committees vouches for it, but even in the absence of such support, it may see little downside in trying to deal with the problem, especially if it perceives that the legislation's sponsor did not intend the legislation to harm the Agency's interests.

⁴⁷ Cary interview, 24 November 1987, 34.

Whether it is the Agency or one of the oversight committees that takes the initiative, one or the other must decide what the sponsoring committee or member can be told. Inevitably, they will want to know why their proposal is a problem. Sometimes this can be easily explained but, on other occasions, may involve disclosing highly classified information. While sensitive details are avoided where they can be, if the committee or member refuses to accommodate, the Agency may be faced with revealing more information to get what it wants. Typically such issues are resolved at Agency headquarters, or, if one of the oversight committees is involved, in discussions between the Agency and the staff handling the issue.

If, in the end, the other committee, or individual member, refuses to provide the requested relief, the issue then becomes whether the Agency and/or the oversight committee should elevate. Informal means, such as talking to the leadership of the committee involved, would ordinarily be the first option. Failing that, formal amendments might be drawn up or offered, either in committee or on the floor, to take care of the problem.

Occasionally, the Agency and/or the intelligence committees learn of a troublesome amendment only as it is being offered or about to be offered on the floor. At this stage, members must be consulted, and, if they agree, primed to do battle against the proposal. There is often very little time to mount such a challenge.

If the offending language survives debate on the floor, as sometimes happens, the Agency and/or committee involved can try to have the problem resolved in conference. This would be attempted first at the staff level and, if that fails, at the conferee level. If this does not resolve the problem and it is truly serious, a presidential veto might be sought.

Although this informal, convoluted process has not always been able to prevent objectionable legislation from being enacted, hundreds, if not thousands, of legislative proposals that would have caused problems for the Agency, have been modified or shelved because of it.