

NO MERE OVERSIGHT



CONGRESSIONAL OVERSIGHT OF INTELLIGENCE IS BROKEN

Denis McDonough | Mara Rudman | Peter Rundlet

Center for American Progress



No Mere Oversight

Congressional Oversight of Intelligence is Broken

Denis McDonough | Mara Rudman | Peter Rundlet

June 2006

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

—James Madison, Federalist No. 51

Contents

Executive Summary	1
Introduction	5
The History of Intelligence Oversight	9
“Era of Trust”	9
Era of Oversight	11
The Current Era: The System Is Broken	14
Consequences and Opportunity Costs	17
The Missions, Ways, and Means of Intelligence Oversight	19
General Oversight Mission	19
Oversight of the Intelligence Budget	21
Oversight of Covert Action	21
Special Case: “Gang of Eight” Covert Action Oversight	22
What Constitutes Good Oversight of Intelligence?	22
Instruments and Mechanisms Needed to Conduct Proper Oversight	24
Leverage Available to Congressional Overseers of Intelligence	25
Obstacles to Achieving Robust Congressional Oversight	27
Conclusion: Overseeing the Overseers	29

Executive Summary

As Americans are learning every day, effective congressional oversight of U.S. intelligence agencies run by the executive branch is critical to protecting our national security as well as the values of freedom and openness on which our country was founded. Recent news headlines that the National Security Agency is collecting the phone records of tens of millions of Americans without the knowledge of key congressional committees underscores the need for Congress to serve as the American public's watchdog in overseeing intelligence agencies.

Congress must ensure the U.S. Intelligence Community has the resources it needs to identify terrorist threats at home and abroad while also ensuring that intelligence operations are conducted consistent with the law and the Constitution. Alas, Congress today has been negligent on both scores — with profound implications for the safety and security of America. The consequences of faulty pre-Iraq war intelligence are mounting daily in the Middle East and around the world just as the United States must unite the world behind efforts to stop Iran from charging headlong into production of nuclear weapons material.

America's ability to persuade the world and the American people to stop Iran from taking this destabilizing step will depend in large part on the assessments of the Intelligence Community about Iran's capability and desire to produce and use nuclear weapons. It's the job, of course, of the 17 executive branch agencies that make up the Intelligence Community to perform these functions, but Congress has an essential role to play in order to ensure these agencies have the resources and guidance they need to do their job well and within the limitations of the laws and Constitution of the United States.

Recent history demonstrates that in the absence of such guidance, the country loses a key check on the Intelligence Community that could help avoid the consequences of bad intelligence or potential abuses of fundamental freedoms. Consider that in just the past five years:

- Intelligence suggesting that Iraq had weapons of mass destruction (WMD) and was developing additional WMD capabilities regularly trumped intelligence that suggested otherwise.
- Decisions leading to the detention, interrogation, and abusive treatment (including rendition) of prisoners in Iraq and elsewhere in the war against terrorists resulted in an outpouring of anger directed at America. This seriously harmed our ability to rally international support in the war against Islamic extremists and forced President Bush to acknowledge recently that the Abu Ghraib prisoner scandal was the “biggest mistake” in Iraq.¹
- Warrantless eavesdropping on American citizens undertaken shortly after 9/11 by the National Security Agency without any meaningful oversight by Congress seriously undermines fundamental American values.
- Instability and low morale within the Intelligence Community is leading to questions about the intelligence capabilities of key agencies as experienced officers quit in droves.
- Failure to act on reforms suggested by the bipartisan 9/11 Commission to improve the capabilities of the Intelligence Community and the way Congress conducts oversight of intelligence leaves America more exposed to terrorist threats.²

How did we get to this point? From the mid-1970s until the late-1990s, congressional oversight of the Intelligence Community was relatively stringent and aggressive and defined by a bipartisan understanding that Congress played a key part in ensuring the intelligence agencies remained competent and acted within the law. This was no golden age of intelligence oversight — recall the Iran Contra scandal or the utter surprise within the Intelligence Community by the collapse of the Soviet Union in the 1980s — yet this period was marked by increased congressional awareness of intelligence programs and covert operations and greater congressional influence over these programs and operations.

Starting in the late 1990s, however, congressional oversight became increasingly partisan and increasingly less effective. That is the state of play today as well; intelligence oversight by Congress is described by commentators and members of Congress alike as dysfunctional. This breakdown

should be a source of great concern as it threatens to further weaken the intelligence committees in the House of Representatives and the Senate just when outside observers are calling for more effective oversight mechanisms — and when the United States needs effective intelligence gathering capabilities more than ever.

Yet correcting the problems that plague congressional oversight of intelligence will not require dramatic changes in the existing oversight structure. Congress has all the tools it needs to conduct its oversight responsibilities effectively. Interviews with current and former participants in the oversight process and reviews of the literature on intelligence oversight in this country lead to the ineluctable but quite unremarkable conclusion that Congress has all of the tools it needs; it is simply not using them. It must.

*Congress has all of the tools it
needs; it is simply not using them.
It must.*

Methodology

In the course of this research, the authors of this report have reviewed prior histories and analyses of congressional oversight of intelligence and have interviewed dozens of current and former participants in all aspects of the oversight process, including former House and Senate members and staff of the intelligence and appropriations committees, as well as current and former officials within the Intelligence Community who have been involved with congressional overseers.³ Because the importance of congressional oversight of intelligence is so clear, and because so many experts, commentators, and blue-ribbon panels have concluded that it is completely broken today, the Center for American Progress decided that it was important to undertake this research project to determine: what good oversight of intelligence means and what it consists of; whether it has ever existed in fact; and if so, what has gone wrong and what can be done about it.

Introduction

After the catastrophic terrorist attacks of September 11, 2001, and after more than three years (and counting) of lost American lives and treasure in Iraq partly because of faulty and misused intelligence, there's no longer any doubt about the crucial importance to U.S. national security of obtaining robust, accurate, and objective intelligence. Every person in America has a stake in ensuring that our policymakers take actions based on the best available intelligence.

The collection, processing, analysis, and dissemination of intelligence is a very complicated process, made more difficult because it is necessarily conducted under a shroud of utmost secrecy. It is the job of the 17 executive branch agencies that make up the so called Intelligence Community (see table, page 6) to perform these functions, but Congress has an essential role to play with respect to ensuring that these agencies have the resources and guidance they need to do their job well and within the limitations of the laws and Constitution of the United States.

History has demonstrated that in the absence of such guidance, the country may well suffer from the consequences of bad intelligence as well as abuses of our fundamental freedoms. The former chair of the House Permanent Select Committee on Intelligence and Vice Chair of the 9/11 Commission, Lee H. Hamilton, has described oversight this way:

Oversight is designed to look into every nook and cranny of governmental affairs, expose misconduct, and put the light of publicity to it. Oversight can protect the country from the imperial presidency and from bureaucratic arrogance. It can maintain a degree of constituency influence in an administration. It can

encourage cost-effective implementation of legislative programs and can determine whether changing circumstances have altered the need for certain programs.⁴

Unfortunately, this is not an academic issue of the past. Even as recently as last month it was reported that the National Security Agency (NSA) has been secretly collecting the phone call records of "tens of millions of Americans" without the knowledge of key congressional committees.⁵ The day the story was made public, Senator Patrick Leahy (D-VT) announced during an unrelated hearing of the Judiciary Committee that, "The press is doing our work for us, and we should be ashamed of it."⁶ Republican Senate Judiciary Committee Chairman Arlen Specter (R-PA) concurred: "We're really flying blind on the subject," he said. "And that's not a good way to approach . . . the constitutional issues involving privacy."⁷

The consequences for our safety and security may be even more profound. With the failures of the pre-Iraq war intelligence so evident today in Iraq, the United States now faces a more dangerous and more urgent threat from Iran. On April 11, 2006, Iranian President Mahmoud Ahmadinejad declared that Iran had "joined the nuclear countries of the world" and that its scientists had successfully enriched uranium for nuclear fuel.⁸ That announcement came just days after both *The New Yorker* and the *Washington Post* reported that the Bush administration was seriously considering military strikes to prevent Iran from developing nuclear weapons.⁹

President Bush subsequently dismissed those reports as wild speculation, but significant uncertainty about both Iranian and American intentions remains. The Bush administration's decision in late May to extend an offer of direct negotiations raised the prospect of an eventual

The Intelligence Community

The Intelligence Community was formally established by the National Security Act of 1947.²⁰ Originally, it brought together the agencies of the U.S. government that have intelligence responsibilities under the coordinating control of the Director of Central Intelligence, who concurrently also had the job as the Director of the Central Intelligence Agency (CIA). The Intelligence Reform and Terrorism Prevention Act of 2004 separated the two roles and created the position of Director of National Intelligence to assume the responsibility of managing the Intelligence Community.²¹ The 17 agencies or portions thereof currently included in the Intelligence Community are:

- Air Force Intelligence
- Army Intelligence
- Central Intelligence Agency
- Coast Guard Intelligence
- Defense Intelligence Agency
- Department of Energy Office of Intelligence
- Department of Homeland Security
- Department of State Bureau of Intelligence and Research
- Department of Treasury Office of Intelligence and Analysis
- Drug Enforcement Administration
- Federal Bureau of Investigation
- Marine Corps Intelligence
- National Geospatial-Intelligence Agency
- National Reconnaissance Office
- National Security Agency
- Navy Intelligence
- Office of the Director of National Intelligence

diplomatic solution to the current standoff, yet a showdown over Iran's nuclear program is still very possible. Decisions regarding which direction it will take will be based largely on the assessments of the U.S. Intelligence Community about Iran's capability and intent to produce and use nuclear weapons.

This should be a cause for great concern. In its March 2005 report, the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction concluded that the Intelligence Community knows "disturbingly little" about the nuclear programs of countries like Iran.¹⁰ That conclusion should have set off alarm bells on Capitol Hill. But more than

a year later, there is no organized effort to examine the Intelligence Community's work on Iran.

Senator Pat Roberts (R-KS), the chairman of the Senate Select Committee on Intelligence, admitted that the committee has "not made the progress on our oversight of Iran intelligence."¹¹ And the chairman of the House Permanent Select Committee on Intelligence, Representative Pete Hoekstra (R-MI), confirmed this assessment, stating that "there's a whole lot we don't know about Iran that I wish we did know."¹²

These admissions confirm the clear — and cutting — conclusion of the bipartisan 9/11 Commission: "Congressional oversight for

intelligence — and counterterrorism — is now dysfunctional.”¹³ Editorials around the country have excoriated the intelligence committees, especially the Senate Intelligence Committee.¹⁴ “The panel has become so paralyzingly partisan that it could not even manage to do its basic job,” said one editorial.¹⁵ “Is there any aspect of President Bush’s miserable record on intelligence that Senator Pat Roberts, chairman of the Senate Intelligence Committee is not willing to excuse and help to cover up?” asked another.¹⁶

The list of congressional oversight failures raised by these commentators typically includes: the failure of pre-Iraq war intelligence on weapons of mass destruction; the failure to conclude the so called “Phase II” of the Senate investigation regarding the political manipulation of intelligence; the refusal to investigate allegations of torture and other illegal treatment of detainees; the failure to obtain a proper understanding of, let alone provide robust oversight over, the NSA warrantless wiretapping program; and the failure to pass the Intelligence Authorization Act for first time in nearly 30 years.

Members of Congress, in their oversight role, act as the eyes and ears of the American people, holding the executive branch of government accountable, and in so doing, ultimately help the Intelligence Community achieve more effective and sustainable policies. Congress’s role in overseeing the programs and activities of the executive branch is important in our checks and balances system of government, but congressional oversight of intelligence is even more critical than it is for those areas that are more easily accessible to the general public. Because it is essential for valid national

security reasons that most intelligence activity remain secret, the people must depend on their elected representatives to ensure that their liberty and security interests are protected.

When congressional oversight works effectively — as it did at various times in the late 1970s through the 1980s and into the mid- to late-1990s — it provides important assurance to the American people that the Intelligence Community is functioning and that objective observers are

monitoring these agencies’ compliance with the law and Constitution.¹⁷ That reassurance will be vital when Washington debates issues of war and peace — as it is starting to do on Iran. Without confidence in the intelligence that is informing such policy debates — and without the assurance that covert action is

not being used to direct foreign policy, as it was under the late Director of Central Intelligence Bill Casey in the Reagan years — Congress and the president run the risk of losing public support for difficult policy choices.¹⁸

Nearly five years after 9/11, Osama bin Laden remains at large, and the misuse of intelligence in the run-up to the Iraq war have yet to be explored.¹⁹ Our nation faces real and graver threats from Iran and North Korea. In the absence of effective oversight, our intelligence apparatus has fallen short. Until Congress begins to provide aggressive and appropriate oversight over the activities of the Intelligence Community, the American people will be more vulnerable.

“There’s a whole lot we don’t know about Iran that I wish we did know.”

-- Rep. Pete Hoekstra (R-MI)

The Intelligence Committees and Leadership, 1976 – present

Senate Intelligence Committee Chairman and Vice Chairman

House Intelligence Committee Chairman and Ranking Members

109th Congress	
Pat Roberts, Chairman (R-KS)	Peter Hoekstra, Chairman (R-MI)
John D. Rockefeller IV, Vice Chairman (D-WV)	Jane Harman, Ranking Member (D-CA)
108th Congress	
Pat Roberts, Chairman (R-KS)	Porter Goss, Chairman (R-FL)
John D. Rockefeller IV, Vice Chairman (D-WV)	Jane Harman, Ranking Member (D-CA)
107th Congress	
Bob Graham, Chairman (D-FL)	Porter Goss, Chairman (R-FL)
Richard Shelby, Vice Chairman (R-AL)	Nancy Pelosi, Ranking Member (D-CA)
106th Congress	
Richard Shelby, Chairman (R-AL)	Porter Goss, Chairman (R-FL)
Richard Bryan, Vice Chairman (D-NV)	Julian C. Dixon, Ranking Member (D-CA)
105th Congress	
Richard Shelby, Chairman (R-AL)	Porter Goss, Chairman (R-FL)
Bob Kerrey, Vice Chairman (D-NE)	Julian C. Dixon, Ranking Member (D-CA)
104th Congress	
Arlen Specter, Chairman (R-PA)	Larry Combest, Chairman (R-TX)
Bob Kerrey, Vice Chairman (D-NE)	Norm D. Dicks, Ranking Member (D-WA)
103rd Congress	
Dennis DeConcini, Chairman (D-AZ)	Dan Glickman, Chairman (D-KS)
John Warner, Vice Chairman (R-VA)	Larry Combest, Ranking Member (R-TX)
102nd Congress	
David Boren, Chairman (D-OK)	Dave McCurdy, Chairman (D-OK)
Frank Murkowski, Vice Chairman (R-AK)	Bud Shuster, Ranking Member (R-PA)
101st Congress	
David Boren, Chairman (D-OK)	Anthony Beilenson, Chairman (D-CA)
Frank Murkowski, Vice Chairman (R-AK)	Henry Hyde, Ranking Member (R-IL)
100th Congress	
David Boren, Chairman (D-OK)	Louis Stokes, Chairman (D-OH)
William Cohen, Vice Chairman (R-ME)	Henry Hyde, Ranking Member (R-IL)
99th Congress	
David Durenberger, Chairman (R-MN)	Lee Hamilton, Chairman (D-IN)
Patrick Leahy, Vice Chairman (D-VT)	Henry Hyde, Ranking Member (R-IL)
98th Congress	
Barry Goldwater, Chairman (R-AZ)	Edward Boland, Chairman (D-MA)
Daniel Patrick Moynihan, Vice Chairman (D-NY)	J. Kenneth Robinson, Ranking Member (R-VA)
97th Congress	
Barry Goldwater, Chairman (R-AZ)	Edward Boland, Chairman (D-MA)
Daniel Patrick Moynihan, Vice Chairman (D-NY)	J. Kenneth Robinson, Ranking Member (R-VA)
96th Congress	
Birch Bayh, Chairman (D-IN)	Edward Boland, Chairman (D-MA)
Barry Goldwater, Chairman (R-AZ)	J. Kenneth Robinson, Ranking Member (R-VA)
95th Congress	
Daniel K. Inouye, Chairman (D-HI)	Edward Boland, Chairman (D-MA)
Barry Goldwater, Chairman (R-AZ)	Robert Wilson, Ranking Member (R-CA)

History of Intelligence Oversight by Congress

How did we get to this point? The answer is critical to understanding why congressional oversight has deteriorated so alarmingly in recent years and yet also points the way to rebuilding a workable oversight regimen between Congress and the executive branch intelligence agencies. Indeed, the history of intelligence oversight by Congress is the foundation for the final recommendations of this report. But first, let's review the history.

“Era of Trust”

Though historical reviews of congressional oversight of intelligence during the early years of the Central Intelligence Agency vary, no historian suggests that oversight was comprehensive or particularly effective.²² They begin by recounting the three decades that followed the establishment of the Central Intelligence Agency in 1947, in the wake of the dissolution of the former Office of Strategic Services.²³ Oversight in the early years, according to one former Intelligence Committee staffer, was “minimal at most.”²⁴ One historian, Loch Johnson, referred to oversight conducted between 1947 and 1974 as the “Era of Trust.”²⁵ A recently released book takes apart this view, laying bare that Congress was not only not passive but aggressively pushing for covert action (including the Bay of Pigs invasion), yet in the end concludes that congressional oversight of intelligence was not comprehensive, was deferential to the president and directors of the Central Intelligence Agency, and was largely in the dark about CIA activities inside the United States.²⁶

Oversight of the Intelligence Community during this “era of trust” was conducted by subcommittees of the House and Senate Armed Services Committees and by the Appropriations Committees in both houses. The perfunctory nature of this oversight is perhaps best illustrated

by an anecdote reported by Loch Johnson: then-CIA Director James Schlesinger recalled that Senate Armed Services Committee Chairman John Stennis (D-MS) telling him in 1973, “Just go ahead and do it, but I don’t want to know!”²⁷

One former member of the Senate Armed Services Committee echoed the Schlesinger story. The former member reported seeing then-Chairman Stennis tell CIA briefers that they had information that he just did not need to hear.²⁸ Though the agency briefers apparently wanted to provide information to Senator Stennis and the Committee, he demurred, telling them he preferred to talk about other matters.

This approach to intelligence oversight underwent a dramatic shift in the mid-1970s when Congress, stunned to have learned of a series of botched and ill-advised covert actions at home and abroad — primarily from press accounts — established committees in both the House and Senate charged with overseeing the operations of the U.S. Intelligence Community. The findings and 14 reports of the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, more popularly known as the “Church Committee,” after Senator Frank Church (D-ID), are the most well-known.

But other investigatory committees included the House of Representative’s Pike Committee — so named for its chairman, Representative Otis Pike (D-NY) — and the President’s Commission on CIA Activities Within the United States, more commonly referred to as the “Rockefeller Commission,” because it was chaired by Vice President Nelson Rockefeller. These investigative committees were given somewhat different names, structures, and operating rules than the standing committees of the House and the Senate.

Still it was not just members of the House and Senate who did not want to hear about what intelligence agencies were doing during the era of trust. Congressional staffers were equally disinterested.

Still, it was not just members of the House and Senate who did not want to hear about what the intelligence agencies were doing during the era of trust. Congressional staffers apparently were equally disinterested. Case in point: Britt Snider, a long-time intelligence professional who served in a variety of capacities in both the legislative and executive branches, recalls his initial efforts as a Church Committee staffer to investigate the conduct of the National Security Agency. Having been tasked, along with colleague Peter Fenn, to “crack what was perceived to be the most secretive of U.S. intelligence agencies,” Snider and Fenn went to the staff on the Senate Armed Services and Appropriations Committees, whose job it was to oversee the NSA.

The outcome? “Only one staff person on each committee was cleared for NSA information, and I managed to obtain appointments with each,” he recalls. “Both committees had budget and program data on NSA, but nothing that dealt with oversight. Neither of the staffers I interviewed was aware of NSA ever doing anything to raise oversight concerns. “You’ve got to understand,” I was told, “they focus on foreign targets.”²⁹

What became clear in the course of the Church, Pike, and Rockefeller investigations is that while the NSA was focused on foreign targets, as the staff overseers assured Snider, it was also focused on Americans, including on war protesters and, in the case of the so called Shamrock program in the 1950s and 1960s, every telegram, including those from American citizens, that left the United States from Western Union International, RCA Global, and ITT World Communications from New York, Washington, D.C., San Francisco, and San Antonio. In particular, the findings of the Church Committee revealed that the targets of illegal domestic surveillance included “a United States congressman, congressional staff members,

Senate Resolution 400 From the 94th Congress, 2nd Session*

Considered, Amended and Agreed to May 19, 1976
A Resolution Establishing a Select Committee on Intelligence

Resolved, That it is the purpose of this resolution to establish a new select committee of the Senate, to be known as the Select Committee on Intelligence, to oversee and make continuing studies of the intelligence activities and programs of the United States Government, and to submit to the Senate appropriate proposals for legislation and report to the Senate concerning such intelligence activities and programs. In carrying out this purpose, the Select Committee on Intelligence shall make every effort to assure that the appropriate departments and agencies of the United States provide informed and timely intelligence necessary for the executive and legislative branches to make sound decisions affecting the security and vital interests of the Nation. It is further the purpose of this resolution to provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States.

**House Resolution 658 of the 95th Congress, 1st Session, established the House Permanent Select Committee on Intelligence the following year. That resolution included nearly identical language on oversight to S. Res. 400 but gave the House committee even greater jurisdiction than its Senate counterpart.*

journalists and newsmen, and numerous individuals and groups who engaged in no criminal activity and who posed no genuine threat to the national security, such as two White House domestic affairs advisors and an anti-Vietnam protest group.”³⁰

These stunning revelations convinced many Senators and Representatives that Congress had been too lax in carrying out its oversight responsibilities. The “era of trust” came to an end.

Era of Oversight

Congressional resurgence in intelligence matters and the institutionalization of aggressive oversight capability within the Congress soon came to define this second period of intelligence oversight. The first indication that the era of trust was over came with the passage at the end of 1974 (during a rare congressional session over the Christmas holidays) of the Hughes-Ryan Amendment,

which required the president to notify between six and eight congressional committees of covert intelligence actions.³¹

Further institutionalization of congressional oversight came in 1976, when the Senate established a committee to oversee the funding and the conduct of U.S. intelligence agencies. (See box above.) The House followed suit the next year. The formation of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence was the one recommendation — of 96 recommendations proposed — enacted by Congress after the investigations into FBI and CIA intelligence activities by the Church, Pike, and Rockefeller committees.

Other institutional changes followed, including the creation and passage of rules for each committee that authorized the right to subpoena

information and compel witnesses to testify. The formation of the House and Senate intelligence committees began a long, arduous, and mostly successful effort to build trust between the Congress and the intelligence agencies, which harbored a natural suspicion of any outsider and feared intrusion from Congress, an institution defined by political posturing.

Despite the inherent difficulties, the early years of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence demonstrated that it is possible for Congress to oversee the conduct of intelligence effectively without compromising the effectiveness of the intelligence agencies. Through the determined leadership of a series of Committee leaders, during which some of the most respected figures of the House and Senate demonstrated their ability to check their partisan beliefs and agendas at the door of the intelligence committees, the two committees developed a functional agenda that resulted in a solid flow of information and ideas — and therefore good oversight by Congress over the Intelligence Community.

Intelligence committee leaders such as Senators Inouye, Goldwater, Moynihan, Cohen, and Specter and Congressmen Boland, Hyde, and Hamilton, were integral to several instances of highly effective oversight (see table on page 8), including a pivotal Senate Intelligence Committee report regarding the American Intelligence Community's ability to adequately verify Russian compliance with the Intermediate Nuclear Forces Treaty of 1987 and the Iran Contra scandal.³² Three additional and specific examples of solidly functioning oversight during this period include:

- **The Foreign Intelligence Surveillance Act.**
Although the House and Senate Judiciary committees had primary jurisdiction over

the writing of the Foreign Intelligence Surveillance Act (FISA), the two Intelligence committees also had a chance to influence the product in what is referred to as “sequential referral.” After it was enacted, the Senate Intelligence Committee also conducted annual reviews of the use of the Act, with its findings released to the public. These annual reviews — and a subsequent five-year review that was conducted and prepared in 1984 at the request of the Department of Justice but not released to the public — were important indicators to the public that the Committee was closely overseeing the new law's use. Moreover, the public reports made clear to the public that despite the increasing number of cases being heard before the FISA court, the Committee was satisfied that the law was being followed and that no U.S. citizens were being inappropriately targeted by FISA wiretaps.

- **The Classified Information Procedures Act.**
This new law — again drafted principally by the House and Senate Judiciary Committees but with input on sequential referral from the two intelligence committees — was enacted principally as a result of an investigation conducted by the Senate Intelligence Committee. The Classified Information Procedures Act (CIPA) created a set of procedures that permits the use of classified information in a criminal proceeding without compromising classified information, sources, and methods. Both the investigation and the drafting of the statute illustrated not just cooperation among the members of the two intelligence committees but cooperation between the two chamber's intelligence and judiciary committees, a phenomenon that current House and Senate staffers almost uniformly suggest is all but nonexistent today.

- **The Investigation into the Iran Revolution.**

A January 1979 House Intelligence Committee Staff report, entitled “Iran: Evaluation of U.S. Intelligence Prior to November 1978,” was a hard-hitting report written weeks after the fall of the Shah in Iran. It examined the failure within the Intelligence Community to see the Shah’s weakness before it was too late, but also found “a failure to which both the Intelligence Community and the users of intelligence contributed.”³³ The report faulted policymakers’ preconceptions about the Shah’s staying power, which in turn “skewed the intelligence,” a key indicator that congressional oversight could result in necessarily critical reports and evaluations.

This period of effective oversight was not simply a period when congressional overseers stopped bad plans or malfeasance within the Intelligence Community. According to former Senate Intelligence Committee staffers, within three years of establishing the Senate Committee, its staff and members pushed for an increase in the budget for the Intelligence Community after concluding that the existing budget and budget requests were insufficient for ongoing intelligence efforts.

The executive branch, which was happy to accept the increased budget, had not sought the increases itself because it was fearful — given the lingering public concern about the Intelligence Community and its programs — it would not get them. In fact, one former Senate staffer reports that it took three years of budget increases initiated by Congress before the executive branch sought increases on its own. It is fair to conclude that without effective oversight of this period, the Intelligence Community budget would have continued unchanged.

This period of effective oversight, however, cannot be considered a “golden age of oversight.” One former staffer, describing the oversight of covert operations during the 1980s, underscores the delicate balance demanded for independent oversight. He recalls that at any given time many covert operations would be underway, but only seven members of the staff of the Senate Intelligence Committee would be informed about part or all of those operations. A member of that subset of cleared staff, however, might sit in on covert operations planning meetings.

Sitting in served as a political reality check of how the Intelligence Committee members would react to the planned operation, and in more than one instance concerns raised by attending staff resulted in modifications to those plans. Another former staffer, however, makes clear that Senate Intelligence Committee staff sitting in on CIA covert action planning did not necessarily lead to more effective oversight in the 1980s. That contention, he said, “ignores the fact that Director Casey used covert action as a means to direct foreign policy. This raises a question of whether Senate Intelligence Committee staff participation in CIA planning was appropriate and established the necessary arms-length relationship inherent in effective oversight.”

Nevertheless, the period from the establishment of the House and Senate Intelligence Committees until the mid- to late-1990s was a period of functioning oversight. Staff and members serving in these committees at the time remember several pivotal attributes to ensuring that success, including: the stature of the members appointed to the Committees; the relations between the Intelligence Committees and those committees such as Armed Services and Appropriations that had competing jurisdictions in intelligence oversight; the seriousness with which they treated the assignment;

the professionalism and nonpartisan conduct of the staff; and the willingness of the Committee's leadership to get on with their "opposite number," the Vice Chairman in the Senate and the ranking member in the House.

Two anecdotes underscore how these committees worked at the time — and how much different they are today. Upon learning of the covert action to mine the harbor of Nicaragua, Senator Barry Goldwater (R-AZ), then chairman of the Senate Intelligence Committee, wrote a letter to DCI Casey saying, "I am pissed-off." Similarly, Lee Hamilton, then a democratic congressman from Indiana and chairman of the House Intelligence Committee, had a policy of refusing to be briefed by DCI Casey when Casey would say he had something to share with him but which he could only share with the chairman. If Casey would not permit him to share it with the entire committee, Hamilton said, then he would not allow Casey to share it with just him. Senator Bob Kerrey (D-NE) recalled having a similar policy in the Senate.

Some historians date the end of this period of functioning, nonpartisan oversight with the hearing on the nomination of Robert Gates to serve as a Director of Central Intelligence.³⁴ The move away from bipartisanship led to a move away from productive oversight, beginning with the assumption of the chairmanship of the Senate intelligence committee by Senator Richard Shelby (R-AL) in 1997 — a chairman whose tenure was dominated by investigations of the executive branch that were mostly unrelated to intelligence oversight.³⁵

Beyond the numerous investigations, both intelligence committees became increasingly caught up in the minutia of the annual Intelligence Authorization bill — to the detriment of effective oversight.³⁶ The reason: partisan focus on

tiny aspects of the authorization process for political gain left the larger issues of oversight unaddressed, indicating the growing partisanship in both congressional committees. Several former staffers and analysts commented that, in the late 1990s and into this decade, the Intelligence Authorization process has been marked, in the words of one former staffer, by "an increasing trend toward micromanagement."³⁷ A former House staffer adds: "Rather than a review of all platforms in our overhead intelligence, you have staffers up there looking at and legislating on one small gadget on one limited platform of one service's overhead intelligence program."

This hard look at individual issues comes at a price: decreased time and resources to review strategic intelligence challenges. In the Senate, "Weekly Intelligence Updates" replaced serious oversight hearings. The meetings, though useful in keeping members abreast of current events, rarely constituted meaningful, in-depth oversight of intelligence programs.³⁸ The House Intelligence Committee also experienced less public hearings.

The best way for the public to measure Senate Intelligence Committee oversight of intelligence programs is through the biannual report on the activities conducted by the previous Congress, as required by the Senate rules.³⁹ Regrettably, in 2005, the Senate Committee produced no such report.

The System Is Broken: The Current Era

Professor Loch Johnson, Regents Professor of Political Science at the University of Georgia and the author of *Bombs, Bugs, Drugs, and Thugs*, has labeled the current era of congressional oversight, from 2002 to the present, as the "Era of Congressional Acquiescence."⁴⁰ Congressional oversight indeed has come full circle, returning

to an era when the congressional intelligence committees do not conduct comprehensive oversight and largely defer to the president and the intelligence agency heads on important intelligence matters.

The dysfunction is now so deep that oversight is broken. A partisan breakdown has delayed a final investigation in either the Senate or House of the use of intelligence in the run-up to the Iraq war. Indeed the record is rife with evidence that congressional oversight is completely lacking today. Cases in point:

- **Pre-War Intelligence on Iraq.** Despite the magnitude of the failures of intelligence in the lead-up to the war in Iraq, the leadership of the House and Senate Intelligence Committees initially refused to consider a review of pre-war intelligence related to Iraq.⁴¹ In June 2003, Senate Intelligence Committee Chairman Roberts issued a joint press release with Vice Chairman Jay Rockefeller (D-WV) that outlined steps the Senate Committee would take to look into the issue, yet the inquiry itself was marked by competing partisan demands. Throughout, Senator Roberts refused to request White House documents and e-mails or interview policymakers about the *use* of intelligence. After initial resistance from Senator Roberts, the Senate Intelligence Committee unanimously voted in February of 2004 to expand the scope of the Iraq inquiry — into what is commonly referred to as the Phase II report — to include an evaluation of how policymakers used the intelligence available to them. More than

“The Senate Intelligence Committee is sitting on the sidelines and effectively abdicating its oversight to media investigative reporters.”

-- Sen. John D. Rockefeller (D-W.Va)

two years later, that report is not done and the Committee appears to be still several months away from completing it. Recently, Senator Roberts told *U.S. News & World Report* that the delay in completing the Phase II investigation has led him to delay a systematic review of intelligence related to Iran's nuclear program.⁴²

- **Prisoner Detentions, Interrogations, and Renditions.** To date, neither the House or Senate Intelligence Committees have opened investigations into Intelligence Community involvement in the prisoner detentions, interrogations, and renditions around the globe — a matter that is clearly under the jurisdiction of both committees.

- **NSA Warrantless Eavesdropping Program Targeting U.S. Citizens.**

After press revelations and the president's public acknowledgement of the warrantless eavesdropping program, six members of the Senate Intelligence Committee, including two Republicans, wrote to Intelligence Committee Chairman Roberts and Vice Chairman Rockefeller on December 19, 2005, encouraging the Committee to undertake an investigation. Vice Chairman Rockefeller made the same suggestion in a letter to Chairman Roberts on January 10, 2006. Chairman Roberts reacted with a 19-page letter to the Senate Judiciary Committee on the legal justification of the program, an analysis apparently written without Committee discussion or consultation with the minority members of the Committee — and likely without the guidance of Committee counsel

who had not been briefed on the program in question. Ultimately, the Senate Intelligence Committee decided — in what appears to have been an entirely partisan decision with little or no consultation with the minority yet extensive consultation with the Office of the Vice President — to create a special subcommittee of members of the Intelligence Committee.⁴³ What’s more, despite significant concerns raised about the legality of the NSA program by Senate Judiciary Committee Chairman Arlen Specter (R-PA), who also served as Chairman of the Intelligence Committee in his long Senate career, there has not been an independent investigation of the program’s legality.⁴⁴

- **Oversight Hearings on the Newly Reorganized Intelligence Community.**

The Intelligence Reform and Terrorism Prevention Act of 2004⁴⁵ was signed into law in December 2004, and Ambassador John Negroponte was sworn in as the first Director of National Intelligence (DNI) in April 2005. Yet, to date, neither the House nor the Senate has conducted a meaningful assessment of the status of the newly reorganized Intelligence Community as recommended by the 9/11 Commission. This despite the shared view of many, including 9/11 Commission Vice Chairman Lee Hamilton, that “follow through is essential.” Hamilton says, “It’s one thing to ask agencies to improve their performance, but it requires the work of members, committees and aides to ensure changes have taken place.”⁴⁶

- **Recommended Changes in Intelligence Oversight Infrastructure.** The 9/11 Commission report, which led to the enactment of the Intelligence Reform and Terrorism Prevention Act of 2004, also called

for significant reforms of the way Congress conducts oversight of intelligence. In the Senate, intense negotiation on and extensive debate about the 9/11 reforms resulted in the drafting and passage of S. Res. 445.⁴⁷ That resolution included some, though by no means all, of the recommended reforms. To date, many of those reforms have been ignored. Tellingly, section 401 of S. Res. 445, which created a “Subcommittee Related to Intelligence Oversight,” has not been debated in the Intelligence Committee, let alone implemented. The House Intelligence Committee has made some of the changes called for in the 9/11 report, among them establishing a Subcommittee on Oversight and developing its independent audit capacity on its staff.

- **Partisanship Marks the Intelligence Committees.** The historically collegial and cooperative Senate Intelligence Committee has been overtaken by partisanship,⁴⁸ with the Committee majority completely abdicating to the executive on matters of oversight.⁴⁹ In the House, a remarkable appearance on the floor in June 2004 by then-Intelligence Committee chairman Goss demonstrated the partisanship which seems the rule rather than the exception on intelligence matters in the House. His words that day: “I will hold this [sign with a 1997 quote from John Kerry] up because this is why the problem exists. The promise was broken. I quote, ‘Now that that struggle, the Cold War, is over, why is it that our vast intelligence apparatus continues to grow?’ Now, that kind of statement just before ‘no’ votes on supporting the Intelligence Community happens to have been made by such distinguished Members of the Congress as Senator John Kerry. That was in May of 1997 from the record. I got books full of that

stuff. There is no doubt where the record is. The Democratic party did not support the Intelligence Community.”⁵⁰

- **Unhealthy Jurisdictional Competition Between Committees.** Partisanship within the Committee in the House is only part of the challenge to conducting effective oversight. Former staff members of both the Intelligence and Appropriations Committees report that competition between the staff of the Intelligence Committee and the Appropriations Committee results in less rather than more oversight. This is because the competition among the various House committees allows the Intelligence Community to play one committee against the other, often getting the funding it needs without the level of oversight and scrutiny that every other federal agency has come to expect.

The dysfunction is so deep that oversight is broken.

Consequences and Opportunity Costs

The result of this breakdown in oversight should be a source of great concern. The annual Intelligence Authorization bill has been the mechanism the Committee uses to guide the intelligence agencies, authorize funding levels, safeguard the civil liberties of Americans, restrict activities, and ensure compliance with the law and policies laid out in statute and regulation. Since the intelligence committees were created in the mid-1970s, they have established an unbroken record of ensuring enactment of an annual intelligence authorization act. That record is in danger of being broken. The Senate has not acted on the FY 2006 Intelligence Authorization Bill and there is no indication it intends to consider it.⁵¹

In fact, since the Senate Intelligence Committee has already reported out the FY07 bill, action on the FY06 bill is very unlikely. This failure threatens to further weaken both committees at a time when outside observers are calling for more effective oversight mechanisms. If they continue to be unable to enact an annual authorization bill, the intelligence committees risk giving up their most important oversight lever and, as a result, they will not just risk losing stature among other committees in the Congress but the two committees whose

sole function is to oversee the Intelligence Community will be weakened further — and its function undercut.

Indeed, it appears that the intelligence committees may already be losing jurisdiction through their

inaction. Despite the national debate on the need for a comprehensive, systemic examination of the Intelligence Community’s organization and effectiveness, the Senate Intelligence Committee convened only one hearing related to intelligence reform, prompted by legislation introduced by Senator Diane Feinstein (D-CA), before the report of the independent 9/11 Commission was issued in July 2004. Responsibility for reviewing and enacting the reforms called for in the 9/11 Commission report was assigned to the Governmental Affairs Committee in the Senate.

Similarly, oversight of prisoner detention programs have been handled almost entirely by the Senate Armed Services Committee, even though the intelligence committees have jurisdiction over almost all aspects of detention programs run for the purpose of collecting intelligence. Legislation recently debated and enacted by the Senate was passed without a single hearing in the Intelligence Committee and thus

without the benefit of a full understanding of the intelligence programs involved.

On surveillance programs, the Senate Parliamentarian referred the bill, S. 2455, the Terrorist Surveillance Act of 2006, negotiated between the White House and members of the Senate Intelligence Committee, to the Judiciary Committee, not to the Intelligence Committee.⁵² As a result, it appears at the moment that the

Judiciary Committee, not the Intelligence Committee, has been given the first chance to debate and amend the proposed legislation. Yet the Judiciary Committee has not had the benefit of a full briefing on the program the bill seeks to authorize. Assigning the responsibility of authorizing the program's continuation to a committee that lacks a full understanding of an existing intelligence program makes effective oversight impossible.

Legislation recently debated and enacted by the Senate was passed without a single hearing.

The Mission, Ways, and Means of Intelligence Oversight

Dysfunctional congressional oversight of the Intelligence Community is clearly dangerous to the safety of the United States and our Constitutional rights. Fortunately, however, tools are available to Congress to reverse course swiftly and effectively. Since the two intelligence committees were established in the 1970s, institutional capabilities to facilitate effective oversight have been in place for the two intelligence committees to engage in proper oversight. Intelligence Committee members in both the House and Senate, particularly the chairmen of these two committees, both of whom boast great power in their assignments, should brush up on the use of these tools.

These tools are examined in detail in this section. The members of the two committees should study them and then get on with the tasks at hand. The threats to homeland security and fundamental American freedom are too important to do otherwise.

General Oversight Mission

Senate Resolution 400 and House Resolution 658, which created the Senate and House committees, made explicit that the chief function of the committees was oversight of the Intelligence Community. But what does this mean? Testifying before the 9/11 Commission as the ranking member of the House Intelligence Committee, Representative Jane Harman (D-CA) described it this way:

“Intelligence oversight is not about playing “gotcha” or going over personalities. We conduct oversight in order to make improvements to the way our intelligence agencies conduct their business. [It] is not about micromanagement of the Intelligence

Community. The people working on these issues are very dedicated, and very impressive. We need to make sure they have the leadership, organization and resources they need. Oversight is about making sure the intelligence agencies are protecting civil liberties and preparing for the threats of the future. . . . [It] is about focusing on policy and not politics. While much of the Committee’s work is closed—even to the rest of the Congress—the Committee is there to assure the American people that the Intelligence Community is accountable, just as other elements of our government are.”⁵³

Current and past members of the two intelligences committees and former and current committee staff members who we interviewed agreed with Harman. Specifically, they identified the purpose and mission of congressional oversight of intelligence in this way:

- ensure that the Intelligence Community is planning and undertaking activities directed toward producing the best, objective intelligence possible to guide the decisions of policymakers;
- ensure that the Intelligence Community is conducting programs and pursuing activities that are in compliance with the law and the Constitution;
- ensure that the Intelligence Community is getting the resources it needs and that it is using them efficiently.

Congress Needs to Improve Upon Current Notification Requirements

The public debate in Congress about the Bush administration's decision to limit notification of the National Security Agency's warrantless wiretapping program to the so called Gang of Eight senior congressional Intelligence Committee members demonstrates a need to improve the underlying statute governing notification itself. The executive branch needs to keep all Intelligence Committee members informed of "all intelligence activities" other than covert actions, which the NSA warrantless eavesdropping program is not.

Judging from a recently declassified list of members who were briefed and when they were briefed, it appears that the leaders of the House and Senate were not briefed on the NSA program until March 10, 2004, or more than two years after the program started.⁶² As such, it appears that the administration was relying not on the extraordinary authority in the Gang of Eight provision, since the Gang of Eight was not notified for approximately 30 months after the program started.

There does not, however, appear to be language in the statute authorizing the president, the director of national intelligence, other intelligence agency heads or the chairman and ranking member of the intelligence committees to limit the number of committee members briefed about "intelligence activities." In fact, our interviews with former members and staff of the committees lead us to conclude that it has not been the practice. One Republican former Senate Chairman remembers such limitations being placed only infrequently and even then only on covert actions, not intelligence activities.

This distinction is very important in the current context. Some members of Congress understand that distinction very well, among them Senator Arlen Specter (R-PA), the chairman of the Senate Judiciary Committee. Not so the chairmen of the House and Senate Intelligence Committees, Senator Pat Roberts (R-KS) and Representative Peter Hoekstra (R-MI). Remarkably, both men opined on the legality of the program apparently without benefit of legal guidance from either Committee counsel and without consulting other members of the Committee with experience in overseeing such programs.

At least one intelligence professional also wonders whether the NSA would have chosen to go forward with the program if it had had the benefit of the reaction of the full membership of the House and Senate Intelligence Committee members. Given the apparent weakness or lack of clarity in the underlying statute, the Intelligence Committee ought to specify clearly that all Committee members must be kept fully and currently briefed on intelligence activities.

Trust and accountability are key. The 9/11 Commission noted that democracy's best oversight mechanism is public exposure.⁵⁴ Because of the highly classified and necessarily secret activities of the Intelligence Community, it is particularly important to have robust congressional oversight of intelligence (see box above).

Most other government operations benefit from the added accountability that an alert public, often informed by reports in the press, can create. Such outside pressure is typically, but not always, due to whistleblowers who bring to light ineffective or illegal activities. That kind of outside pressure is largely unavailable in the intelligence context.

Beyond accountability, however, is effectiveness. Quite apart from catching or preventing illegal or wasteful activities, several officials described the benefit of a “reality check” when discussing the planned activities of the intelligence agencies with congressional overseers *in advance*. These officials recognized that they often suffered from being overly insulated and at times unable to evaluate objectively the wisdom of their plans and activities. During the era of functioning oversight a decade ago, many officials told us there was a clear benefit to having members and staff of the intelligence committees review and discuss plans with the intelligence operators. Several lamented that this type of oversight is no longer taking place.⁵⁵

Oversight of the Intelligence Budget

The annual Intelligence Authorization process is critical to accountability. Because of the sensitive nature of the Intelligence Community’s activities, the National Security Act of 1947 requires that intelligence and intelligence-related activities be specifically authorized. The House and Senate Intelligence Committees, therefore, are responsible for producing an annual authorization bill for all elements of the Intelligence Community.

The broad guidelines provided by the authorizing committees typically translate into aggressive daily reviews of the budgets for the intelligence agencies. Given the intricacies of those budgets — which remain classified — the intelligence committees in both houses maintain auditing staff dedicated to the continuous review of budgets. The House Appropriations Committee also maintains a team of cleared and experienced auditors to review intelligence budget submissions. As one former Appropriations Committee staffer explains, “You can tell a lot

from a hard look at a budget.” In fact, it appears that the Iran-Contra era “Yellow Fruit scandal” was partly uncovered as a result of unusual budget numbers.⁵⁶

Oversight of Covert Action

The intelligence activity guidelines authorized in the annual authorization act are very broad, but they translate on a daily basis into very concrete requirements that, if followed, can build critical trust between the congressional oversight committees and the Intelligence Community. The National Security Act of 1947, as amended, requires the CIA to notify the Intelligence Committees of covert actions.⁵⁷ Covert action, which is distinct from clandestine (or secret) actions,⁵⁸ refers to certain activities of the U.S. government undertaken to influence political, economic, or military conditions abroad in such a way that the role of the U.S. government will not be apparent or acknowledged publicly.⁵⁹

Pursuant to law, such actions require that the president specifically find them to be “important to the national security of the United States” and “necessary to support identifiable foreign policy objectives.” Moreover, the president must report that finding to Congress in writing — allowing for it to be put in writing retroactively when events so necessitate — and “as soon as possible” and “before initiation of the covert action.”⁶⁰

In the area of covert activity, which is among the most sensitive of intelligence activities, the consultation between the intelligence agencies and the congressional overseers is particularly important. A former CIA employee lamented that such cooperative oversight today is long gone. “In our briefings, the committee was a very effective reality check,” the former

employee recalls. “The committee was another set of eyes on our programs and decisions, and that was an important check on whether what we had planned made sense.”

Or, as General Michael Hayden recently said, in testimony before the Senate Intelligence Committee: “If you want someone on the craft, you got to have them on the manifest.”

Special Case: “Gang of Eight” Covert Action Oversight

In “extraordinary circumstances” in which the president determines that it “is essential to limit access to the finding” affecting “vital interests of the United States,” the reporting to Congress requirement may be limited to the so called “Gang of Eight,” comprised of the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.⁶¹ Gang of Eight oversight is — by definition — less oversight. For this reason, it is essential that any determination to pursue this type of oversight be made correctly and used judiciously.

The current controversy swirling around warrantless eavesdropping on U.S. citizens by the NSA highlights the dangers from limited oversight. First, the program did not qualify as “covert action” pursuant to the legal definition — an activity related to domestic collection of intelligence, even if it were clandestine. Second, members of the Gang of Eight, who were supposedly given some information about the program in advance, have expressed great frustration about the fact that these special limitations precluded them from seeking the guidance of their professional staff and counsel. Moreover, when one of these members, Senate Intelligence Committee Vice Chairman

Rockefeller, had concerns about the program, he felt severely constrained from taking any action related to the program. He wrote a letter to the vice president laying out his concerns and then put a copy in a safe.

What Constitutes Good Oversight of Intelligence?

The responses we received from everyone we interviewed — current and past committee members and staff of both intelligence committees, current and past staff members of the appropriations committees, and former intelligence agency officials — regarding what conditions were required for the proper and robust exercise of oversight were remarkably consistent. Virtually everyone who participated in the process of intelligence oversight by Congress when it was effective said that members and staff of the committees shared a basic sense of the importance of the congressional oversight mission and believed that the mission itself was more important than short-term partisan point-making.

At its core, this shared vision was more about the importance of the balancing role of the legislative branch as coequal to the executive branch. Such a vision is sorely lacking today. After the recent public release of information relating to the NSA’s warrantless wiretapping program, for example, the chairmen of the House and Senate committees responded remarkably with a legal defense of the program and initially fought to maintain the small number of members, including themselves, who had been briefed about the program. They eventually agreed to expand that list, but only to a subset of all members of the Intelligence Committees. Only public pressure from non-briefed members in the lead-up to nomination hearings of General Hayden to be Director of Central Intelligence did the Committee chairmen

and the White House agree to expand the number of briefed members to all members of the Intelligence Committees.

In addition to a shared mission, there was a broad consensus among those interviewed that previous Senate and House Members of the intelligence committees were notably different from their successors today. First, they were of higher caliber, more hardworking, and generally more willing to sort through the extremely complex issues that arise in the intelligence agencies, despite the lack of public recognition for their efforts.

One former House staffer recalled that serious members of the House Intelligence Committee wanted to be sure they were fully briefed on the intelligence programs. “They did not want to be approached by one of their colleagues in the cloakroom after something came out in the press and have to say, ‘I didn’t know anything about that,’” said the former staffer. “They knew they had a responsibility to their colleagues to know what was going on.”

Second, they were more interested in performing their oversight function responsibly than in protecting the executive branch when a committee member was of the same party. Or, conversely, they didn’t use information gained in oversight to politically undermine the executive branch when a member of the minority party.

Similarly, there was a broad consensus that the professional staffers on the intelligence committees were much more likely to be *professional*; that is, expert and experienced in their area of intelligence, and more likely to rise above the daily partisan combat that can characterize much of Capitol Hill. We spoke with professional staff hired by committee members who never inquired about their party

affiliation. And those staff served with skill and professionalism their members, regardless of party affiliation.

Several former Republican and Democratic staff of the Senate Intelligence Committee in the 1980s fondly remembered the work of Keith Hall, one of the most effective budget auditors on the Senate Intelligence Committee staff. He was so knowledgeable and well-regarded for his budget expertise that he was routinely invited by the Committee Chairman, Senator David Boren (D-OK), to question Intelligence Community witnesses who appeared before the committee. His expertise was later recognized by the executive branch when he was named Executive Director of Intelligence Community Affairs and eventually appointed Director of the National Reconnaissance Office.

In 1988, the Senate Intelligence Committee created an auditing unit to oversee intelligence activity, a move that Senator Boren says was one of the most important achievements under his tenure as chairman. Specifically, he calls the development of the auditing unit “the first time that the oversight process has had that kind of independent monitoring capability.”⁶³

The auditing group was at first two people, but during the 104th Congress, a resolution passed increased the staff to three. Over the years, the auditing unit has expanded to add staff as needed in the review of intelligence activity. The capability of the unit to operate independently was dramatically weakened in January 2005, when Senator Roberts, chairman of the committee, fired six members of the committee staff without any concurrence from or consultation with minority members of the committee — despite committee rules that state the staff works for the committee as a whole.

Among those fired was the committee's chief auditor, who according to several people interviewed, had a lengthy and distinguished career of service on the Committee.

Sources added that the individual who replaced the chief auditor has no technical background in intelligence budget auditing, and no qualified auditors have been hired in the past year. The prospect of returning to the keen professionalism of the past in the current political environment seems remote.

Instruments and Mechanisms Needed to Conduct Proper Oversight

Once outfitted with dedicated members and professional staff, the Committee has a variety of instruments and mechanisms at its disposal with which to exercise oversight. Our review of the academic literature and our interviews revealed the following seven mechanisms as the most significant with respect to congressional oversight of intelligence:

- Annual Intelligence Authorization Act process
- Oversight hearings
- Staff investigations and field studies
- Program evaluations conducted by committee staff
- Staff communications with intelligence agency personnel
- Program evaluations by congressional support agencies such as the Congressional Research Service, Inspector General Reports, and the Government Accountability Office
- Program reauthorization hearings

Each of these mechanisms or processes provides a means for the intelligence committees to obtain important information about what the intelligence agencies are doing, as well as to provide direct or indirect oversight and guidance as to how the agencies should perform their functions. Of these oversight mechanisms, the process of passing the annual intelligence authorization bill is perhaps the most important. In addition to authorizing the specific intelligence-related activities of the Intelligence Community, the authorization act typically will include committee findings and recommendations and task the Intelligence Community to take certain actions or draft reports in response to committee concerns.

Oversight hearings — in both closed and open sessions — also provide an opportunity for executive branch officials to present reports to the committees and for committee members to question officials about intelligence activities. For most government functions, the benefit of oversight hearings is enhanced by the fact that they provide another means by which the media and general public can learn what government agencies are doing. Most oversight hearings for intelligence, however, are conducted as classified sessions closed to the public.⁶⁴

Still, oversight hearings can be a useful tool if used properly. Today, though, some current and former members and staff express concerns that oversight has devolved to the point where executive branch officials send over their planned testimony, and the overseers focus on “poking holes” in the testimony, conducting little more than “gotcha oversight.”

Direct staff communications with agency personnel, as well as staff field studies, provide an additional opportunity for ongoing interaction and information sharing. For example, one staff

member recounted how his investigations and field studies served the dual purpose of personally seeing intelligence officials in the field and, as he developed relationships with those personnel, serving as an important conduit of information from the field back to the Committee members and, ultimately, intelligence agency headquarters.

Of lesser significance, but still important, are the reports provided by congressional support agencies. The Congressional Research Service (CRS), the public policy research arm of Congress, provides objective research and analysis to Congress on a nonpartisan basis. Although the role of CRS is occasionally significant with respect to the oversight of intelligence — such as the recent CRS memorandum that analyzed the purported legal rationale of the administration in pursuing its domestic warrantless wiretapping program — typically CRS reports provide useful background more than an adequate basis for oversight.⁶⁵

Unfortunately, the Government Accountability Office (GAO), which is often called the investigative arm of Congress and typically recommends ways to make the government more effective, has been largely prevented from investigating and evaluating the key intelligence agencies, underscoring the importance of ensuring that the Intelligence and Appropriations Committees have effective and independent staff working to aggressively oversee these programs.⁶⁶ The committees also depend significantly on the investigations and reports of the Inspectors General in the Pentagon and the CIA. (See Inset, page 26).

Leverage Available to Congressional Overseers of Intelligence

Once congressional overseers identify improper or misguided activity by the intelligence agencies — or when they identify the failure to take action

where, in their judgment, actions should be taken — what leverage does Congress have to encourage or force corrections to be made? Here again, the necessity for secrecy, and therefore the lack of public accountability, impedes Congress's ability to use "sunlight as a disinfectant," to paraphrase the late Supreme Court Justice Louis Brandeis.

Congress has three primary instruments to force change: the power of the purse, the power to pass laws dictating or prohibiting behavior, and, to a lesser extent, the power to go public. The threat of employing any of these powers provides a mechanism in addition to actually using them.

The power of the purse. The Constitution gives the Congress the power to fund — and defund — the activities of executive branch agencies. When congressional authorizers or appropriators have concerns about what an intelligence agency is or is not doing, it can act to cut off funds to a particular program in order to stop activity or force change. Sometimes the power of the purse is invoked to force the intelligence agencies to provide information, where disclosure to Congress has been lacking. In fact, the mere threat of withholding authorization for funding of specific programs can be an important lever to ensure Intelligence Community cooperation with oversight committees, if the threat is deemed credible. The annual appropriations bill serves a similar purpose, providing the Appropriations Committee the opportunity to use the power of the purse to compel compliance with congressional demands for intelligence policy or programs. Each staffer with whom we met — authorizer or appropriator — recalled at least one annual instance in which a committee member threatened to statutorily withhold funding as a lever for sharing of information necessary for oversight that would not otherwise have been forthcoming.

The Inspectors General: A Boon to Oversight

The Inspectors General Act of 1978, as amended, created statutory offices of inspector general in order to consolidate responsibility for auditing and investigations within federal departments and agencies, as well as many boards, commissions, and governmental corporations.⁶⁷ Nearly 60 federal entities now have a statutory inspector general (IG), each of which is intended to be a permanent, nonpartisan, independent office. It is important to emphasize that several agencies or subcomponents of agencies — such as the National Security Agency — have inspector generals that are not *statutory* inspectors general, which means that they serve at the pleasure of their agency heads and therefore do not have the same independence as a statutory inspector general.

The IG for the Department of Defense was created pursuant to the Inspector General Act, but the IG for the CIA was created under a separate law, the Intelligence Authorization Act of 1990, although the statutory guidelines for both are similar.⁶⁸ Inspectors General have three principal responsibilities under the law:

- to conduct and supervise audits and investigations relating to the programs and operations of the federal agency;
- to provide leadership and coordination and recommend policies for activities designed to promote economy, efficiency, and effectiveness of such programs and operations, and to prevent and detect fraud and abuse in such programs and operations; and
- to keep the agency head and Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations, and the necessity for and progress of corrective action.⁶⁹

Inspectors General are often instrumental in improving the effectiveness of congressional oversight because they are embedded in the agencies they cover (and therefore have direct access to all the records and information of the agency) and because they have important reporting obligations to Congress and others regarding their findings and recommendations. These include:

- reporting suspected violations of criminal law to the Attorney General;
- reporting every six months to the agency head, who must then submit the IG report (along with his or her comments) to Congress within 30 days; and
- reporting “particularly serious or flagrant problems” immediately to the agency head, who must then submit the IG report to Congress within seven days.

The IG of the CIA also must report to the House and Senate Intelligence committees if the Director is the focus of an investigation, audit, or inspection. IGs also inform Congress by testifying at hearings, meeting with members of the House and Senate and their staff, and responding to congressional requests for information.

The power to enact laws. When Congress becomes aware of activities that it does not approve of — or if Congress determines that certain actions must be taken that are not being taken — it can pass laws requiring appropriate action. For example, in the aftermath of revelations of inappropriate warrantless surveillance of U.S. citizens that came out of the Church Committee hearings and reports over two decades ago, Congress passed the Foreign Intelligence Surveillance Act of 1978,⁷⁰ which provided a legal framework, with a set of restrictions, for such surveillance. Similarly, Congress can pass laws requiring the reporting of information to Congress to ensure regular and timely sharing of information.⁷¹

The power to go public. There is a complicated set of rules that apply to the declassification of classified material by members of the House and Senate that permits them to declassify information against the desire of the executive branch. Those rules have never been utilized.⁷² As such, the threat of going public is not realistic — or, ultimately, advisable. One former Chairman of the House Intelligence Committee suspected that a favorite trick of DCI Casey was to leak information immediately after providing it to Congress — and then blame the leak on Congress. A ranking member of the Senate Intelligence Committee had similar suspicions. And one former senior staffer in the House Intelligence Committee recalled that a committee member with concerns about intelligence could go to the National Security Adviser or directly to the president, but they chose to do so only rarely and even then “such haranguing did not lead to any changes.”

Obstacles to Achieving Robust Oversight

There are several reasons why the oversight of intelligence is more difficult than the oversight of

other government functions. First and foremost, of course, is that much of intelligence agency work takes place under the shroud of extreme secrecy. Congressional overseers — members and staff alike — do not know what they do not know. More often than not they are dependent upon the executive branch intelligence agencies to inform them of their activities so that Congress can make further inquiries into the efficacy, legality, and costs of such actions.

Although the annual authorization and appropriations process is very helpful in bringing programs to light, the limited understanding of Congress regarding the administration’s recently revealed warrantless surveillance program is a significant example of this information-sharing dependency. Additionally, the secret nature of intelligence work deprives the intelligence committees of the significant assistance other overseers get from the media and other public attention on the workings of our government.

Less discussed as an obstacle to effective congressional oversight is the extremely complex nature of much of the work of the Intelligence Community. Many of the programs are very technical in nature, involving dozens of expensive and complicated technology systems. Many of the people we interviewed emphasized this point and indicated that it is extremely difficult for already busy committee members to master the intricacies of these programs in order to provide effective and robust oversight of them.

Additionally, the relatively limited number of oversight personnel is at least in part an obstacle to robust oversight, given this complexity and the fact that all or parts of 17 agencies are being overseen by these committees. Many of those people we interviewed noted the tendency to perform “gotcha” oversight — spending limited

staff and member time pursuing relatively less important matters such as petty improprieties like the number of personnel taking business class flights — because this was easier than working more comprehensively to understand and craft effective and cost-efficient intelligence policies.⁷³

Moreover, the secrecy of the oversight efforts and the complexities of policing the Intelligence Community offer very limited political capital to those serving on the intelligence oversight

committees. Politicians maintain or enhance stature (and therefore ongoing electability) by demonstrating to their constituents that their service has been beneficial to them, for one reason or another. Because Intelligence Committee members are unable to advertise the details of their service, they have less incentive to take the time to work through the complexity. Often it is only the intelligence failures that become known to the public, not any “successes” that may have been instrumental in enhancing our national security.

Much of intelligence agency work takes place under the shroud of extreme secrecy. Congressional overseers—members and staff alike—do not know what they do not know.

Conclusion

Overseeing the Overseers

Immediately following the May 5 resignation of CIA Director Porter Goss, news reports began to piece together the fact that a review of the CIA conducted by President Bush's Foreign Intelligence Advisory Board (PFIAB) convinced the president he had to shake up the Intelligence Community by asking for the resignation of Director Goss. According to these news reports, after hearing from current and former high ranking intelligence officials, the PFIAB produced a report critical of Director Goss.⁷⁴

Even though the problems at the CIA were apparently clear enough for the PFIAB to understand the need for an investigation, and even though public reports had reached conclusions critical of the state of the CIA,⁷⁵ there does not appear to have been a similar review conducted by either of the congressional intelligence committees. This lack of action came despite calls from Representative Jane Harman and others to oversee the status of the reform of the Intelligence Community.⁷⁶

The good news is that the PFIAB identified a problem and used its oversight authority to seek a change. The bad news is this: Missing in action were the congressional intelligence committees, both of which should provide the leading independent intelligence oversight for the benefit of the American public.

The problem, of course, is that the public is generally completely unable to discern whether the intelligence committees are engaged in these critical challenges. Even the regular report required by the full Senate of intelligence committee activities have not been filed by the Intelligence Committee for the last Congress.

One former Senate leader noted his frustration with the situation and suggested the need for oversight of the overseers. He explained that even though each of the leaders in the Senate is a member of the Senate Intelligence Committee by virtue of being the leader, time constraints and committee practice make it difficult for the leader and other members of the Congress who do not serve on the committee to have a complete picture of the committee's oversight goals and whether it is meeting them. If key congressional leaders are in the dark, the general public stands almost no chance of penetrating the world of the Intelligence Community.

It need not be this way. In his enumeration of the 10 valuable lessons he learned on congressional oversight, Lee Hamilton writes: "There needs to be greater public accountability in congressional oversight. The general public can be a very important driving force behind good oversight. Congress needs to provide clear reports from each committee outlining the main programs under its jurisdiction and explaining how the committee reviewed them."⁷⁷

Hamilton, of course, is exactly right. Given its central role in effective intelligence, Congress — like the Intelligence Community itself — must be held accountable for its oversight. This is especially so today. In the coming months, the United States will begin anew the debate over the appropriate policy to confront a country seemingly bent on acquiring nuclear weapons. Americans will also ask Congress whether the kinks have been worked out of the reformed Intelligence Community architecture in the wake of the resignation of CIA Director Goss and the appointment of General Hayden. And without a full accounting of the use and misuse

of intelligence in the run-up to the Iraq war, the Intelligence Community will remain demoralized and the American people still lacking confidence in our intelligence capabilities.

Now more than ever, Congress — through nonpartisan and effective oversight — needs to assure the American people that it can serve as their proxy in the sensitive area of intelligence as well as assure the dedicated professionals within the Intelligence Community that Congress can be an equal partner. The fact of the matter is that

we have been here before as a country, in the mid-1970s, when we were bruised and battered by bad decisions and ineffective intelligence programs. Congress today should take a page from the bipartisan leaders of those times, who took it upon themselves to exercise the powers made available to Congress and to establish a credible, nonpartisan oversight regimen that could be trusted both by the American public and the Intelligence Community.

The time to do so is long overdue.

Endnotes

¹ <http://www.whitehouse.gov/news/releases/2006/05/20060525-12.html>

² http://www.9-11pdp.org/press/2005-12-05_report.pdf

³ Although the overwhelming majority of individuals we spoke with were willing to be referenced by name, some were not. For this reason, to enhance the anonymity of those who did not feel comfortable being openly identified, the authors have decided to keep all of our interviewees anonymous, with the rare exception where we cite a former member by name.

⁴ Lee H. Hamilton *Oversight vs. Glitzy Investigation*, *Christian Science Monitor*, July 15, 1999, at 11.

⁵ See Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, *USA Today*, May 11, 2006, at A1.

⁶ See Frank James, *NSA Phone-Records Story Excites Washington*, *Chicago Tribune Online*, May 11, 2006, available at http://newsblogs.chicagotribune.com/news_theswamp/2006/05/nsa_phone_recor.html (last viewed May 11, 2006). Senator Leahy went on to say, "Shame on us, being so far behind, in being so willing to rubberstamp anything this administration does. The Republican-controlled Congress refuses to ask questions and so we have to pick up the paper to find out what is going on. We ought to fold our tents and steal away."

⁷ See Ronald Brownstein & Maura Reynolds, *Congress 'Flying Blind' on NSA Issue, Some Say*, *L.A. Times*, May 12, 2006, available at <http://www.latimes.com/news/nationworld/nation/la-na-assess12may12,1,99186.story?coll=la-headlines-nation> (last viewed May 14, 2006).

⁸ See Nazila Fathi, et al, *Iran Reports Big Advance in Enrichment of Uranium*, *N.Y. Times*, Apr. 12, 2006, at A1.

⁹ See e.g., Seymour M. Hersh, *The Iran Plans*, *New Yorker*, Apr. 8, 2006 (posted online; print issue dated Apr. 17, 2006), available at http://www.newyorker.com/printables/fact/060417fa_fact (last viewed May 11, 2006).

¹⁰ See Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Report to the President of the United States*, Mar. 31, 2005, at 4, available at http://www.wmd.gov/report/wmd_report.pdf (last viewed May 11, 2006).

¹¹ See Kevin Whitelaw, *Washington Whispers*, *U.S. News & World Report*, Apr. 24, 2006 (available online Apr. 16, 2006), available at <http://www.usnews.com/usnews/politics/whispers/articles/060424/24whisplead.htm> (last viewed May 11, 2006). Roberts contention comes despite the fact that the Senate Committee staff at the moment – with 36 staff members – is close to as large as it has ever been. The largest staff on that committee was 42.

¹² See Guy Taylor, *"We Really Don't Know" Status of Iran Nukes*, *Washington Times*, Apr. 24, 2006, available at <http://washingtontimes.com/national/20060423-104145-6304r.htm> (last viewed May 11, 2006).

¹³ National Commission on Terrorist Attacks Upon the United States, *Final Report*, at 420, (2004).

¹⁴ See Senator Pat Roberts R-KS): *Chairman of the Senate Cover-up Committee*, at <http://thinkprogress.org/Roberts-coverup#editorials> (last viewed May 11, 2006) (summarizing and linking to critical editorials in the *Los Angeles Times*, *Wichita Eagle*, *Boston Globe*, and *Cleveland Plain Dealer*).

¹⁵ Editorial, *The Death of the Intelligence Panel*, *N.Y. Times*, Mar. 9, 2006, at A22.

¹⁶ Editorial, *Doing the President's Dirty Work*, *N.Y. Times*, Feb. 17, 2006, at A22.

¹⁷ The exception to this general rule is a brief period after the attacks of 9/11 when, in the form of the Joint Inquiry, the House and Senate Intelligence Committees jointly reviewed the intelligence available before those attacks. The report produced by the Joint Inquiry was largely viewed as solid, but remarkably very little of it was picked up and further reviewed or acted upon by either the House or Senate Committees.

¹⁸ Congressional chairmen of the House and Senate Intelligence Committees during the period of Casey's tenure as DCI underscored their belief that a central concern during their tenures as chairmen was dealing with Casey's efforts to use covert actions to direct foreign policy, as with the mining of the Nicaraguan harbor. Interestingly enough, we learned from one of the staff at that time that the Intelligence Committees were specifically not informed about the Nicaraguan harbors incident. The CIA chose instead to inform the House Defense Appropriations subcommittee chairman. Such an effort by the CIA – exploiting overlapping jurisdictions within the Congress so as to find the forum within which it is most likely to gain support for its decisions – appears to be common today, when relations between the chambers and within each chamber among committees with jurisdiction are so poor as to ensure that little if any communication and collaboration occurs among the various committees.

¹⁹ The House and Senate Intelligence Committees have conducted investigations of the prewar intelligence. The White House formed a bipartisan commission to investigate intelligence and weapons of mass destruction. And according to reports, the Intelligence Community itself has conducted a harshly self-critical investigation of the prewar intelligence. Consider, however, that one former CIA analyst on Iraq wrote in the March/April 2006 *Foreign Affairs* that, "What is most

remarkable about prewar U.S. intelligence on Iraq is not that it got things wrong and thereby misled policymakers; it is that it played so small a role in one of the most important U.S. policy decisions in recent decades.” Notwithstanding this finding by a respected intelligence analyst deeply involved in Iraq, there still has not been a completed investigation of the use of intelligence in the lead-up to the Iraq war.

²⁰ 50 U.S.C. § 401a(4), as amended.

²¹ See Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 §§ 1011-1020, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr796.108.pdf (last viewed May 7, 2006).

²² Examples of historical reviews of Congressional Oversight include Loch K. Johnson, “Governing in the Absence of Angels: On the Practice of Intelligence Accountability in the United States.” Frank John Smist, Jr., “Congress Oversees the United States Intelligence Community: 1947-1994.” David M. Barrett, “The CIA and Congress: The Untold Story from Truman to Kennedy.”

²³ For more on the creation and dissolution of the Office of Strategic Services, see Michael Warner, *The Office of Strategic Services: America's First Intelligence Agency*, (CIA Office of Public Affairs, May 2000), available at <http://odci.gov/cia/publications/oss/foreword.htm>, (last viewed May 6, 2006). The Central Intelligence Agency was created by the National Security Act of 1947.

²⁴ Marvin C. Ott, *Partisanship and the Decline of Intelligence Oversight*, International Journal of Intelligence and Counterintelligence, Spring 2003, at 73.

²⁵ Loch K. Johnson, *Governing in the Absence of Angels: On the Practice of Intelligence Accountability in the United States*, (September 2003), at 12, available at http://www.dcaf.ch/legal_wg/ev_oslo_030919_johnson.pdf (last viewed May 6, 2006).

²⁶ David M. Barrett, “The CIA and Congress: The Untold Story from Truman to Kennedy.”

²⁷ Ibid at 13.

²⁸ Authors’ interview of Senator Gary Hart, March 1, 2006.

²⁹ L. Britt Snider, *Unlucky Shamrock: Recollections from the Church Committee’s Investigation of NSA*, Central Intelligence Agency Studies in Intelligence, Winter 1999-2000, available at <http://www.cia.gov/csi/studies/winter99-00/art4.html> (last viewed May 7, 2006).

³⁰ See S. Rep. No. 604, 95th Cong., 1st Sess. 7-8, 29 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3908-09, 3930.

³¹ The Hughes-Ryan Amendment was enacted at least in part in response to a Seymour Hersh story in the *New York Times* on December 22, 1974, that laid bare much of the CIA and NSA programs that had, among other things, targeted American citizens. The amendment required the president to authorize covert actions by specifically “finding” such an action to be “important to the national security of the United States.” It also required such findings to be reported in a timely fashion to “appropriate” congressional committees. The amendment was modified by the FY1981 Intelligence Authorization Act, Sec. 501(a)(P.L. 96-450), maintaining the requirement for a finding but replacing the reporting requirement to as many as eight committees with a general requirement to keep the two intelligence committees fully and currently informed of intelligence activities.

³² Marvin C. Ott, *Partisanship and the Decline of Intelligence Oversight*, International Journal of Intelligence and Counterintelligence, Spring 2003, at 77.

³³ Staff Report, Subcommittee on Evaluation, Permanent Select Committee on Intelligence, U.S. House of Representatives, “Iran: Evaluation of U.S. Intelligence Performance Prior to November 1978,” U.S. Government Printing Office, 1-2.

³⁴ Interviews with two longtime intelligence professionals came to differing conclusions. One cited the Gates hearings as the start of a steady decline in nonpartisan, professional oversight. Another argues persuasively: “Led by Democratic Chairman David Boren, several other Democrats and all Republican Members voted to confirm Gates in spite of serious allegations by senior current and former CIA officials that Gates had politicized intelligence reporting as DDCI.” Subsequent interviews and a close review of the record point to effective, nonpartisan oversight conducted in the 103rd and 104th Congresses. All the professionals we interviewed cited – and lamented – the dramatic increase in partisanship in the 105th Congress and beyond.

³⁵ Gregory C. McCarthy, *GOP Oversight of Intelligence in the Clinton Era*, International Journal of Intelligence and Counterintelligence, Spring 2002, at 31.

- ³⁶ One illustrative investigation conducted by the House Intelligence Committee at this time included investigations of the politicization of intelligence surrounding the Haiti invasion, an investigation that heated up around the time of the 1996 presidential campaign and dissipated shortly thereafter.
- ³⁷ Marvin C. Ott, *Partisanship and the Decline of Intelligence Oversight*, *International Journal of Intelligence and Counterintelligence*, Spring 2003, at 88.
- ³⁸ As a benchmark it is useful to note that there were 126 open and closed hearings in the Senate Intelligence Committee during the two years of the 104th Congress when Arlen Specter was the Chairman and Bob Kerrey the ranking member.
- ³⁹ See Rule XXVI 8(a)2B <http://rules.senate.gov/senaterules/rule26.php>
- ⁴⁰ Loch K. Johnson, *Governing in the Absence of Angels: On the Practice of Intelligence Accountability in the United States*, (September 2003), at 12, available at http://www.dcaf.ch/legal_wg/ev_oslo_030919_johnson.pdf (last viewed May 6, 2006).
- ⁴¹ House staff point to a similar debate in the House Intelligence Committee. In June 2003, apparently at the behest of Rep. Harman, the House Intelligence Committee launched the first bipartisan review of pre-war intelligence. In September 2003, Chairman Goss and Ranking Member Harman wrote a long letter to DCI Tenet outlining intelligence failures, but it appears that sometime thereafter Chairman Goss shut the inquiry down — and it has never been heard from again.
- ⁴² See Kevin Whitelaw, *Washington Whispers*, *U.S. News & World Report*, Apr. 24, 2006 (available online Apr. 16, 2006), available at <http://www.usnews.com/usnews/politics/whispers/articles/060424/24whisplead.htm> (last viewed May 11, 2006). There are exceptions to this rule, not least of which was the Joint Inquiry into the attacks of 9/11 and the bipartisan investigation in the House Intelligence Committee which preceded it. The report from that study can be found at <http://intelligence.house.gov/CaseStudies.aspx?Section=86>.
- ⁴³ The subcommittee was created after a Democratic effort for an investigation of the program in question was defeated on a party line vote. The chairman characterized the new subcommittee as “an accommodation with the White House.” <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/07/AR2006030701549.html>
- ⁴⁴ SSCI, prior to 2001, annually reviewed FISA in order to verify compliance by the Intelligence Community, but most importantly it worked with intelligence agencies to develop methods to best procure intelligence while following the constitution. For example, the Special Report by the Committee in 2000 (released on Aug. 3, 2001) advised that “monitoring of the Intelligence Community’s research and development efforts to ensure that collection capabilities keep pace with communications technologies will continue to be a high priority for the Committee’s oversight of the FISA.” Since 2001, the attention of the SSCI vis-à-vis FISA has concerned itself exclusively on extending the reach of agencies under FISA (i.e., reducing oversight) without appropriately overseeing or managing the Intelligence Community’s efforts with regards to emerging technologies as outlined in the 2000 Special Report.
- ⁴⁵ The precursor to — some argue the model for — the 9/11 Commission report recommendation for the creation of the Director of National Intelligence was H.R. 4104, drafted and introduced by the HPSCI Democrats in April 2004.
- ⁴⁶ Lee H. Hamilton, *Oversight vs. Glitzy Investigation*, *Christian Science Monitor*, July 15, 1999, at 11.
- ⁴⁷ In the fall of 2004, the Senate extensively debated the proposed reforms of congressional oversight of intelligence, resulting in the passage of S. Res. 445, 79-6 on October 9, 2004. That resolution, which impacted only the Senate since the House never took up a similar effort, made several changes with regard to the Senate Intelligence Committee. According to the Congressional Research Service, it (1) ended the eight-year limitation on Senators serving on the Intelligence Committee; (2) gave Senate floor leaders authority to name the Intelligence Committee chair and vice chair, in addition to their current authority to appoint all committee members; (3) reduced the size of the Intelligence Committee from 17 to 15 members, but retains the requirement that the majority have only a one-seat margin on the committee; (4) retained earmarked Intelligence Committee seats for two members each from the Committees on Appropriations, Armed Services, Judiciary, and Foreign Relations; (5) allowed the chairman and ranking member of the Armed Services Committee to serve as ex-officio non-voting members of the Intelligence Committee; (6) authorized the Intelligence Committee to establish subcommittees whose chair and vice chair would be selected by the full committee chair and vice chair respectively, and requires the establishment of an oversight subcommittee responsible for “ongoing oversight of intelligence activities”; (7) assigned to the Intelligence Committee jurisdiction over civilian nominations to advice-and-consent positions within the Intelligence Community (Other committees with jurisdiction over these nominations would be allowed to hold hearings on

and interview the nominees, but the Intelligence Committee would report the nominations); (8) permitted each Intelligence Committee member to appoint a staff aide to the committee staff (subject to the granting of appropriate security clearances), in addition to any core committee staff positions; (9) formally allocated committee staff between the parties at a 60-40 ratio, excluding staff designees appointed by individual Senators; (10) expanded current requirements that the Intelligence Committee report periodically to the Senate on its findings to require such reports quarterly; and (11) elevated the committee to category “A” assignment status.

⁴⁸ See e.g., Charles Babington, *Senate Intelligence Panel Frayed by Partisan Infighting*, Washington Post, Mar. 12, 2006, at A9, also available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/11/AR2006031101029.html> (last viewed May 13, 2006).

⁴⁹ *Congressional Quarterly* reported that Democrats on the Senate Intelligence Committee were seeking to temporarily replace Senator Jay Rockefeller, who was recovering from back surgery, on the newly created subcommittee to oversee the NSA warrantless wiretapping program. The same article reports that Republicans on the Senate Intelligence Committee were seeking approval for the replacement from the White House, despite the fact that Intelligence Committee rules permit the Committee to decide the make up of subcommittees. See *Substitute Sought on Senate Panel*, CQ Today, Apr. 4, 2006.

⁵⁰ Statement of Rep. Porter Goss, Congressional Record, June 23, 2004, at H4870, available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2004_record&page=H4870&position=all (last viewed May 13, 2006).

⁵¹ One thoughtful commentator who reviewed an earlier draft of this paper accurately pointed out that the Senate Committee reported its bill out of its committee but that the full Senate has not acted on the bill because of an anonymous hold – or holds – in the full Senate. That is accurate, but the hold also confirms our larger concern: that relations between the committees with competing jurisdiction on intelligence matters has so degraded that the Intelligence Committee bill for this fiscal year is still not enacted, even though we are approaching the end of the fiscal year.

⁵² Shaun Waterman, *Intel Committee Sidelined on Warrantless Wiretapping Laws*, UPI, Mar. 27, 2006. The legislation, S. 2455, and references to its referral is available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:S.2455>: (last viewed May 13, 2006).

⁵³ See Statement of Jane Harman to the National Commission on Terrorist Attacks Upon the United States, May 22, 2003, available at http://www.9-11commission.gov/hearings/hearing2/witness_harman.htm (last viewed May 7, 2006).

⁵⁴ National Commission on Terrorist Attacks Upon the United States, Final Report, at 103, (2004).

⁵⁵ One House staffer described that only six non-Intelligence Committee members of the House reviewed the classified annex to the Intelligence authorization for FY 2006.

⁵⁶ Seymour Hersh has a concise description of the “Yellow Fruit Scandal” in the January 24, 2005, edition of *The New Yorker* in an article entitled, “The Coming Wars.” He writes, “The Pentagon has tried to work around the limits on covert activities before. In the early nineteen-eighties, a covert Army unit was set up and authorized to operate overseas with minimal oversight. The results were disastrous. The Special Operations program was initially known as Intelligence Support Activity, or I.S.A., and was administered from a base near Washington (as was, later, Gray Fox). It was established soon after the failed rescue, in April, 1980, of the American hostages in Iran, who were being held by revolutionary students after the Islamic overthrow of the Shah’s regime. At first, the unit was kept secret from many of the senior generals and civilian leaders in the Pentagon, as well as from many members of Congress. It was eventually deployed in the Reagan Administration’s war against the Sandinista government, in Nicaragua. It was heavily committed to supporting the Contras. By the mid-eighties, however, the I.S.A.’s operations had been curtailed, and several of its senior officers were court-martialed following a series of financial scandals, some involving arms deals. The affair was known as ‘the Yellow Fruit scandal,’ after the code name given to one of the I.S.A.’s cover organizations-and in many ways the group’s procedures laid the groundwork for the Iran-Contra scandal.”

⁵⁷ 50 U.S.C. § 413b, as amended.

⁵⁸ A very usable description of the difference in these words and their meaning under U.S. law can be found in a column written by William Safire. <http://www.nytimes.com/2005/02/13/magazine/13ONLANGUAGE.html?ex=1266037200&en=09a19068b4121bf3&ei=5090&partner=rssuserland>

⁵⁹ See 50 U.S.C. § 413b(e).

⁶⁰ An interesting and very usable description of the history of these legal requirements is included in James E. Gauch, “Restoring Congress’s Proper Role in Oversight of Covert Intelligence Operations.” We do not, however, agree with Mr. Gauch’s conclusions on the “proper” role for Congress in oversight of covert operations.

⁶¹ See 50 U.S.C. § 413b(c)(2).

- ⁶² <http://www.usatoday.com/news/2006-05-17-nsa-list.pdf>
- ⁶³ Sen. Boren's statements on the Senate floor (24 Oct. 1990).
- ⁶⁴ Compare, for example, the list of open and closed hearings by the Senate Select Committee on Intelligence during the 109th Congress, which is *available at* <http://intelligence.senate.gov/hr109.htm> (last viewed May 7, 2006).
- ⁶⁵ See Elizabeth B. Bazen & Jennifer K. Elsea, CRS Memorandum: *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, Jan. 5, 2006, *available at* <http://www.fas.org/sgp/crs/intel/m010506.pdf> (last viewed May 8, 2006).
- ⁶⁶ Sen. John Glenn (D-OH) introduced in 1987 the General Accounting Office-Central Intelligence Agency Audit Act of 1987. The bill proposed that the Comptroller General be given the authority to evaluate the activities of the Central Intelligence Agency in conjunction with the activities of the Senate Select Committee on Intelligence. The bill was referred to the SSCI, but no further congressional action was taken. The bill was S.1458.
- ⁶⁷ See 5 U.S.C. Appendix 3.
- ⁶⁸ It is worth noting that the Department of Defense also has a little-known officer called the Assistant to the Secretary of Defense for Intelligence Oversight, the primary purpose of which was to ensure that military intelligence did not conduct any intelligence activity domestically. See <http://www.dod.mil/atsdio/> for more information about the mission of this office.
- ⁶⁹ See generally Frederick M. Kaiser, *Statutory Offices of Inspector General: Establishment and Evolution*, CRS Report for Congress, Mar. 5, 2003.
- ⁷⁰ 50 U.S.C. 1801 *et seq.*
- ⁷¹ See the discussion regarding the need to report findings and actions with respect to covert action pursuant to 50 U.S.C. 413b, above.
- ⁷² See e.g., S. Res. 400, Section 8 (describing the procedures and circumstances under which the committee may disclose publicly any information that the committee determines would serve the public interest).
- ⁷³ See e.g., interview of Congressional Affairs officer for the CIA, March 30, 2006.
- ⁷⁴ <http://www.mercurynews.com/mld/mercurynews/news/politics/14548515.htm>
- ⁷⁵ See, in particular, <http://www.usnews.com/usnews/news/articles/060213/13cia.htm> and <http://www.nytimes.com/2006/05/14/weekinreview/14weiner.html?ex=1305259200&en=514d19d937472c12&ei=5090&partner=rssuserland&emc=rss>, and <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/18/AR2005101801549.html>
- ⁷⁶ http://www.pbs.org/newshour/bb/fedagencies/july-dec04/cia_11-15.html, <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/18/AR2005101801549.html>
- ⁷⁷ Authors' interview of Senator Tom Daschle, Feb. 16, 2006. See also Lee H. Hamilton *Oversight vs. Glitzy Investigation*, *Christian Science Monitor*, July 15, 1999, at 11.

About the Authors

Denis McDonough, Senior Fellow

Denis McDonough is Senior Fellow and Senior Adviser to Distinguished Senior Fellow Tom Daschle at the Center for American Progress. Prior to joining American Progress, Denis was Legislative Director for Senator Ken Salazar of Colorado. From July 2000 to December 2004, Denis was Foreign Policy Adviser to Senate Democratic Leader Tom Daschle. In that role, Denis worked extensively on legislation related to the war on terrorism, the response to the global HIV/AIDS pandemic, Iraq and the greater Middle East.

Prior to his time working in the Senate Leadership, Denis was a Fellow with the Robert Bosch Foundation of Stuttgart, Germany from 1999 to 2000. During that yearlong fellowship, Denis worked with the Bundestag in Berlin and the German Chapter of Transparency International in Munich. From 1996 to 1999, Denis was a member of the Democratic Professional Staff of the House International Relations Committee, where he was focused on U.S. policy in Latin America. He earned a master's degree from Georgetown University (1996) and graduated summa cum laude from St. John's University in Collegeville, MN (1992).

Mara Rudman, Senior Fellow

Mara Rudman is a Senior Fellow at the Center for American Progress. She also serves as Senior Partner at Quorum Strategies, an international strategic consulting firm. From 2001 to 2004, she was a vice president and general counsel to The Cohen Group. From 1997-2001, Mara served as Deputy Assistant to the President for National Security Affairs and Chief of Staff for the National Security Council. In that position, Mara advised the President and the National Security Adviser, and coordinated and directed activities within the National Security Council and among the Departments of State, Defense, Treasury, Energy, and Justice.

Previously, Mara served as chief counsel to the International Relations Committee, supervising procedural and political aspects of committee operations, and managed legislation related to war powers issues, the Middle East peace process, the Persian Gulf, Africa, Asia, Latin America, Europe, export controls, sanctions and sanctions reform, foreign assistance, and reorganization of foreign affairs agencies.

Prior to her committee positions, Mara was a litigation associate at Hogan & Hartson. She clerked for the Honorable Stanley Marcus, now of the Eleventh Circuit, in the Southern District of Florida. Earlier she worked as a legislative assistant to Congressman Gerry Studds. Mara serves on the board of advisors of the Dickey Center for International Understanding at Dartmouth College and as an advisor to the German Marshall Fund of the United States. She is also a frequent media commentator. Mara received her A.B. summa cum laude from Dartmouth College and her J.D. cum laude from Harvard Law School, where she was the editor-in-chief of the *Harvard Human Rights Journal*.

Peter Rundlet, Vice President for National Security and International Affairs

Peter Rundlet is the Vice President for National Security and International Affairs at the Center for American Progress. Prior to joining American Progress, Peter was Counsel for the National Commission on Terrorist Attacks Upon the United States (the “9/11 Commission”), where he focused on domestic intelligence and law enforcement policy, including related civil liberties issues. In 1997, Peter was selected to be a White House Fellow, serving in the Office of the Chief of Staff to the President. After his fellowship year, he was appointed Associate Counsel to the President and was responsible for a range of policy and constitutional law issues until the end of the Clinton administration.

After his White House tenure, Peter was an attorney in the political law department of Skadden, Arps, Slate, Meagher & Flom. Earlier in his career, Peter received the Skadden Public Interest Law Fellowship and was an Assistant Counsel for the NAACP Legal Defense and Educational Fund, where he litigated voting rights, housing, school desegregation, and employment discrimination cases. Peter was also a Peace Corps volunteer in Honduras. He received his undergraduate degree from Brown University, a master’s degree from the Fletcher School of Law & Diplomacy at Tufts University, and a law degree from the University of Pennsylvania Law School.

Center for American Progress



ABOUT THE CENTER FOR AMERICAN PROGRESS

The Center for American Progress is a nonpartisan research and educational institute dedicated to promoting a strong, just and free America that ensures opportunity for all. We believe that Americans are bound together by a common commitment to these values and we aspire to ensure that our national policies reflect these values. We work to find progressive and pragmatic solutions to significant domestic and international problems and develop policy proposals that foster a government that is “of the people, by the people, and for the people.”

Center for American Progress
1333 H Street, NW, 10th Floor
Washington, DC 20005
Tel: 202.682.1611 • Fax: 202.682.1867
www.americanprogress.org