13 Congressional oversight of US intelligence activities

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Introduction

The United States Constitution assigns to Congress the responsibility to oversee activities of the executive branch, both to enhance the quality of decision-making and to ensure democratic accountability of the executive. The work of US intelligence agencies is essential for national security and necessarily shrouded in secrecy. These characteristics make skilled external oversight crucial to prevent abuse and enhance the quality and credibility of intelligence activities, but they also make that oversight unusually difficult. US history is riddled with intelligence scandals and oversight failures. Congress has learned from these experiences and has crafted a credible oversight structure and process. But challenges remain for congressional overseers. This chapter examines these challenges, how they affect congressional oversight of intelligence, and Congress's efforts to ensure accountability for US intelligence activities.

History of congressional oversight and reforms

Early oversight and the Church Committee

The United States Government has engaged in intelligence collection and covert action since its earliest days. Congressional oversight of intelligence activities, however, has a relatively short history. It was not until the late 1940s, with the creation of the Central Intelligence Agency (CIA), that the US House of Representatives and Senate created entities – subcommittees of their Armed Services committees – with responsibility for intelligence oversight.¹

Congressional overseers in this early period exhibited a tendency common to oversight through the years: a cyclical interest that ramps up in response to public attention or perceived agency failure, but rarely persists past the crisis. Loch Johnson describes this pattern, which he calls his “shock theory” of intelligence oversight:

[After some pivotal event that leads to reform] At first, members of Congress keep a close eye on the spy organizations to assure the new rules are honored.

Before long, though, the interest and attention span of lawmakers begin to wane and the intelligence agencies are treated with a sense of benign neglect on Capitol Hill.

Inevitably the unwatched agencies go astray and shocked overseers “shake themselves out of their lassitude, rally to investigate what went wrong, and attempt to set the spy agencies back on a proper track . . . but only for a while before dropping off again” (Johnson 2018, 18).

A watershed in congressional oversight came in late 1974 after journalist Seymour Hersh published a lengthy article in the *New York Times* revealing significant illegal domestic activities by the CIA, including wiretaps, break-ins, mail openings, infiltration of domestic political organizations and the existence of files on 10,000 Americans involved in the anti-war movement (Snider 2008, 33). In the wake of these revelations, the Senate voted overwhelmingly to establish a select committee, chaired by Senator Frank Church, to investigate Intelligence Community activities (Snider 2008, 37–9).²

The Church Committee’s investigation lasted 15 months and was the “most exhaustive look at our government’s (or any government’s) secret intelligence agencies” (Schwartz Jr. 2007, 19). The Committee investigated domestic and foreign intelligence activities and its revelations were earthshaking. Its final report described massive efforts by the Federal Bureau of Investigation (FBI), CIA, National Security Agency (NSA) and other intelligence organizations to spy on, harass, disrupt and undermine US organizations and citizens because of their political views and lawful speech and activities. In its reporting on foreign activities, the Committee revealed assassination plots, election meddling and coup attempts, among other morally questionable and often flawed and counterproductive covert action (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities 1975; 1976a; 1976b; Snider 2008, 275–8).

In his transmittal letter for Book II of the Committee’s report, Committee Chairman Senator Church gave this description of the greatest lesson from the investigation:

The root cause of the excesses which our record amply demonstrates has been failure to apply the wisdom of the constitutional system of checks and balances to intelligence activities The founding fathers foresaw excess as the inevitable consequence of granting any part of the government unchecked power. This has been demonstrated in the intelligence field where, too often, constitutional principles are subordinated to a pragmatic course of permitting desired ends to dictate and justify improper means.

Our recommendations are designed to place intelligence activities within the constitutional scheme for controlling government power (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities 1976b, III).

Post-Church Committee reforms

The Church Committee revelations and other concerns that surfaced during that period led to a number of significant reforms to intelligence oversight. In the years since, there have been additional changes to structure and process.

In response to one of the Church Committee's key recommendations, within a year after the report's release the Senate and the House established "select" committees³ – the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI) – with responsibility for oversight of intelligence and authorization of appropriations for intelligence activities.

Beyond structure, Congress also focused on ensuring a greater flow of information to the Congress from the Intelligence Community. In October 1980, Congress passed what is known as the Intelligence Oversight Act of 1980, which imposed consequential reporting requirements that continue to this day. The Act required that the intelligence agency leaders keep the intelligence committees "fully and currently informed" of intelligence activities, including "any significant anticipated intelligence activity", and "report in a timely fashion" any illegal activities or significant intelligence failures.⁴ In 1991, Congress shifted these notification responsibilities to the president.⁵ It imposed similar requirements on the Director of National Intelligence (DNI), when that position was created in 2004.

Congress also passed significant additional reforms to processes for covert action and electronic surveillance. In 1974 Congress passed what is known as the Hughes-Ryan Amendment in response to concerns about the covert activities that the CIA conducted in Chile, intended to thwart the election of Salvador Allende. The Hughes-Ryan Amendment, for the first time, formalized the process for approval and oversight of one important, and often perilous, type of intelligence activity: covert action, which is operational activity intended to "influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly". Hughes-Ryan required that the CIA must obtain the president's approval to conduct covert action and that the president must "find" that the activities are "important to the national security of the United States". The president must report this "Finding" to Congress (Ford 2006, 24–5). Congress amended these reporting requirements further in 1981 and again in 1991 to require covert action reports to the intelligence committees "as soon as possible" and "before the initiation of the covert action". If the president "determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States", he may inform a smaller group of eight members of Congress. This has become known as "Gang of Eight" reporting (Ford 2006).⁶

The Church Committee subject that generated perhaps the greatest outrage was its extensive chronicling of domestic electronic surveillance by intelligence agencies. The Committee found that wiretapping of US citizens with no judicial warrant had been rampant (Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities 1976b). In response, in

1978 Congress passed the Foreign Intelligence Surveillance Act of 1978 (FISA), which sets out a process for seeking a warrant from a specially constituted court to conduct surveillance within the US for the purposes of foreign intelligence. FISA's procedures guide the conduct of all electronic surveillance for foreign intelligence purposes in the United States. The FISA Amendments Act, passed in 2008, amended FISA to establish a process for some broader "programmatic surveillance" of foreign targets outside of the United States without individualized suspicion.

Congressional oversight tools

Hearings, briefings and legislation

The Intelligence Committees conduct virtually all of their work in classified settings. Their standard information gathering tools are hearings (open and closed), formal briefings, statutorily required reports, ad hoc information requests, and informal interactions. Legislation also plays a key, if indirect, role in oversight. The executive branch fears the impact of what it believes is ill-considered legislation. Often it will increase its interaction with the committees hoping to head off or change proposed legislation, or it will take corrective action itself in an attempt to persuade members that legislation is unnecessary.

The most important legislation for the intelligence committees is the annual Intelligence Authorization Act. Heather Molino, a former HPSCI staff director, described this bill as the committee's key tool for oversight of the Intelligence Community (Bahar et al. 2018). Although the congressional appropriations committees decide on funding for the agencies, Senate and House rules require that all intelligence appropriations be authorized separately and the intelligence committees have that responsibility. In producing authorization legislation, committee members and staff delve in minute detail into intelligence agency programmes, offices, activities and personnel to determine what may be funded, what is prohibited and other important details of how agencies will conduct their activities and interact with the committees. Thus, the legislation is a source of great influence and leverage for the committees. At least this is the case in theory. In fact, the intelligence committees have struggled over the last two decades to produce authorization legislation that can pass the Congress. When there is no authorization legislation, Congress inserts language into the National Defense Authorization Act (NDAA) that provides a blanket authorization for all amounts appropriated for national intelligence. The uncertainty about passage of this annual legislation reduces the effectiveness of intelligence committee oversight.

Investigations

Congressional investigations are a longstanding and critical tool of oversight. They usually arise from incidents of perceived failure or abuse or some other high-profile systemic concern. Congressional intelligence committees have used

this tool regularly over the years. Recent examples include the SSCI's lengthy investigation of the Bush Administration's detention and interrogation practices, HPSCI's investigation of the 2012 attacks on US diplomatic facilities in Benghazi, Libya and both committees' investigations of Russia's interference in the 2016 election. For some significant investigations of intelligence issues, however, Congress has created special committees in each chamber – such as with the investigation of the Iran-Contra affair in 1986–87 – or joint committees involving both chambers – such as the congressional investigation following the 9/11 attacks. Investigations tend to be more public and more adversarial than other tools of oversight. They are a key mechanism for developing an understanding of complex facts to uncover abuse, monitor the implementation of policy and inform the public. They also can serve as the basis for development of legislation and reforms.

Committee staff

Staff on the intelligence committees plays an outsized role in oversight. Both intelligence committees now have majority and minority staffs. The tradition in both the House and Senate has been to avoid partisanship and the staffs have usually worked together, although this tradition breaks down on occasion.⁷

Committee members delegate to their staff much of the day-to-day oversight of the Intelligence Community. Staff conduct the initial fact-finding and analysis that result in hearings, reports and legislation. Although members provide the vision and broad goals for this work, and they become intensely involved on certain issues, it is the staff that develops the information and expertise. Many professional staff members on both committees have worked previously in the Intelligence Community and are familiar with the offices and personnel. The staff engage with personnel in intelligence agencies more frequently and in more depth than staff of most other congressional committees.

Dynamics

Types of oversight

Much of the academic literature on congressional oversight identifies two dichotomous approaches. In the most influential article on the subject, political scientists Matthew McCubbins and Thomas Schwartz describe two categories of oversight: “police patrol” and “fire alarm”. With police patrol oversight Congress takes the initiative to review the activities of the overseen entity with the goal of finding and fixing potential problems. Police patrol oversight is active and centralized, in that the overseers themselves are responsible for uncovering concerns. Fire alarm oversight is initially more passive on the part of the overseers; it relies primarily on outside observers to identify existing problems or abuses and raise concerns to which Congress will respond. Police patrol is the more time- and resource-intensive of the two forms in this model (McCubbins and Schwartz 1984).

Other experts have identified “active” and “reactive”, “anticipatory” and “post-hoc”, and “institutional” and “investigative” as the most important distinctions between forms of congressional oversight (Nolan 2007, 116–17; Schwartz Jr. 2007, 23). The categories tend to line up. The first of the two terms – police patrol, active, anticipatory and institutional – describe oversight that uses hearings, briefings, formal and informal information requests, and legislation to stay on top of the agencies, understand their business and identify problems before they arise. The second terms – fire alarm, reactive, post-hoc and investigative – describe a form of oversight that reacts to discovery, usually from an outside source, of a failure or abuse and then investigates what happened and draws conclusions about fault and possible reforms.

McCubbins and Schwartz identified fire alarm as the most common form of oversight in Congress. Members of Congress prefer it, they argue, because it is cost-effective and its more decentralized approach is a better fit with the incentives for legislators than the more hands-on police patrol model. Other experts, however, have found that that police patrol oversight is more prevalent in Congress than McCubbins and Schwartz suggest. They attribute this to a change in the incentives for legislators since the mid-1970s because of a greater public interest, post-Watergate and Church Committee, in assuring that government programmes operate competently and consistent with law (Johnson 2018, 37–8).

Congress uses both forms of oversight with the Intelligence Community but is less effective at each than in other areas because of the unique challenges of intelligence oversight. Police patrol, as McCubbins and Schwartz noted, is a time and resource-intensive form of oversight. It becomes even more costly with intelligence because, as discussed in the following, relevant information is far more difficult to acquire, there are cumbersome restrictions on where it can be reviewed and with whom it can be discussed, and legislators, for a variety of reasons, lack the incentive to devote time and energy to these activities. As a result, although the intelligence committees do engage regularly in this proactive type of oversight, it is largely the responsibility of the professional committee staffs, with limited focus from members unless the issues are high profile (Johnson 2018, 209–48).

Fire alarm oversight is less effective with intelligence because there are fewer sources for alarms. McCubbins and Schwartz anticipated outside observers and interest groups who would act as watchdogs, keeping an eye on agency activities and alerting lawmakers to problems. In the intelligence world, because of the secrecy of the programmes involved, there are far fewer outside observers capable of raising alarms. Journalists play this role at times, usually based on leaked classified information.

Secrecy, expertise and capture

The most significant difference between oversight of intelligence and almost any other field is the difficulty congressional overseers experience acquiring and using information. Obtaining information is a challenge for all congressional oversight; the departments and agencies have greater expertise and knowledge

about the matters being overseen and legislators have to work hard to know the right questions to ask. But no other discipline involves the information constraints that exist for intelligence. Although the intelligence agencies share a significant amount of information with Congress, most relevant information is extremely sensitive and the agencies appropriately take measures to protect it from release. Moreover, unlike in other areas there are very few sources to which the overseers can look for information on intelligence other than the agencies they are reviewing. The resulting dynamic affects the legislators' ability to develop expertise and undermines effective oversight.

The executive branch has an expansive view of the president's legal authority to control classified national security information. The US Justice Department's Office of Legal Counsel has explained that the President has "ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the executive branch", including for dissemination to Congress (Christopher H Schroeder, Memorandum opinion for the General Counsel Central Intelligence Agency, November 26, 1996).⁸ Congress and some experts dispute this legal analysis and the US courts have never resolved these differences (Cumming 2010, 3; Fisher 2008, 221). In practice, Congress has largely acquiesced in the view that the president is the "owner" of intelligence and is able to control access to information and operational details under some circumstances. Legislators consider the statutory reporting requirements, discussed earlier, to be a critical counterbalance; in particular the requirement that the president keep Congress, through its intelligence committees, "fully and currently informed of all intelligence activity" (Cumming 2010, 1–2). That requirement is vague, however. The executive branch has never interpreted this obligation to require provision of *all* intelligence to Congress. Congress asserts that right but has never sought to enforce it.

The branches have never developed a written set of rules for what the Intelligence Community must share (Kibbe 2010, 33). As a result, they rely on norms and historical understandings about what Congress may demand and conflicts are common. If Congress is not satisfied with what it receives, its realistic recourse is to criticize the administration publicly and use its leverage over appropriations, legislation and nominations to force the executive's hands. The effectiveness of these tools depends on whether the president feels Congress's actions can hurt him politically.

Even when Intelligence Community personnel agree to provide information in hearings or briefings, they often are selective in what they share. As James Baker explains, "[m]embers see only part of the picture, and then only that part of the picture contained in executive talking points that have survived layers of editing and that are designed to fend off policy or partisan attack" (Baker 2007, 132). Loch Johnson provides many examples from his own experience and that of others when the Intelligence Community provided obscure or incomplete information to intelligence committee questioners. He quotes former Senator William Cohen during a SSCI hearing about an intelligence controversy involving a CIA

asset in Guatemala who was implicated in various human rights violations: “if you asked the wrong question of the Agency you never got the right answer”, he complained and “If you asked the right question, you got only half the right answer” (Johnson 2018, 157).

Sometimes the process breaks down entirely. This was the case with the Iran-Contra scandal during the Reagan Administration in the mid-1980s. Members of the Reagan National Security Council and CIA secretly sold arms to Iran in exchange for Iran’s assistance in obtaining the release of US hostages in Lebanon. This sale violated the Arms Export Control Act. The NSC staff then created a private organization, outside of government, and funnelled some of the proceeds from the arms sale to that organization for its use in supporting the Contras, a Nicaraguan rebel organization. This too violated the law. Congress had enacted a series of measures, known as the Boland Amendments, that restricted US assistance to the Contras. One of these amendments specifically prohibited the use of funds to support the Contras.

The Reagan Administration reported neither of these operations to Congress. Indeed, when members of Congress specifically asked the National Security Advisor and his deputy about rumours of operations involving Nicaragua, the officials did not reveal the work of the private organization they had created (Johnson 2018, 147–8). This is despite notification requirements for intelligence activities and specifically for covert action. Iran-Contra is perhaps the most egregious violation by the executive branch of its post-Church obligations to notify Congress (the affair included many other serious violations of law as well). It is an example of the dangers of a notification system that must rely, to some degree, on the good faith of the president and those who work for him.

Secrecy poses other problems for members of Congress in their efforts to oversee the Intelligence Community. For example, members face difficulty in accessing intelligence that the Intelligence Community has provided. To read classified intelligence, they must go to a Sensitive Compartmented Information Facility (SCIF), a windowless vaulted space usually located in the intelligence committee’s office space. They may only read the materials there and, if notes are permitted, they must also be stored in the SCIF.

The use of limited briefings to inform some members about particularly sensitive covert actions or other sensitive intelligence programmes is another concern. The National Security Act permits the president to limit congressional notification of a covert action where he “determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States”. In that case, the president is only obligated to inform the House and Senate majority and minority leaders and the chairs and ranking minority member of the House and Senate intelligence committees. In addition to these statutory “Gang of Eight” notifications for covert actions, there is a longstanding practice of “Gang of Four” notifications – to the chairs and ranking minority members of the intelligence committees – for some particularly sensitive intelligence activities that are not covert actions. When these limited notifications occur, members may not discuss what they have heard beyond the limited group that has been briefed, which

sometimes does not include even senior staff. This poses a hardship because these members rely on their staff for expertise and guidance.

Without being able to discuss the matter with staff, lawyers or any colleagues other than the few who had also been briefed, members of Congress have few avenues to raise concerns or take corrective action. Nonetheless, the executive branch may use the briefings to suggest approval. In response to public and congressional anger after a controversial programme leaked to the press, George W Bush Administration officials repeatedly cited severely limited congressional briefings – and the lack of subsequent congressional action – as proof that Congress had approved of their actions. Thus, as Kathleen Clark has argued, the briefings serve little or no oversight purpose and allow the executive branch to inoculate itself against later criticism for controversial programs (Clark 2012; Decker 2006, 300–1). Since the Bush Administration, the intelligence committees have pushed back much harder against limited briefings.

These constraints on the flow of information affect the quality and effectiveness of oversight in a number of ways. First, the inability to share or discuss the information they have robs lawmakers of traditional avenues for effective oversight. In the case of limited briefings, members can only raise objections with the executive branch and other briefed members. They cannot use the information to persuade colleagues to use leverage to address the concern – for example to pass legislation or cut funding (Kibbe 2010, 37). It is difficult to convince other lawmakers to take action when you are not able to explain why. Even if the briefing is not limited, the classified nature of the information prevents discussing it publicly, which often is the only effective way that individual legislators can bring attention to an issue.

Moreover, a number of factors make it difficult for lawmakers to develop expertise on complex intelligence matters. It is rare for any member of Congress to come into the job with experience in the intelligence community, so they must develop expertise on the job, which can take many years. Term limits for committee members have contributed to this problem. In this complex area, members often will just be getting up to speed when it is their time to leave the committee. The Senate no longer imposes term limits on SSCI members for this reason, but HPSCI members are limited to six years on the committee. The difficulty for members of obtaining and accessing information, and their inability at times to rely on staff expertise, makes learning the issues particularly time-consuming. Thus, lawmakers often are unable to develop expertise on complex intelligence matters. Or, more accurately, they are unwilling to take the time that developing that expertise would require.

Finally, when lawmakers do endeavour to develop expertise, they have few if any sources of relevant information other than the agencies they oversee and are unable to reach out to colleagues or others to debate or discuss the tough issues involved. As a result, they tend to give the views of the Intelligence Community significant, perhaps undue, weight. “Capture” – the loss of objectivity and distance – of overseers by the entities they oversee is always a concern in Congress. This is particularly true when the stakes for the country are high, as they

are when national security is involved. Capture is a significant risk with intelligence oversight. As Oregon Senator Ron Wyden described the problem, the Intelligence Community “sweeps in” and explains “[w]ell, these are tough issues”, and “only one point of view gets conveyed”. He says the committee members can “get caught up in the culture that makes you, in effect, something more like an ambassador [for the Intelligence Community] than a vigorous overseer” (Johnson 2018, 185).

To be sure, legislators come in many varieties and not all are subject to capture by the Intelligence Community. Loch Johnson describes the varying roles of intelligence committee members over the years. There are “ostriches”, who trust the intelligence community and pay little attention to committee matters; “cheerleaders”, who are outspoken defenders of the intelligence community; at the other extreme there are the consistently negative and mistrustful “lemon suckers”, and finally there are the “guardians” – the type most suited to effective oversight – who combine respect for the intelligence agencies with distance and the ability to criticize when necessary (Johnson 2018, 278–88). The dynamics of intelligence oversight tends to encourage ostriches and cheerleaders.

Incentives

The nature of intelligence oversight also affects the incentives for lawmakers to serve on the intelligence committees and to devote time to these issues if they do. A study in the 1970s of individual members of Congress found the three primary goals for legislators that guide the activities they choose to pursue: (1) reelection, (2) power and influence within the chamber and (3) good public policy. Legislators prioritize these in different ways (Nolan 2007, 124–5). Membership on one of the intelligence committees only reliably helps with the third goal.

Service on the intelligence committees produces little tangible benefit to a lawmaker’s constituents. It does not benefit local businesses, assist with infrastructure, improve the economy or address any day-to-day local concerns. It is possible, depending on what is happening in the world and the interests of constituents in a particular district, that an intelligence role will enhance a legislator’s reputation for seriousness among constituents. It is difficult for a committee member to capitalize on that role, however, because they cannot discuss their work publicly. Power within the Congress comes from many things, but a significant public profile and the ability to deliver something of use for fellow members, either politically or legislatively, are useful in pursuing influence among colleagues. Intelligence committee work typically produces neither of these things.

As a result, this is the situation intelligence committee members face: they have to work harder to obtain the information they need to do their job, they have difficulty developing expertise because of access restrictions and a lack of non-Intelligence Community sources of expertise, they lack sufficient leverage to produce positive oversight results, they get little or no press attention for the work they do, which rarely helps them get reelected, and they stand a good chance of being blamed for Intelligence Community failures if they occur. It is no wonder

that legislators either to avoid work on the intelligence committees or, if they cannot do that, do not prioritize their intelligence work.

Partisanship

A relatively recent phenomenon – the rise of partisanship on the intelligence committees – has had a significant impact on congressional oversight of intelligence. Avoiding partisanship was a key goal when Congress created the intelligence committee structure. This was, for example, the reason they were established as select committees, whose members would be chosen by leaders, rather than through the more political process used for standing committees. For most of their history, the committee leaders have respected this intent and avoided partisanship in their conduct of committee business. There were some breakdowns over the years, over the Reagan Administration policy towards the Contras, for example, and nominations for Director of Central Intelligence in the administrations of George HW Bush and Bill Clinton (Kibbe 2010, 39–40). But the committees largely returned to their bipartisan nature afterwards.

During the George W Bush Administration partisan relationships on the committees began to fray again, largely over committee Democrats' desire to investigate intelligence failures in the run-up to the Iraq War (Kibbe 2010, 40). The partisan breakdown of the committees continued through the Obama and Trump Administrations. During the Trump Administration, partisan rancour over investigation of the Russian interference with the 2016 election and, later, the impeachment of President Trump, caused the HPSCI to become largely dysfunctional.

Partisanship undermines effective oversight in many ways. It has interfered with the ability to pass intelligence authorization legislation, which is perhaps the single most important committee function. It also makes responsible investigation of intelligence failures and abuses less likely. More subtly, partisanship alters the focus of overseers. They become more interested in pursuing issues that can harm the other party or avoiding those that will harm their own. These interests crowd out focus on the crucial, complex, long-term problems of intelligence oversight.

Jurisdictional issues

When the House and Senate created the intelligence committees, the idea was that they would be the primary sources of oversight for the Intelligence Community. Their ability to control the authorization of appropriations would be their strongest oversight weapon. Some quirks of congressional structure, however, undermine the intelligence committees' authority considerably. One committee in each house of Congress is responsible for the appropriation of the entire executive branch budget. This means the committees with the power to authorize appropriations cannot assure that their carefully considered budget judgements will find their way into the final appropriation legislation. This is the same for all authorizing committees, but it has proven to be a particular problem for the intelligence committees because of another historical practice.

The intelligence budget has always been classified and housed in a classified section of the much larger defence appropriation. The purpose is to prevent adversaries from discovering intelligence capabilities by analyzing the intelligence budget. This means that the intelligence budget, unlike most key appropriations, does not have its own subcommittee. Instead, the Defense Subcommittees of the appropriations committees also handle the intelligence budget. Since 2009, at the recommendation of the 9/11 Commission, the Director of National Intelligence has declassified and released the “top line” budget number for the National Intelligence Program (NIP). This means it is no longer necessary to bury the top line number in the defence budget, which addresses one of the key reasons for combining the appropriations. Nonetheless, the structure remains and the subcommittee that considers the much larger defence appropriation has intelligence as a side duty (Kibbe 2010, 30).

That does not mean that the appropriators have no views on intelligence matters. It is not unusual for the appropriations committee to fund less than the authorizers have recommended or – potentially more problematic – fund programmes that the intelligence committees have specifically declined to authorize (Kibbe 2010, 31–2). Appropriators sit much higher in the congressional power hierarchy than the intelligence committees. Thus, despite the intelligence authorizers’ greater expertise and attention to intelligence issues, the appropriators usually win these battles, when they occur.

Additional observations on effectiveness of oversight

Structural weaknesses

The dynamics discussed earlier combine to pose hardships for congressional intelligence oversight that are greater than in other areas. Some of these problems are fixable, or at least could be alleviated. There have been proposals for decades to improve the strength of intelligence oversight by restructuring committee responsibilities in the House and Senate, whether by creating a joint House-Senate intelligence committee – the most ambitious and least realistic proposal – combining authorization and appropriation responsibilities in each chamber or, most modestly, creating stand-alone intelligence subcommittees on the appropriations committees (National Commission on Terrorist Attacks on the United States 2004).⁹

The purpose of each of these proposals is to boost the power and leverage of intelligence overseers. But Congress so far has proven incapable of structural reform. As the 9/11 Commission noted, “Few things are more difficult to change in Washington than congressional committee jurisdiction and prerogatives. To a member, these assignments are almost as important as the map of his or her congressional district” (National Commission on Terrorist Attacks on the United States 2004, 419). Powerful committee chairs, particularly on the appropriations committees, are unwilling to give up turf and there is no real constituency among other members for the change. The 9/11 Commission recognized this fact when it

said its structural recommendations for Congress, including the merging of intelligence authorization and appropriation responsibilities, were among its most important, but also the least likely to be implemented (National Commission on Terrorist Attacks on the United States 2004, 419).

The value of statutory requirements

Some of Congress's greatest successes have come when it weathered executive branch opposition and imposed process and notification requirements by statute. The executive branch resists statutory obligations out of a concern that they will reduce the President's flexibility on national security issues. Nonetheless, Congress has at times managed to capitalize on the right political environment – usually after a major intelligence scandal or failure – to get it done.

An example of such a success is the regulation of covert action. The Hughes-Ryan Amendment and subsequent reforms transformed covert action from chaotic and virtually ungoverned to a careful, deliberative process that is taken seriously within the executive branch and reliably communicated to intelligence committee overseers. One of the most important aspects of the reforms was the requirement for presidential sign-off on any covert action programme. This requirement recognizes that no matter how effective external oversight is, it can never succeed without strong oversight within the entities carrying out the activities. By requiring the president to be involved, Congress created an incentive for the bureaucracy to professionalize itself, both to protect the president from embarrassment and to protect the agencies from presidential wrath. One of the Church Committee's observations about the covert operations they reviewed was that they often had few "fingerprints" on them. There was no record of who approved or designed them, so nobody could be held accountable. Particularly in an area like covert action that is prone to abuse, it is critical to have awareness – and accountability – at the top. By imposing statutory process requirements, Congress assured this accountability exists with covert action.

Another example of effective obligations imposed by statute are the notification requirements imposed with the Intelligence Oversight Act of 1980 and subsequent legislation. These acts require the Intelligence Community to keep the committees "fully and currently informed" of intelligence activities, including "any significant anticipated intelligence activity" and any illegal activities or significant intelligence failures. Despite their vagueness and the difficulties that remain for the intelligence committees in getting information from the executive branch, these requirements have had a major, positive impact on the information flow.

The executive branch prefers to be guided in its interactions with Congress by norms and informal understandings. These norms are often effective, but they can also fall away if a president does not respect norms and does not fear political repercussions for violating them. With statutory obligations, agencies may look for ways to skirt them or interpret them narrowly, but they are unlikely simply to ignore them. Thus, it is in Congress's institutional interests to capitalize on the rare opportunities it has to impose oversight requirements through legislation.

Investigation successes and failures

Investigations are one of the most powerful tools for congressional oversight. The history of their use for in intelligence oversight is spotty, however, with some shining successes and many disappointments. The Church Committee, one of the most thorough and influential congressional investigations on any subject, is the gold standard.

Another recent success – messier and more modest – was the SSCI investigation of the CIA’s detention and interrogation programme. This investigation began in 2009 as a bipartisan effort, with the minority Republicans supporting the Democratic majority. The investigation process was not smooth. There were many disagreements between the agency and the committee staff, some extremely bitter and public. The Republicans eventually withdrew their support for the inquiry, which was approved on a partisan vote – only one Republican senator voted with all of the Democrats. But in 2012 the committee completed a 7000-page report and in 2014, after a sometimes painful process, obtained the Obama Administration’s final approval to release a redacted version of the 500-page executive summary. The published official report of the SSCI investigation provides a clear and disturbing picture of the CIA’s activities and treatment of detainees in the post-9/11 period (Senate Select Committee on Intelligence 2015). Although the CIA disputes the accuracy of parts of the report, the investigation has provided a public historical record that otherwise might not have existed of a dark episode in the history of US intelligence.

Other recent intelligence investigations have had more mixed results. The SSCI investigation of Russian interference in the 2016 election, for example, produced five bipartisan volumes of reports that, although they did not receive as much attention as they deserved, were well-regarded. A HPSCI Investigation of the same subject, on the other hand, resulted in a partisan melt-down that left the committee largely dysfunctional.

It is impossible to account for all of the circumstances that make some investigations succeed while others fail or never get off the ground. One similarity between the Church Committee and SSCI Torture investigations that might be relevant is that they both were charged with reviewing past actions that posed little political threat to the administration in power. In both cases the CIA opposed the efforts vigorously, but the executive branch political leadership was more forthcoming, if reluctantly.

Conclusion

An effective, responsible intelligence community guided by law with internal checks and a sense of accountability to the public is an important and realistic goal in the United States. Key to achieving that goal is strong external oversight from Congress. The intelligence community will always be “chiefly concerned with achieving the objectives of the president, whatever they might be. Because of this, it is sometimes tempted to downplay the risk and accentuate the gain” of

intelligence activities (Snider 2008, 307). Congress's relative distance from the role of planning and carrying out the activities allows it to be a needed dispassionate voice that corrects for this inherent bias.

Congressional oversight of intelligence has come a long way since its early days and Congress can point to many successes along the way. Nonetheless, inherent challenges of overseeing intelligence and the idiosyncrasies of congressional structure and incentives assure that this oversight will be inconsistent and flawed. Congressional oversight in the United States will remain, to paraphrase Winston Churchill, the worst form of oversight other than all the others we have tried.

Notes

- 1 Prior to formation of these subcommittees, what minimal oversight there was came from congressional defence committees (Snider 2008, 3).
- 2 The House followed suit in February and established a select committee, chaired first by Rep. Lucien Nedzi and later by Rep. Otis Pike. The House Committee proved to be less effective than its Senate counterpart and never officially published a final report (Snider 2008, 275–8).
- 3 In an effort to discourage partisanship in this sensitive area, the committees were established as “select” committees, for which party leaders would appoint the members, rather than going through the party caucuses, as happens with typical standing committees.
- 4 Intelligence Authorization Act for Fiscal Year 1981 (Intelligence Oversight Act 1980), §501(a) (1980).
- 5 Intelligence Authorization Act for Fiscal Year 1991, Pub. L. No. 102–88 (1991).
- 6 Intelligence Authorization Act for Fiscal Year 1981 (Intelligence Oversight Act 1980) Pub. L. No. 96–450 (1980); Intelligence Authorization Act for Fiscal Year 1991, Pub. L. No. 102–88 (1991); National Security Act of 1947, USC 50, §§3001 et. seq. (1947).
- 7 During its investigation of Russian election interference, relations between the majority and minority deteriorated to the point that the Republican committee majority reportedly planned to erect a physical barrier to separate the majority and minority staffs. The plan was abandoned (Grazis 2018).
- 8 See https://fas.org/sgp/othergov/olc_nuccio.html
- 9 Indeed, Senate leadership took the step to order the creation of such a subcommittee but has never implemented the change.

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