

*Roots, rules, reflections*

## CONGRESSIONAL OVERSIGHT OF INTELLIGENCE

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In the section of *Democracy in America* titled "Accidental Causes That May Increase the Influence of the Executive Power," Tocqueville states:

If executive power is weaker in America than in France, the reason for this lies perhaps more in circumstances than in the laws. It is generally in its relations with foreign powers that the executive power of a nation has the chance to display its skill and strength. . . . The President of the United States possesses almost royal prerogatives which he has no occasion to use . . . the laws allow him to be strong. But circumstances have made him weak.<sup>1</sup>

Tocqueville's statement comes as a surprise to most students of American government. It is surprising because it suggests that at bottom the American presidency is in some respects "imperial." Arthur Schlesinger, Jr., notwithstanding, Tocqueville clearly sees within the formal office of the chief executive the seeds of a powerful head of state.

Such a conception of the potential of the presidency is alien to most students of the American constitutional system of separation of powers because most have accepted without question an interpretation of separation of powers most memorably expressed by Justice Louis Brandeis:

The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of governmental powers among the three departments, to save the people from autocracy.<sup>2</sup>

In short, separation of powers is an institutional tool that was employed by the architects of the American constitutional system for restraining government's power, but not for promoting its effective use.

This view of separation of powers is not without some powerful and prestigious adherents; it can be found in Woodrow Wilson's *Constitutional Government*, in Richard Neustadt's *Presidential Power*, and in James MacGregor Burns' *The Deadlock of Democracy*. The American constitutional system was designed for deadlock, not decision.

That this vision of the formal framework of the government has had such a powerful hold on academics and politicians alike is not surprising given the

<sup>1</sup> Alexis de Tocqueville, *Democracy in America*, ed. Mayer (New York: Doubleday, Anchor Books, 1969), pp. 125-26.

<sup>2</sup> *Myers v. United States*, 272 U.S. 52, 293 (1926).

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pedagogic capacity of someone like Wilson and the regime's ever-present democratic impulse to suspect instinctively any complexity as an impediment to the immediate attainment of its desires. Its staying power notwithstanding, the fact is, history gives little support to this interpretation of the American system of separation of powers. As one suspects of most such matters, the truth is more complex.

To begin with, if stalemate and inertia had been the goal toward which the framers were in single-minded pursuit, it is somewhat difficult to explain their substantial expenditure of energy in shedding the Articles of Confederation. If ever there was a system of government designed for deadlock, that was it. Moreover, if that had truly been their goal, then in forming the constitution almost any division of power among any number of arbitrarily chosen branches would have sufficed. But this is not what happened. The framers were careful to define the powers of government and almost equally careful in distributing them to the branches of government which had been specifically constructed to house them. To a much larger degree than is commonly understood, and in contrast to Neustadt's famous description of the government as "separate institutions sharing powers," the architects of the American system of separation of powers were driven by "the belief that kinds of power are best exercised by particular kinds of bodies."<sup>3</sup>

By the time of the Constitutional Convention, the general incompetence of the Congress of the Articles of Confederation and the capriciousness of the various state assemblies had changed many of the framers' minds about the government's need for a vigorous and independent executive. Having earlier reacted to the perceived abuses of king and governors alike with the establishment of weak state executives and the disestablishment of an independent executive authority on the national level, it was, according to James Wilson, "high time that we . . . chastise our prejudices; and that we . . . look upon the different parts of government with a just and impartial eye."<sup>4</sup>

The desire for a separate executive branch of the government was partially fostered by the incapacities of Congress under the Articles of Confederation in the areas of national defense and foreign affairs. The letters of Washington, Hamilton, Jay, Morris and even Jefferson bear testimony to this concern.<sup>5</sup> For example, frustrated by the lack of energy and dispatch exhibited by the national assembly in prosecuting the war, Colonel Hamilton concluded that Congress had "kept the power too much into their own hands." After all, "Congress is," Hamilton continued, "properly a deliberative corps and it forgets itself when it attempts to play the executive."<sup>6</sup>

Congress' reputation fared little better in the area of foreign affairs. John Jay, a member of Congress and eventually its Secretary for Foreign Affairs,

<sup>3</sup> Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (New York: Wiley and Sons, 1960), p. 33; Ann Stuart Diamond, "The Zenith of Separation of Powers Theory: The Federal Convention of 1787," *Publius* (Summer 1978), p. 59.

<sup>4</sup> James Wilson, *Works*, ed. McCloskey (Cambridge: Harvard Univ. Press, 1967), Vol. 1, p. 293.

<sup>5</sup> See Louis Fisher, "The Efficiency Side of Separated Powers," *Journal of American Studies* (August 1971).

<sup>6</sup> Alexander Hamilton, *Papers*, ed. Syrett (New York: Columbia Univ. Press, 1961), Vol. 2, p. 404.

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complained repeatedly about the assembly's impotence in this area of concern. The plural composition of the Congress made timely action nearly impossible, and always improbable. Vacillation, not decision, was the norm. This was especially evident in those issues of most importance to states, as exemplified in Congress' tortured and factionalized attempts to draft instructions for the negotiators of the peace treaty with Great Britain. Jay, like Hamilton, did not blame particular members of Congress for the delays or the failures. Congress was just being a congress. In a letter written to Jefferson in 1787, just prior to the Constitutional Convention, Jay suggests that the functional incapacities then plaguing the government could only be overcome by the adoption of separation of powers. As matters stood under the Articles of Confederation, Congress was given both executive and legislative duties. According to Jay,

Congress is unequal to the first . . . but very fit for the second . . . and so much time is spent in deliberation that the season for action often passes by before they decide on what should be done; nor is there much more secrecy than expedition in their measures. These inconveniences arise not from personal disqualifications but from the nature and construction of government.<sup>7</sup>

As Hamilton was to state succinctly elsewhere, there "is always more decision, more dispatch, more secrecy, more responsibility where single men, than when bodies are concerned."<sup>8</sup>

Instructed by their experience, the Constitution's framers adopted and, through the administrations of Washington, Adams, and Jefferson, maintained an executive office whose institutional logic was consonant not only with the maxims of free government but also those of effective government.<sup>9</sup> In general, they recognized that the doctrine of separation of powers when effectively implemented was not simply a tool to prevent power's abuse but a means to assist its use. Brandeis' statement about the intention of the founders is only half true. Charles Thach in his little-read *The Creation of the Presidency* completes the picture:

The adoption of the principle of separation of powers as interpreted to mean the exercise of different functions of government by departments officered by entirely different individuals, also seemed insistently demanded as a *sine qua non* of governmental efficiency.<sup>10</sup>

Specifically, the framers came to understand a government's need for an independent and unitary executive whose powers and office were as carefully molded as the checks they placed upon it. Through their implementation of separation of powers, they hoped to meet the particular demands and neces-

<sup>7</sup> John Jay, *Correspondence and Papers*, ed. Johnston (New York: Putnam's, 1890-93), Vol. 3, p. 223.

<sup>8</sup> Hamilton, *Papers*, Vol. 2, p. 245.

<sup>9</sup> See, in general, Abraham Sofaer, *War, Foreign Affairs and Constitutional Power: the Origins* (Cambridge: Ballinger, 1976). Of the first eight years, Sofaer comments that the "framework for executive-congressional relations developed" during that time "differs more in degree than in kind from the present framework." p. 127.

<sup>10</sup> Charles C. Thach, Jr., *The Creation of the Presidency: 1775-1789* (Baltimore: Johns Hopkins Univ. Press, 1929), p. 74.

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sities placed upon a nation by its being only one among (a possibly hostile) many.

This functional aspect of the American system of separation of powers is key to understanding Tocqueville's statement about the presidency. Seen from this perspective, it is hardly surprising that as circumstances warrant and the necessities of foreign affairs grow, the latent powers of the presidency would be tapped.

Again, if separation of powers is properly understood, the fact that there was a rather marked increase in the power of the executive office after World War II does not of itself mean that some form of constitutional usurpation had taken place. Quite the contrary, given America's expanded role in the world, it was "natural" that such an increase should occur. What some critics in the not-too-distant past dismissed as rationalizations for the *de facto* dominance of the presidency in foreign affairs are in fact connected to that office's *de jure* qualities. As Edward Corwin wrote in the wake of World War I, "that organ which possesses unity and is capable of acting with greatest expedition, secrecy and fullest knowledge—in short, with greatest efficiency—has obtained the major participation."<sup>11</sup>

In general, through separation of powers the framers attempted to construct a government which is both effective and safe. Its powers were to be complete but also carefully hedged. So understood, it is natural that over the two hundred years of the Constitution's existence that power and prestige would ebb and flow from the various branches of the government. Its explicit division of labor made it inevitable that at different times, and in different sets of circumstances, the different branches would grow and recede in strength.

There is in this system a certain assumption made by the framers that adjustments in the strength of the branches would coherently follow the dictate of necessity. To a large extent, their Enlightenment belief that necessity—especially that of self-preservation—would be self-evident has been borne out. In such instances as the Civil War and World War II, power has accrued quite readily to the executive office. However, in those instances outside the circumstance of war, exercise of a strong executive power has proved more difficult. In particular, since the end of World War II we have seen a shift from an "imperial" to an "imperiled" presidency. The necessities of war are clear and paramount; unfortunately, the necessities of peace and events leading to war are rarely so clear. As a result, what becomes crucial is the public's understanding of the circumstances the nation faces in times short of war. It is at these times that the dominance of the presidency is dependent not upon the necessities themselves, but the public apprehension and consensus about them.

It is the thesis of this essay that the key to understanding the history and the prospects of congressional oversight of one of the President's more valued prerogatives—the exercise of clandestine activities—is precisely that con-

<sup>11</sup> Edward S. Corwin, *The President's Control of Foreign Relations* (Princeton: Princeton Univ. Press, 1917), p. 205. See also, Corwin, "The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention," *30 American Historical Review* (1925), pp. 511-36.

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sensus. While the independent, deliberative capacity of the Congress should not be dismissed, neither should it be accorded undue weight. Congress is, to state the obvious, a representative body, first and foremost.

## The Cold War and Executive Prerogative

In 1947, the Cold War began and with it two decades of consensus over the principles and necessities guiding American foreign policy. In March of that year, President Truman, reacting to the crisis posed by communist subversion in Greece and Turkey, declared that "it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressure." Truman's Doctrine was given its most famous, expanded, and authoritative elucidation in George F. Kennan's "The Sources of Soviet Conduct," which appeared in the July 1947 issue of *Foreign Affairs*. Within four months, the theory and practice of American foreign policy coalesced, and the execution of the policy known as containment had begun.

As explained by Kennan, containment was a political and military strategy to resist Soviet expansion. It was, according to Kennan, "the adroit and vigilant application of counterforce at a series of constantly shifting geographical and political points, corresponding to the shifts and maneuvers of Soviet policy." Containment, as explicated by Kennan and understood by most, was a long-term strategem to be used by the United States and its allies in a world of undeclared hostilities.<sup>12</sup> The hot war had become cold, but it was war nevertheless.

The public consensus that formed around the policy of containment was remarkable in its strength. While a Democratic administration gave containment birth, its most explicit applications were to be found in the Republican administration of President Eisenhower. The Republican platform of 1952 notwithstanding, Eisenhower rejected the policy of rolling back the Soviet Union's imperium in favor of maintaining the status quo central to the doctrine of containment in the case of Korea and, later, Hungary. Around containment a bipartisan, national consensus coalesced. It was a consensus that would last for some twenty years and four administrations—Truman's, Eisenhower's, Kennedy's, and Johnson's.

This post-World War II consensus about foreign affairs was the dominant factor in how congressional oversight of intelligence was carried out. In an era of undeclared hostilities it seemed only proper to most members of Congress that the restraint they had shown toward the Executive Branch during the war should carry over to this novel—but no less dangerous—age. Oversight of intelligence was to be no exception.

As a former Chairman of the Senate Appropriations Committee noted at the time, "[legislative interference with intelligence] would tend to impinge upon the constitutional authority and responsibility of the President in the

<sup>12</sup> "Mr. X" [George F. Kennan], "The Sources of Soviet Conduct," *Foreign Affairs*, July 1947; reprinted in G. F. Kennan, *American Diplomacy 1900-1950* (Chicago: Univ. of Chicago Press, 1951).

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conduct of foreign affairs."<sup>13</sup> Or, as one scholar has put it a bit more pithily, "[Congress'] World War II motto was said to be 'Trust in God and General Marshall.' In the Cold War atmosphere . . . the attitude seems to have been 'Trust in God and Allen Dulles.'"<sup>14</sup>

Formally, Congressional oversight did in fact exist. In the Senate and the House of Representatives the Armed Services Committees and the Defense Subcommittees of the Appropriations Committees had authorizing and appropriating jurisdiction for the intelligence community. Special subcommittees of these four committees were formed to handle oversight, with the chairman of the full committee assuming the chair of the subcommittee.

Substantively, however, oversight was *de minimis*.<sup>15</sup> There were never more than a few members of either house of Congress actually involved in intelligence oversight. In fact, because of the leniency of Senate rules governing committee membership, there were Senators who held seats on both the Armed Services and Appropriations intelligence subcommittees simultaneously. So great was the overlap that during a period in the 1960s, when Senator Richard B. Russell of Georgia was chairman of both the Armed Services and the Defense Appropriations Subcommittees, the two Senate intelligence subcommittees often met and transacted their business as one.

Limited membership on the intelligence subcommittees was matched by an even more limited number of committee staff to assist them in their deliberations. Often no more than the clerk and an assistant had access to the subcommittee material. As one might expect, the number of subcommittee hearings held was also limited. Indeed, there were several years where the "joint" committee of the Senate met only once or twice. According to the CIA, from 1967 to 1972 it averaged 23 annual appearances before congressional committees. The greatest percentage of these appearances was before committees other than the four intelligence subcommittees.

This pattern of oversight seems generally not to have been a product of CIA or intelligence community reluctance to appear before the committees or inform the Congress. The subcommittees were apparently regularly informed of the most significant covert programs and routinely briefed on the intelligence budget. The mechanism for oversight clearly existed; what was missing was an interest in using it—or more properly speaking, a consensus that would legitimize its use. Such major events as the creation of the National Security Agency, the Defense Intelligence Agency and the merging of the State Department's Office of Policy Coordination with the CIA's Office of Special Operations (centralizing clandestine activities within the CIA) were carried out by executive fiat. In short, while Congress appropriated millions of dollars for the

<sup>13</sup> Statement of Sen. Carl Hayden, cited in Harry Howe Ransom, *The Intelligence Establishment* (Cambridge: Harvard Univ. Press, 1970), p. 161.

<sup>14</sup> Ransom, *Establishment*, p. 172.

<sup>15</sup> "At their most active, the House 'subcommittees' reportedly met with agency officials a half-dozen times a year, spending as much (or as little) as fifteen to twenty hours in oversight. There was little, if any, record keeping of formal reporting or staffing, with the exception of budget review. . . . The pattern in the Senate was similar." Roy Godson, "Congress and Foreign Intelligence," eds. Lefever and Godson, *The CIA and the American Ethic* (Washington: Ethics and Public Policy Center, Georgetown University, 1979), p. 33.

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intelligence agencies, their creation and operations were generally understood, for nearly a quarter of a century, as lying within the realm of executive prerogative.

The year 1947 saw the adoption of the policy of containment. The effect of the consensus supporting that policy on congressional oversight of intelligence is largely exemplified in the National Security Act of the same year. The Act created the Central Intelligence Agency, yet one would search in vain among the various committee reports accompanying the legislation for more than a passing reference to its establishment.

### Isolation and Congress as Semi-Sovereign

From 1947 to the late 1960s the consensus surrounding the policy of containment was solid. Under the pressure of the war in Vietnam that consensus began to dissolve as criticism of our military intervention in Southeast Asia necessarily brought with it questions about the wisdom and the utility of the strategy of containment. This critique was carried on at two levels. On the first, containment's apparent call to counter every thrust by the Soviet Union left the US with little leeway to raise tactical and prudential questions necessarily involved in any particular commitment of US power and prestige. A second and more fundamental critique appeared later in the debate over Vietnam. It held that US intervention was not only tactically wrong but that intervention *per se* was, in the words of the former Chairman of the Senate Foreign Relations Committee, a manifestation of the "arrogance of power." In short, not only was the consensus upholding the means of containment shattered, so also was the public's resolve to achieve its end.

The Nixon Doctrine and strategy of detente was an attempt to salvage the goal of containment while jettisoning its unacceptable means. In place of US intervention and dependence on US military strength, a sophisticated array of coalitions (China), surrogates (Iran), and incentives (Pepsi-Cola) was to carry the task of moderating Soviet behavior. Sophisticated or not, the Nixon Doctrine never stood a chance of gaining public acceptance on an order that resembled the consensus surrounding containment. Left substantially undressed was that larger critique of containment which concerned the legitimacy of its ends. Indeed, the language used during this period—that of spheres, superpowers, and balance of power—tended to cast the struggle between the East and West in terms more appropriate to mechanics than to statecraft. The Nixon Doctrine exacerbated the very forces of isolation that it had ostensibly attempted to counter.

As the consensus in support of containment disappeared, so did confidence in the institution most conspicuous in carrying it out. The isolationist reaction to an active American role in the world implied a diminished role for the President and the instrumentalities he wielded in support of it. One after another, presidential prerogatives in foreign affairs were challenged. Presidential discretion in these matters was greatly curtailed as Congress passed numerous pieces of legislation to make him more accountable to the legislative

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branch.<sup>16</sup> A key element in the program to make the presidency less imperial was the effort to reduce both the resources and autonomy of the intelligence arm of the Chief Executive.

The impetus to rein in the presidency and American intelligence was enhanced by a series of revelations and events. In 1971, the Pentagon Papers were published; in 1972, the Watergate scandal began; in 1973, Agnew resigned; in August of 1974, Nixon resigned. One month later, a highly controversial covert action program in Chile was disclosed. Three months later, during Christmas week, the *New York Times* ran a front-page story on what it called a "massive" domestic intelligence operation run by the CIA.

Immediately upon Congress' return from its holiday recess, both the House and Senate created special committees to investigate the past and present activities of the intelligence agencies. The two committees, most widely known by the names of their respective chairmen, Senator Frank Church and Representative Otis Pike, were, in the words of the former, after the "rogue elephant." They were joined in that hunt by the President's own special commission, known by the name of its chairman, Vice President Rockefeller. For the next year and a half, the nation was treated to a deluge of reports from these three bodies concerning the past failures and abuses of the intelligence community. Among other things, they found: questionable domestic surveillance operations, assassination plans, intercepts of mail and cable traffic, programs to infiltrate dissident domestic groups, drug experiments on unwitting individuals, and efforts to topple foreign governments.

In their final reports both the Church Committee and the Pike Committee recommended a major change in the oversight process. Both called for the creation of select, permanent standing committees tasked specifically with overseeing the intelligence community. In May of 1976, the Senate established the Select Committee on Intelligence (SSCI) and, a year later, the House created its Permanent Select Committee on Intelligence (HPSCI).

Given their inheritance, it is not surprising that the new intelligence committees initially focused on setting down new rules and creating restraints. Because the debate about intelligence during the mid-1970s had been concerned principally with examples of improper and/or illegal activities, it was natural that the agenda for the House and Senate intelligence committees be the imposition of restrictions on the intelligence community.

Three pieces of legislation, two of which eventually became law, dominated the first few years of the new oversight process. The most important of these, the Hughes-Ryan Amendment to the 1974 Foreign Assistance Act, had been enacted into law before the establishment of the intelligence committees. As with the creation of the committees, Hughes-Ryan was unprecedented. It was the first law ever passed by Congress which called explicitly for congressional oversight of an activity of a component of the American intelligence community.

<sup>16</sup> See, in general, Allen Schick, "Politics Through Law: Congressional Limitations on Executive Discretion," ed. King, *Both Ends of the Avenue* (Washington: AEI, 1983).



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President Ford signed Hughes-Ryan (P.L. 93-559) on 30 December 1974. The amendment consisted of two key provisions. The first was that the CIA could spend no monies on programs not related to the collection of intelligence (that is, on covert action) until the President had certified "that each such operation is important to the national security of the United States." The second key provision of Hughes-Ryan was that after the President had made such a finding he was obligated to report it "in a timely fashion" to the "appropriate" committees of the Congress.

The first requirement had the consequence that in the future all covert activity would clearly be the responsibility of the President. Although the claim was advanced that internal executive branch guidelines made that the case already, Hughes-Ryan gave those regulations the force of law. Under Hughes-Ryan, there would be no room for a repetition of ambiguously authorized attempts to assassinate the likes of Fidel Castro; presumably, there is for presidents no longer any room, for better or worse, for "plausible denial." A second consequence of the requirement for presidential certification of every covert action as "important to the national security" is the implication that presidents are to make covert action an exceptional rather than a characteristic tool of American foreign policy.

The indirect effects of Hughes-Ryan were small in comparison with its direct effect on clandestine activities by the requirement that the "appropriate" committees of Congress be notified prior to or upon initiation of any presidentially approved covert action. Before passage of Hughes-Ryan, covert action had been rather loosely monitored by the Congress. Typically, a handful of senior committee chairmen were informed of major operations. The discretion as to when or in what detail to brief the Congress lay mainly within the domain of the executive branch. This discretion largely disappeared with the passage of Hughes-Ryan. Reporting to the "appropriate" committees was understood to mean reporting to the full membership of the Senate and House Armed Services Committees, the Senate and House Defense Subcommittees of the Appropriations Committees, the House Foreign Affairs Committee and the Senate Foreign Relations Committee. To these six bodies, both the House and the Senate Intelligence Committees were added. In sum, under the prescriptions of Hughes-Ryan eight committees were to be informed of each covert action.

The result was inevitable. As one scholar noted at the time, "Most [covert actions] . . . which have been brought to the attention of congressional committees pursuant to Hughes-Ryan have become public knowledge." Succinctly stated, it had "all but ruled out effective *covert* operations."<sup>17</sup>

Formally, of course, Hughes-Ryan only required that the committees be notified of covert operations. Unlike the War Powers Act, Hughes-Ryan made no mention of a congressional power to veto a President's decision. But having so many members of Congress in the know virtually guaranteed that proposed covert programs were not going to stay covert for very long. The result was that Hughes-Ryan gave any member of the eight committees a virtual veto

<sup>17</sup> Godson, "Congress," p. 27. Emphasis added.

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over any truly controversial covert action through the power of the timely leak. It was not long after the enactment of Hughes-Ryan that the executive branch was proposing in the main only programs it was willing to see discussed in public. With regard to covert action, statecraft gave way to poll-watching.

Covert action was not the only area of intelligence in this period to come under new restraints. Under the Foreign Intelligence Surveillance Act of 1978, commonly known as FISA (P.L. 95-511), domestic collection was also targeted. FISA governs electronic surveillance (wiretaps, etc.) of places or persons, foreign or American, believed to be involved in espionage or terrorism in the United States. Under FISA, before a US person's domicile or place of work can be wiretapped, the intelligence community must make a case before a special secret court detailing its reasons for wanting to take that action. If convinced by that case, the judge will issue a warrant allowing the tap. The standard the judge uses to rule on each case is specified in the Act as essentially a criminal standard. Under FISA, there must exist probable cause to believe that the person in question is knowingly engaged in clandestine intelligence activities or terrorism before issuance of a warrant is justified. In short, the government, under FISA, cannot tap a US person's phone to gather sensitive intelligence which is otherwise unavailable.<sup>18</sup>

The era of restraint culminated in the attempt to pass a comprehensive charter for governance of the whole of American intelligence. This particular piece of legislation, while proposed, was never enacted into law. The charter was first drafted by the Senate Intelligence Committee and ran for some 300 pages. It attempted to establish a lengthy and complex set of regulations and prohibitions to rule and restrain every activity of American intelligence. From a few dozen words in the National Security Act of 1947 to several hundred pages of charter legislation, congressional oversight of intelligence had evolved from the sublime to the absurd.

Yet, the fact is, Hughes-Ryan, FISA and the proposed charter rather accurately reflected the prevailing distrust and cynicism about the institutions of government. Vietnam and Watergate produced a public both indignant about and distrustful of its government. Congressional oversight of intelligence mirrored both. Of course, what was not reflected in a serious or sustained way was an equally pressing concern about the competence of the intelligence agencies themselves. As Samuel Huntington has bitinglly noted:

In a different atmosphere . . . congressional committees investigating the CIA might have been curious as to why the Agency failed so miserably in its efforts to assassinate Lumumba and Castro. . . [At the time, however] no one was interested in the ability of the Agency to

<sup>18</sup> One could argue that FISA was enacted as a positive remedy to the legal and political situation that existed at the time with regard to domestic electronic surveillance. Before passage of FISA, the Attorney General reported that, with one exception, no US citizen was then a target of electronic surveillance. The use of electronic surveillance for intelligence collection had all but ceased. In order to get the officers and agents of the various intelligence agencies back into the streets (or, in this case, the adjoining room), something like FISA was required. What this helps explain, of course, is the existence of the law. However, its content—complex and restrictive proscriptions conjoined to judicial review—is best explained by a quite different animus.

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do what it was told to do, but only in the immorality of what it was told to do.<sup>19</sup>

## The Collapse of Detente and a Sense of Relief

Congress never did pass an intelligence charter. The animus for doing so gradually passed away. In some measure, this was caused simply by the passage of time and the fact that the intelligence community and the intelligence committees got to know each other a little better. In place of the charter's lengthy list of proscriptions and guidelines there was developing within the oversight process a spirit of comity. This change was perhaps no better exemplified than by the Senate Intelligence Committee's decision in 1979 to drop its Subcommittee on Investigations.

General maturation was not the principal reason for the change in spirit. Much more important was the growing recognition that detente had collapsed. A decade of its implementation had not produced a stable, balanced relationship between the United States and the Soviet Union. Angola, Ethiopia, Afghanistan—all supplied more than ample evidence that Moscow's expansionist behavior had not been fundamentally modified by detente and the process of "normalization." Indeed, if Soviet military expenditures, especially in the area of strategic weapons, were any indication, then Soviet aggressiveness could be expected to grow, not lessen. Faced with these facts and rudely shocked by events in Iran, the American public began to reconsider issues of national security. Given this change in the public's mood, it is not surprising that it was reflected in the actions taken by their representatives—including those charged with overseeing the intelligence community.

If the early years of congressional oversight had set as its agenda the reining in of the American intelligence community, then the agenda of the past 4 years has been, generally, to allow it to regain its former pace. This program of relief has more or less typified the legislative record of the two intelligence committees, with one obvious and important exception. Yet even here, in the wake of the debate over Nicaragua, both the Senate and the House have passed legislation exempting the operational files of the CIA from the normal search and review requirements established under the Freedom of Information Act.

The year 1980 appears to have been pivotal for this change of agenda. In 1980 Congress passed the Classified Information Procedures Act (P.L. 96-456), also known as the "greymail" act. This bill established new procedures for the introduction and protection of classified information in trials. In the past, threats by defendants to subpoena volumes of classified information and expose that information in legal proceedings had, it was claimed, forced the government and the intelligence agencies to drop a prosecution. With passage

<sup>19</sup> Samuel P. Huntington, *American Politics: The Promise of Disharmony* (Cambridge: Harvard University Press, 1981), p. 191.

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of the act, blackmailing the government into dropping such cases became less of a problem.<sup>20</sup>

The year 1980 also saw the introduction of the Intelligence Identities Protection Act, enacted into law (P.L. 97-200) 2 years later. This legislation made it a crime for any person to seek out and publicize the names of American intelligence agents. Despite the fact that the law applied to journalists as well, it passed both houses with overwhelming majorities.

The most important legislative event of 1980 was the passage of the Intelligence Oversight Act (P.L. 96-450), which as Title V of the National Security Act became law on 14 October. The act was noteworthy for two reasons. First, it amended Hughes-Ryan. The key change was that the number of committees to which the President was required to report covert operations was reduced from eight to two: the intelligence committees of the House and Senate. Other provisions were added which allowed the President to act, if circumstances warranted, with greater dispatch and secrecy. The President could now limit prior notice of covert action to the leadership of the House and Senate and the ranking members of their intelligence committees. If he so desired, the President could dispense with prior notification altogether so long as he reported his actions in a "timely fashion" and provided a "statement of the reasons" for dispensing with the prior notice. The second noteworthy aspect of the Intelligence Oversight Act lay in the fact that it made a matter of law the principle behind Hughes-Ryan, the legitimacy of congressional oversight in these matters. While the act itself was unprecedented in that it codified that principle, it nevertheless was understood to be a measure of some comfort to the intelligence community.

The Oversight Act was, in quantity and quality, much different from two charters introduced by the Senate Intelligence Committee. Even the more moderate of the two documents was nearly 200 pages in length; what emerged as law covered all of two pages.

The Intelligence Oversight Act established four basic obligations for intelligence officials. The first was that they keep the two intelligence committees "fully and currently informed of all intelligence activities." The second outlined the revised notification provision concerning covert activities previously noted. The third prescription in the act was that the intelligence agencies were to "furnish any information" deemed necessary by the oversight committees to carry out their responsibilities. The fourth, and final, obligation concerns illegal or failed intelligence activity: both are to be reported to the committees in a "timely fashion."

These obligations are themselves bound by provisions which recognize the legal and constitutional duties of executive branch officials. For example, after enumerating the various reporting requirements, the act directs the House and the Senate committees to establish procedures, "in consultation with the

<sup>20</sup> As with FISA, there were mixed motives behind passage of the Classified Information Procedures Act. While the substantive thrust of the act was to grant some relief to the government in protecting classified information, the act was also supported by some as a measure that might facilitate prosecution of active or former intelligence officers charged with some wrongdoing.

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Director of Central Intelligence," to protect the classified information that is to be given. Equally important is the preamble to the specific mandates of the act. There the need to protect classified information and information "relating to intelligence sources and methods" is confirmed. Additionally, the preamble acknowledges the "duties" conferred by the Constitution upon the executive and legislative branches of the government.

When compared with the various proposed intelligence charters the Intelligence Oversight Act of 1980 is, both in substance and tone, more moderate. In place of congressional oversight's becoming dominated by legal particulars, it became a matter more of comity between the branches. In general, passage of the act was, for the intelligence community, a matter of relief.

## The Committees and the Elements of Intelligence

The literature on congressional oversight and the committee system is, with some notable exceptions, generally governed by models constructed from "interest group" theories. According to these models, the essential role played by Congress and the committees is that of facilitating the process by which the various interests of the society are aggregated and adjusted. The principal activity of the Congress and its parts, then, is to haggle over, bargain about and divvy up the federal pie for the constituents back home. Congressmen are understood to be principally brokers.

While not completely without merit, this view of Congress and the oversight process is hardly sufficient. As Arthur Maas has written: "Much of what Congress and the President do cannot be described adequately by using these models"; they are often "insufficient" and "misleading."<sup>21</sup> This strikes one as generally true with regard to congressional oversight in the area of foreign affairs. While social and economic interests may well play some role in decisions on such matters as the Panama Canal Treaty, SALT II, or a military assistance bill for El Salvador, most members of a committee involved in the legislative process will base their judgments on factors other than the subpolitical. This seems to be particularly true for the process of congressional oversight of intelligence activities. Put crudely, since most of the oversight process in this area takes place behind closed doors, there accrues to the Representative or Senator on an intelligence committee little of the traditionally understood advantage of using his seat on the committee to serve the home district or state.

A more straightforward model of Congress and congressional oversight is one based on the proposition that Congress' principal function in this area is to reflect and refine the views of the population. It should be both representative and deliberative.

## The Committees

Today the primary institutional forms through which that process is to take place in the area of intelligence are the House Permanent Select Com-

<sup>21</sup> Arthur Maas, *Congress and the Common Good* (New York: Basic Books, 1983), pp. 4-5, 7-12.

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mittee on Intelligence and the Senate Select Committee on Intelligence.<sup>22</sup> To understand how they both might reflect and refine public opinion on intelligence, a closer look is required.

Before examining the committees and how they do or do not fulfill those functions, however, one is obliged to note the revolutionary nature of the now generally accepted assumption that committees should be so engaged. Prior to 1976, there were no permanent, standing committees dedicated uniquely to overseeing the intelligence community. Notwithstanding Congress' stature as the most powerful legislative body in the world, it had never exercised its oversight powers so directly. In fact, this arrangement was revolutionary not only in the United States but in the rest of the world as well; no other legislature had ever created such an entity.

Not that the idea of creating an intelligence committee was all that new. As early as 1948, a motion was made to establish a joint committee to oversee intelligence. Yet it, like the nearly 150 similar proposals made over the next quarter of a century, never had the slightest chance of passing. Indeed, only two motions ever made it to the floor; both were soundly defeated by margins of more than two to one.<sup>23</sup>

The first seriously considered proposal to establish an intelligence committee was put forward by the Rockefeller Commission in its final report. In February of 1976, President Ford advanced the Commission's recommendation of a joint committee in a message to Congress. Ford's recommendation, however, was made not much in advance of the Congress' own. In 1975, both the House and the Senate had established temporary select committees to investigate the perceived abuses of the intelligence community. By early 1976, it was clear that both the Church Committee and the Pike Committee would urge their respective chambers to create standing, permanent intelligence committees.

The Church Committee's final report (S.Rept. 94-755) was issued in April of 1976. As expected, it did call for the creation of a Senate committee specifically charged with the oversight of intelligence. Within a month, on 19 May, by a vote of 72 to 22, the Senate established, under S.Res. 400, the SSCI. With the possible exception of a Tower-Stennis proposal to delete from the new committee's jurisdiction the intelligence activities of the Department of Defense, no serious challenge to the new committee was raised. Even here, the vote against deletion was by a margin of two to one.

The House, largely because of the turmoil surrounding its rejection of the Pike Committee's final report and the subsequent publication of large seg-

<sup>22</sup> HPSCI maintains three subcommittees: Legislation; Program and Budget; and Oversight and Evaluation. The SSCI in the recent past has had four subcommittees: Analysis and Production; Budget; Collection and Foreign Operations; and Legislation and the Rights of Americans.

<sup>23</sup> On 11 April 1956, Senate Concurrent Resolution 2, a resolution to establish a joint committee, was defeated by a vote of 59 to 27. Among its list of 33 co-sponsors were Senators Mansfield, Jackson, and Ervin. A decade later, on 14 July, Senate Resolution 283, a resolution to establish a separate Senate intelligence committee, was, on a point of order, defeated by a vote of 61 to 28. Only four senators who had previously voted for the joint committee voted for the Senate committee also. Most notable among the four was Senator Fulbright.

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ments of it in the *Village Voice*, took almost a year longer to establish an intelligence committee of its own. On 14 July 1977, by a vote of 247 to 171, it passed H.Res. 658 creating HPSCI.

While there are some important differences between H.Res. 658 and S.Res. 400, the critical fact is that both committees are given by their respective charters legislative, investigative, and authorizational authority for all of the intelligence community. Each is to exercise exclusive jurisdiction over the CIA and the Director of Central Intelligence; each shares jurisdiction over the rest of the community (NSA, DIA, and the intelligence components of the Department of Defense, State, Treasury, Justice and Energy) with the Armed Services, Foreign Relations/Affairs and Judiciary Committees of both houses.

The resolutions mirror each other in other respects as well. A key point is that both intelligence committees are "select" committees. Members are chosen by the majority and minority leaders of the House and Senate. The majority and minority leaders also serve as *ex officio*, although nonvoting, members of their respective committees. With regard to the professional staff, again the resolutions are the same. All employees of the two intelligence committees are required to sign secrecy agreements and be cleared in a manner "determined . . . in consultation with the Director of Central Intelligence."

H.Res. 658 and S.Res. 400 also establish elaborate procedures for declassifying information. While neither resolution finally gives up its chamber's right to declassify information, the procedures, formally at least, make the exercise of that right quite unlikely. The two resolutions also require the HPSCI and the SSCI to maintain "crossover" members from the Armed Services, Foreign Relations/Affairs, Judiciary and Appropriation Committees. The difference between the charters here is that S.Res. 400 mandates that there be two "crossover" members from each of those committees and that the two be split between the majority and minority parties; H.Res. 658 requires only one "crossover" member from each of those committees and there is no mention of bipartisanship.

The resolutions also speak of rotating "to the greatest extent practicable" a substantial portion of the committee membership each new congress. From the HPSCI's total of 14, the number is 4; from the SSCI's total of 15, the number is 5. Finally, both H.Res. 658 and S.Res. 400 establish bounds on the length of time a senator or representative may remain on the intelligence committee. For members of the HPSCI, the limit is six years; for members of the SSCI, eight.<sup>24</sup>

Similarities aside, there are significant differences between the two resolutions.

<sup>24</sup>With the end of the 98th Congress, both the SSCI and HPSCI faced a significant turnover in membership. Nine of the SSCI's 15 members reached the eight-year limit at the end of the session, including the Chairman (Senator Barry Goldwater) and the Vice Chairman (Senator Daniel Patrick Moynihan). On the House side, HPSCI lost 7 of its 14 members, including the Chairman (Rep. Edward P. Boland) and its ranking minority member (Rep. J. Kenneth Robinson).

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One such difference is that under S.Res. 400 the SSCI's jurisdiction does not extend to include tactical military intelligence. H.Res. 658's mandate to the HPSCI is broader and is understood to cover that facet of intelligence.

The most important difference between S.Res. 400 and H.Res. 658 is that the former attempts to create a bipartisan committee while the latter makes no such effort. Unlike the typical Senate committee, the ratio of majority to minority members on the SSCI is not distinctly disadvantageous to the minority. Of its fifteen members, the SSCI has seven seats reserved for members from the minority side of the aisle. Also, the next ranking member on the SSCI after the chairman is not, as is normally the case, a member of the majority party. Under S.Res. 400, the next ranking member is a member of the minority and is titled vice chairman. In the Chairman's absence, he is acting chairman.

The Senate's decision to establish the SSCI on a bipartisan basis was predicated in large measure by its judgment that if the intelligence agencies were to regain their feet future activities had to rest on the widest consensus possible. The bipartisan makeup of the SSCI was designed to establish that basis. As one of the authors of S.Res. 400 noted, the SSCI was meant to "reflect the composition and philosophy of the entire Senate."<sup>25</sup>

In this regard, the difference between the SSCI and the HPSCI could hardly be greater. Of the latter's total membership of 14, 9 are from the majority. Implicitly or explicitly, no mention is made of bipartisanship in H.Res. 658.

Coming as it did a year after the passage of S.Res. 400, the House resolution's omission of the earlier document's bipartisan features stood out clearly. As expected, their absence in H.Res. 658 was a matter of considerable dispute. Representative John Rhodes, then Minority Leader, strongly objected to the lack of "any provision establishing bipartisan membership" for the new committee. Rhodes' objection did not go unchallenged. Representative Richard Bolling, Chairman of the Rules Committee, which had reported H.Res. 658, rejoined: "The gentleman . . . knows that matters of intelligence . . . involve policy . . . it is only reasonable for us to follow the mandate of the American people in our election to the House of Representatives on policy matters."<sup>26</sup>

### Elements of Intelligence

That the committees reflect the generally dominant views of the public with regard to intelligence seems true enough from our earlier discussion.

<sup>25</sup> *Congressional Record* (May 13, 1976), p. S7275. The desire to maintain as broad a base as possible on the SSCI has been reinforced by the composition of its staff. Under the rules of the committee, the professional staff works for the committee as a whole. However, since its earliest days, each member has had the power to designate one individual to serve on the professional staff. As a result, most of the professional staff serve at the pleasure of a particular senator. Not surprisingly, "committee" work often takes a back seat to the needs and agendas of the individual members. The size of the professional staff is normally in the mid-20's.

<sup>26</sup> *Congressional Record* (July 14, 1977), p. H22942. In contrast to the composition of the SSCI professional staff, HPSCI's professional staff is composed principally of "nonpartisan" appointments hired by and reporting to the chairman. While the staff, like the SSCI's, is also under a mandate to work for the committee as a whole, the hiring and firing practices of HPSCI make it clear that most of the staff works for the chairman. The size of the professional staff is normally a little over 10.



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What is far less clear is how the two intelligence committees refine those views, how they as committees affect the essential elements of American intelligence—collection, analysis, and covert action.

### Collection

Discerning the effect of oversight on the collection of intelligence is no easy matter. There is a paucity of public sources upon which one can draw to make one's case. This fact is itself significant. The lack of leaks and public reports suggests a general lack of interest in this element of intelligence on the part of the two committees. With little at immediate stake politically, it is not surprising that the intelligence committees have generally turned their attention elsewhere.

Two exceptions exist to this pattern of behavior. The first is that the budget process has in the past generated discussion and review of individual components of the collection process. Typically, however, this review is single-member driven or produced by the need to trim the authorization package back to an acceptable level. The second exception to the attention generally given to collection by the committees is tied to major ongoing political debates (SALT II) or to events in which American lives may have been lost due to what is perceived to be poor collection (Beirut). While perhaps not unusual for the Congress, there is much in the way that the two intelligence committees oversee collection that is *ad hoc* in nature.

It is possible to argue, of course, that the reason why collection has not been given more attention by the committees is that all is healthy. Yet this appears dubious on its face. For example, it is well known that most of America's intelligence collection effort is targeted at the Soviet Union; it is also known that much of that effort, at least in terms of dollars spent, is technically based. Yet within the past decade, according to press accounts, three major and essential collection platforms have been compromised through espionage: ELINT, Boyce-Lee; IMINT, Kampiles; and COMINT, Prime. One would assume that, given these events, a thorough and resounding debate on the state of American collection capabilities *vis a vis* the Soviet Union would be in order. There is no evidence that this has in fact occurred in either the SSCI or the HPSCI.

If the committees have not thought it necessary to review the state of intelligence collection on America's prime adversary, it is not surprising that there is little evidence that either committee has ever in a methodical manner addressed the most fundamental question in the area of collection—which is, what it is that we actually want collected. It is obvious but insufficient to say "intelligence." It is no longer clear exactly what is meant by that term. There are, in fact, two types of intelligence being collected today, each distinct and each with its own advocates in the intelligence community and on Capitol Hill. The first type is the kind of specialized, sensitive information we traditionally associate with cloak and dagger; the second type is the kind of general, macro-level information about countries and the world generated by the social sciences. Within the American intelligence community these two conceptions of intelligence compete with each other for resources and attention. In order

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for the intelligence committees to resolve that competition in a reasonable manner, it would seem essential that at some point they engage in some form of debate about the relative merits of each. That neither committee seems to have undertaken such a debate is further evidence that its oversight in the area of collection is unsystematic and largely event-driven.

This reactive approach persists even in the area of domestic collection where constituent concerns about civil liberties sharpen a Senator's or Representative's political sensibilities. Under the terms of the Foreign Intelligence Surveillance Act (FISA), the Attorney General is required to brief the two committees fully twice a year on all electronic surveillances conducted in the United States for purposes of intelligence collection. What is unique, and helpful for the student of the oversight process, is FISA's requirement that the SSCI and HPSCI report annually on the first few years of the act's implementation and include in that report an analysis of its functioning.

HPSCI has issued its fifth and final report. In none of HPSCI's reports has it recommended any amendment to FISA. The clear impression is that the committee is satisfied with the act's implementation and operation. The SSCI has also issued its fifth and final annual report. As with the HPSCI, the SSCI has not recommended a single change to FISA.

In general, the issues raised in the annual reports have been quite minor, ranging from "certain paperwork problems" to "inadvertent" irregularities during the execution of an electronic surveillance. The most serious question posed by the committees' reports has centered on FISA's utility as a legal basis or model for authorizing physical search techniques. In none of the reports is there more than a hint that the committee has reviewed the implementation of the act with an eye to determining its effect on the collection of foreign intelligence or counterintelligence and whether that collection was in any way adequate. While both the SSCI and HPSCI, according to their reports, thought it necessary to do more than take the word of executive branch officials with regard to the act's requirement that dissemination among agencies of information concerning US persons be minimized, they took at face value the statement of FBI Director William Webster that FISA "has not had a deleterious effect on our counterintelligence effort."

It is difficult, after reading FISA and seeing the various complexities and hurdles it constructs, not at least to wonder about its inhibiting effect on the collection of intelligence. At first glance, it appears that whatever effect FISA is having, it is not that. To date, out of the hundreds of applications made to the special courts by the Department of Justice, not a single one has been rejected. For many, this is a sign that the judges of the FISA court have become a "rubber stamp" for the executive branch. But in theory, it is equally possible that instead of executive initiative overwhelming judicial restraint, judicial restraint has infused itself into the collection process. The very existence of the court has probably compelled the Justice Department to "scrub" its applications so thoroughly that only the clearest cases are put forward for the FISA judge to review.

It would seem reasonable to expect the two intelligence committees to sharply question this statistical anomaly. But neither has. Both committees

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would undoubtedly be alarmed if a large percentage of FISA applications were rejected by the court. That a similar concern has not arisen over the fact that not a single FISA request has ever been turned down is telling.

In general, concerted congressional interest in collection has been episodic and largely driven by political concerns of the moment. Even in those instances when committee oversight is exercised on a more systematic basis, it leaves much to be desired.<sup>27</sup>

## Analysis

The effect congressional oversight has had on intelligence analysis is difficult to measure. Neither of the two intelligence committees can be said to have ignored this area. For example, during reviews of the intelligence community's budget, changes in either manpower or dollar levels are made to strengthen or weaken specific analytic fields. Typically, these changes will reflect the strong desires of a particular member. Some of the changes have been substantial, others less so. Yet the total direct effect on the analytic element of the community is far from clear.

Perhaps the most important impact of the new oversight process on analysis derives from the two committees having become themselves major "consumers" of finished intelligence. With rare exception, the bulk of the analytic product is now available to the SSCI and the HPSCI. Certainly, all National Intelligence Estimates are.

It is easy to speculate that this constant committee perusal of the community's product increases the likelihood of its politicization. Surely in an area where policy is in dispute a President or his representative, the DCI, has a strong incentive to ensure either by heavy-handed or subtle means that the finished intelligence does not undermine the administration's stated position.

Any politicization that occurs, however, probably is much less dramatic. As the committees have become consumers, Congress has begun to see the two intelligence committees as its own independent repositories for sensitive information. Given its expanded role in the conduct of foreign affairs, Congress will undoubtedly use the committees to review, challenge or validate intelligence assessments that underlie key executive branch policies. Two past examples of this phenomenon are the SSCI's 1979 report, "Capabilities of the United States to Monitor the SALT II Treaty," and the HPSCI's 1982 report, "U.S. Intelli-

<sup>27</sup> A representative sample of committee oversight of FISA is the Senate Intelligence Committee's final report, "The Foreign Intelligence Surveillance Act of 1978: The First Five Years," U.S. Senate, Select Committee on Intelligence, Report 98-660, Oct. 5, 1984. In the report's 26 pages, not a single paragraph can be found which indicates that the committee made an independent assessment of the impact FISA has had on domestic intelligence collection. On the other hand, numerous pages are dedicated to reassuring the public that under FISA "Big Brother" is not listening. The single-mindedness of the oversight process in this area of collection is exemplified by the first sentence of the report's final paragraph: "The Committee considers its oversight role to be an integral part of the system of checks and balances that is necessary to protect constitutional rights."

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gence Performance on Central America."<sup>25</sup>

Such reviews have their effect. Like any set of bureaucrats, intelligence analysts become set in their opinions and adopt "house" positions. Once these positions have been established, individual reputations and institutional interests make it difficult for contrary views to be heard. Because the committees offer a readership with a wide range of political views for these products, assumptions are inevitably questioned and conclusions challenged. There is much to be gained from a process in which analysts and agencies are required to defend in a more exacting manner their "pet" positions.

On the other hand, there are dangers here. Not every analyst or agency will rise to the challenge. When faced with the committees' wide range of opinionated readers, it is equally possible that the analyst or agency will be tempted to turn out a product that least offends the greatest number. This, of course, only exacerbates the well-known problem within the analytic community of consensus-produced estimates.

In general, it is unlikely that serious oversight of the analytic process is possible if the committee's principal manner of proceeding is to challenge areas of analysis on a seemingly random, case by case basis. At best, such case studies raise the level of analytic reasoning in a particular area for some limited amount of time. More likely, they quicken bureaucratic instincts.

Yet, to date, oversight has been carried out in precisely this manner. Both committees have undertaken a handful of case studies on diverse topics. Among the subjects reviewed have been the fall of the Shah, the oil crisis of 1973-74, the expulsion of the Marielitos, and Soviet oil production. As is suggested by this sample, the committees characteristically examine an issue after it has become a matter of public concern or dispute.

The most recent HPSCI case study was a sharp critique of analysis on selected issues pertaining to El Salvador and Nicaragua. Despite its title, "U.S. Intelligence Performance on Central America: Achievements and Selected Instances of Concern," the report left no question that the committee saw far too few achievements and much about which to be concerned. Some of its specific criticisms were that the community had at times overstated its findings in regard to external support to the Salvadoran insurgents, that it seemed to have little interest in or grasp of rightist violence in El Salvador, that it was overly simplistic in its analysis of the conflict between the Miskito Indians and the Sandinistas, and that it sacrificed its more reasoned judgment about the Nicaraguan military buildup to rhetoric. What praise the report did hand out was in reference to the community's analysis of the organization and activities of the Salvadoran guerrillas and its "detection" of assistance to the insurgents by Cuba and other communist countries. Even so, the praise was faint since the report's final judgment was that there were signs that the analytic "environ-

<sup>25</sup> U.S. Senate Select Committee on Intelligence, "Principal Findings of the Capabilities of the United States to Monitor the SALT II Treaty," Committee Print, October 1979. U.S. House of Representatives, Permanent Select Committee on Intelligence, Subcommittee on Oversight and Evaluation, "U.S. Intelligence Performance on Central America: Achievements and Selected Instances of Concern," Committee Print, September 22, 1982.

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ment" was "under pressure to reinforce policy rather than to inform it." Left unsaid, but clearly implied, was that the community's "achievements" were the result of the administration's particular policy concerns.

Opponents of the Reagan Administration's policies in Central America were quick to praise the report; supporters just as quickly denounced it. Debate was heated. Retired Admiral Bobby Ray Inman, who had become a consultant to HPSCI after leaving the Deputy DCI position earlier in the year, felt obliged to resign as a consultant to protest its publication. Whatever the report's merits, it produced results which were sharply partisan. HPSCI's report on Central America is markedly different from the SSCI's report on perhaps the most important analytic effort of the last decade, the President's Foreign Intelligence Advisory Board's (PFIAB) competitive examination of the National Intelligence Estimate on Soviet strategic capabilities, the so-called "A-B Team" experiment.<sup>29</sup> HPSCI's report raises substantive concerns; in contrast, the SSCI's document is void of any substantive discussion of the findings of the A-B Team effort.

The Senate report begins with the statement that its purpose is to assess "whether the A-B experiment had proved to be a useful procedure in improving National Intelligence Estimates (NIEs) on a centrally important question." Its conclusion was that review of NIEs by outside experts is generally useful. It also concluded that in this particular instance the review was "less valuable" than it might have been.

Most of the reasons the SSCI report gives for this judgment are minor in nature and essentially procedural in character. For example, it faults PFIAB's B Team for reviewing more NIEs on Soviet strategic capabilities than had originally been agreed upon with the DCI. The report also objects to the fact that the experiment itself was leaked to the press and that the "agencies needlessly allowed analytic mismatches by sending relatively junior specialists into the debating arena against prestigious and articulate B Team authorities."(!)

What the reader does not find in the SSCI report is any discussion of the merits of the B Team's findings or any analysis of its arguments. The document's drafters might claim that it was not the committee's intent to resolve the debate between the community and the PFIAB. Nevertheless, it is difficult, if not impossible, to discuss the usefulness of any analytic experiment independent of some assessment of the arguments themselves.

The very different tenors of the two committee reports reflect, of course, the difference in the committees' respective constitutions. The majority-dominated HPSCI might naturally be expected to produce a critique with a partisan edge; the bipartisan SSCI to shy away from divisive analytic disputes. Obviously, neither is finally satisfactory.

<sup>29</sup> U.S. Senate Select Committee on Intelligence, Subcommittee on Collection, Production, and Quality, "The National Intelligence Estimates A-B Team Episode Concerning Soviet Strategic Capability and Objectives," Committee Print, February 16, 1978.

### Covert Action

Covert action (sometimes referred to as "special activities") is defined by the law as "operations in foreign countries, other than activities intended solely for obtaining necessary intelligence." This definition, which tells you what covert action is by telling you what it is not, obviously implies that under the rubric of covert action lies a wide range of options. Covert action is a tool of foreign policy which can be either carrot or stick, mundane or not. It may simply consist in planting a news story in another nation's press or it may encompass the training, arming, and employment of a paramilitary operation. Covert action, in short, may be used to change a government's behavior or to change a government altogether.

Formally, the reforms of the mid-1970s left the President's discretion to use covert action intact, the only exception being the Clark Amendment of 1974 (P.L. 94-329) which prohibits clandestine assistance to the insurgents fighting in Angola. The only other prohibition is a self-imposed one against assassination. While the SSCI and HPSCI are to be informed and briefed on every presidential finding, they have no advise and consent responsibility.

Nevertheless, in practice the two intelligence committees may exercise a great deal of influence. The most direct formal control the committees have over covert programs is through the budget process, as every covert operation is subject to specific authorization by the committees. The second form of control is much less direct, but nonetheless significant. The possibility that an individual member might exercise a "legislative veto" by leaking a particular program to the press can—and does—inhibit the options put forward by the executive branch. In short, while a president, under the law, has at his disposal wide discretion in employing a variety of "special activities," he has in fact a more limited number of options. Only noncontroversial findings remain covert.

The Reagan Administration's reported covert support for the anti-Sandinista insurgents is a case in point.<sup>30</sup> According to press accounts, the President apparently signed the requisite funding in December of 1981.<sup>31</sup> In short order, the stories were out.<sup>32</sup>

In some sense this was only too predictable. The controversy generated by the State Department's White Paper on "Communist Interference in El Salvador," published less than a year previously, clearly indicated a serious lack of consensus regarding the strategic problems facing the US in Central America. Ironically, it was perhaps the very absence of a consensus that would precipitate a decision to challenge the Moscow-Havana-Managua nexus with a

<sup>30</sup> "A Secret War for Nicaragua," *Newsweek*, Nov. 8, 1982.

<sup>31</sup> "Secret War," *Newsweek*, p. 44

<sup>32</sup> "Reagan Backs Action Plan for Central America," *Washington Post*, Feb. 14, 1982, p. A1; "U.S. Approves Covert Plan in Nicaragua," *Washington Post*, March 10, 1982, p. A1. As is typically the case, the administration then attempted to get its side of the story out. The result: ("according to senior Administration officials") "U.S. Reportedly Spending Millions to Foster Moderates in Nicaragua," *New York Times*, March 11, 1982, p. A1. "U.S. Said to Plan Covert Actions in Latin Region," *New York Times*, March 14, 1982, p. A1.

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covert program.<sup>33</sup> According to Alexander Haig's account in *Caveat*, he was "virtually alone" among the President's senior advisers in suggesting that the US bring its "overwhelming" military power "to bear on Cuba in order to treat the problem at its source." The other camp favored, according to Haig, "a low-key treatment of El Salvador as a local problem and sought to cure it through limited amounts of military and economic aid . . . along with certain covert measures."<sup>34</sup> If true, it would seem to be a classic example of covert action's being used as "a 'safe' option—something between diplomacy and sending in the Marines—but in effect as a substitute for policy itself."<sup>35</sup>

More than a year and a half would pass before President Reagan would make a nationally televised address before a joint session of the Congress on the Administration's policy in Central America.

Predictably, in the absence of a policy publicly articulated by the President, the apparent tacit support initially given by the SSCI and the HPSCI began to unravel. As noted previously, from a congressman's point of view the normal political benefit of being a member of an intelligence committee is small. The major problem he faces is the exposure of a sensitive, perhaps embarrassing, and often misrepresented covert program. Not free under the rules of secrecy established by each committee to defend his position or the reasonableness of a particular program in any adequate manner, the member is bound to feel politically exposed. For this reason the committees will tend to act as a brake on covert programs.<sup>36</sup>

The two committees do not exercise this power in the same manner, as is apparent in their respective handlings of the Nicaraguan program. The Senate committee has addressed this issue in a fashion consonant with its composition as a bipartisan body, one which is intended to "reflect the composition and philosophy of the entire Senate." As reported by the press and the committee itself, the SSCI forced the Administration over the spring and summer of 1983

<sup>33</sup> "Early on in the crisis, it was decided that problems with Cuba and Central America should not become 'presidential,' according to two senior Reagan advisors, who calculated that there was much political risk and little potential gain in the military and political crises of the region. . . . A tide of protests . . . poured in to the White House over Central American policy. Richard Wirthlin, the presidential pollster, reported a sharp and sudden drop in presidential popularity." "Central America: The Dilemma," *Washington Post*, March 4, 1982, p. A1.

<sup>34</sup> Alexander M. Haig, Jr., *Caveat* (New York: Macmillan, 1984), pp. 128-29. "Some officials, led by then-Secretary of State Alexander M. Haig, Jr., favored a naval quarantine of Cuba and Nicaragua, but the Pentagon was leery. As the result of a National Security Council meeting on November 16, 1981, Reagan approved a 10-point program including economic and military aid to friendly nations, U.S. contingency planning and military preparedness—but no U.S. military action. One of the 10 points, according to NSC records, was to 'work with foreign governments as appropriate' to conduct political and paramilitary operations against the Cuban presence and Cuban-Sandinista support infrastructure in Nicaragua and elsewhere in Central America." "U.S.-Backed Nicaraguan Rebel Army Swells to 7000 Men," *Washington Post*, May 8, 1983, p. A1.

<sup>35</sup> Malcolm Wallop, "U.S. Covert Action: Policy Tool or Policy Hedge?" *Strategic Review* (Summer 1984), p. 10.

<sup>36</sup> A useful history of this tendency can be found in "Report of the Select Committee on Intelligence, United States Senate, January 1, 1983 to December 31, 1984." U.S. Senate Select Committee on Intelligence, Report 98-665, October 10, 1984, see, "History of Nicaraguan Program," p. 4ff. One result of the controversy generated by this program has been the further formalization of the reporting process of covert activities by the CIA to the two committees. On the nature and content of this new process, see "Covert Action Reporting Procedures," *ibid.* pp. 13-15.

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to rewrite the presidential finding authorizing covert activity in Nicaragua.<sup>37</sup> While the Senate committee apparently agreed to continued support of the paramilitary operation, it did so by reaching a consensus, a middle position, between those willing to see the Sandinista regime overturned and those generally disinclined to support paramilitary actions at all. The result was a program which foreswore the former but maintained the program as a means of bringing pressure to bear on the Sandinista regime to end its "subversion in neighboring countries."<sup>38</sup> It was a compromise which produced a program still large enough to be controversial in nature but probably not large enough to be decisive.

The House Intelligence Committee, unburdened by the institutional norms of bipartisanship, could act in a straightforward and decisive manner. Partisan in its composition, HPSCI was a ready vehicle from which to challenge a program that lacked any semblance of majority support. Since 1983, the HPSCI, in concert with the Democratic leadership, has voted repeatedly to end any support to the Nicaraguan insurgents.

The one exception to this voting pattern was the HPSCI's reported ultimate approval of \$24 million for the paramilitary program for FY 84.<sup>39</sup> This exception can perhaps be explained by the fact that, while there was no public mandate in support of the program, neither was there a clear mandate to end it and suffer the consequences ending it might bring. Also, the House found itself in a legislatively difficult position. Essentially, the House was willing to hold up passage of the intelligence authorization bill over its position on the Nicaraguan program. However, it had to be willing as well to frustrate adoption of the Defense Appropriation Act, which contained the authorized appropriations for the program. Politically, holding up the former, given its relatively small and secret numbers, over one highly visible issue is not nearly as difficult as tying up all Department of Defense appropriations over the same issue. Finally, the House conferees broke and accepted the Senate position, but with the additional—and later, as funds ran out, crucial—proviso that spending for the program be capped at \$24 million.

For FY 85, the House appeared to face a similar legislative dilemma. If the House conferees were to maintain their opposition to the program, they did so at the risk of holding up a "catch-all" appropriations bill required to finance most of the government for the next 12 months. The administration faced a dilemma as well; the first Tuesday in November was only a month away. The White House obviously figured that the political cost of having to shut down the government for an extended period—solely in order to save the

<sup>37</sup> *Ibid.*, p. 6. "U.S.-Backed Nicaraguan Rebel Army Swells to 7000 Men," *Washington Post*, May 8, 1983, p. A1. "New Justification for U.S. Activity in Nicaragua Offered," *Washington Post*, Sept. 21, 1983, p. A29. "Shultz States New Case for Covert Aid to Rebels," *Washington Post*, Sept. 22, 1983, p. A33. "Panel Approves Nicaraguan Aid," *New York Times*, Sept. 23, 1983, p. A4.

<sup>38</sup> "Aid to Nicaragua Rebels Backed," *New York Times*, Sept. 21, 1983, Sec. A, p. 4.

<sup>39</sup> "Sec. 108. During fiscal year 1984, not more than \$24 million of the funds available to the Central Intelligence Agency . . . may be obligated or expended for the purpose or which would have the effect of supporting . . . military or paramilitary operations in Nicaragua." P.L. 98-215.



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program—was too high. The result: the House prevailed and aid to the Nicaraguan insurgents was banned for 5 months.<sup>40</sup>

HPSCI's opposition to the program, its later acquiescence, and its final victory are examples of that committee's tactical flexibility. As the political advantage or liability of its position becomes clear, the House committee is able to shift its position accordingly. While the SSCI often reflects a broad but somewhat flaccid unanimity, the HPSCI just as often reflects a narrower but more partisan-edged consensus.

To state the obvious, covert programs today do not fare well when they operate outside the pale of consensus. It is equally obvious that world events may run in advance of a well-grounded and publicly articulated policy. A nation's foreign environment may be outside its control; friends in battle may overnight become one's enemies. As a result, the contingencies of foreign affairs may easily outstrip the consensus that ordinarily must exist if a democracy is to pursue a policy. Most of the time this does not pose much of a problem. At other times, however, the stakes may be very large. Given the general tendency in the current system of congressional oversight to pull covert action into directions on which there is little debate, the question arises as to whether, in inhibiting imprudent risk-taking, it may also inhibit necessary risk-taking.

### Conclusion

Congressional oversight of American intelligence has on the whole been uneven in character. On the one hand, reports of a CIA program to support the insurgency in Nicaragua have caused serious divisiveness between the intelligence community and the two intelligence committees and among committee members, and have shattered the calm that followed the stormy days of the Church and Pike Committees. On the other, reports of a CIA program to aid the insurgency in Afghanistan have elicited none of the same protest. In fact, it is difficult to find a member of either the SSCI or HPSCI who has publicly criticized the idea of giving assistance to the Mujahidin. What criticism there is holds that not enough is being done.

To some degree the controversy generated by reports of a Nicaraguan program is an exception to Congress' general bent in recent years to grant relief and be supportive of the intelligence agencies. Perhaps no better evidence is available to support this view than that while Congress was prohibiting US support to the Nicaraguan insurgents it was at the same time passing legislation relieving the CIA from some of the requirements of the Freedom of Information Act and enacting an authorization bill for FY 85 which, according to press accounts, continued the prior years' substantial increases in the community's budget.<sup>41</sup>

The trend seems clear; however, it does not rest on a deeply held consensus. As a result, the oversight system appears susceptible to sudden and some-

<sup>40</sup> "Conferees Approve '85 Funds," *Washington Post*, Oct. 11, 1984, p. A1.

<sup>41</sup> P.L. 98-477. "Senate Balks at Raising Debt After Funding Bill is Enacted," *Washington Post*, Oct. 12, 1984, p. A1.

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times disabling shocks. While it is true that events such as the Soviet invasion of Afghanistan and the debacle in Iran changed public and elite attitudes about the need to strengthen the various elements of the national security establishment, there still lingers an underlying suspicion about those elements in general, and intelligence in particular. Events, not a publicly articulated set of strategic principles, have produced what little consensus there is; events can strain and disrupt it just as quickly.

In theory, the two houses of Congress were meant to be both representative and deliberative. Through the committee system, Congress' division of labor, both functions are to be carried out in a particular area of public policy. It is not difficult to conclude that both the SSCI and HPSCI have managed the former fairly well, although somewhat unevenly. As for deliberation, oversight has left much to be desired. Over the past 4 years, public opinion has generally been supportive of the need to enhance intelligence capabilities. The two committees have reflected that outlook but have not made a serious effort to refine this support by a sustained and thorough review of these capabilities.

The potential for the two committees to exercise more substantive oversight exists. First, both the SSCI and HPSCI are "select" committees; their members are chosen by the leadership especially for this task. This presumably means that the membership of both is a cut above the usual congressional committee. Second, while the lack of the typical constituent payoff may at times disincline a member from expending much effort on committee work, that very lack of constituent responsibility may also free him to deliberate more seriously about the matter at hand.

It has also been argued that a sounder oversight process might be achieved by exchanging the two intelligence committees for a joint committee. Depending on just how the joint committee was constituted, this might well prove to be the case. One could hypothesize that a single body, smaller than the combined numbers of the two separate committees, would bear more responsibility and be more responsible in fulfilling this function. At minimum, creation of a joint committee would be a sign that the pendulum of authority in foreign affairs was swinging back toward the executive branch after a decade of expanding congressional power. Whatever the merits of a joint committee, however, the irreducible fact will remain that a congressional committee is a congressional committee.

More critical to the future of oversight than any institutional change is the public adoption of a new, coherent set of principles to guide American foreign policy. The present period is marked by the abatement of the isolationist impulse; however, no publicly accepted doctrine of foreign policy has arisen to take its place.

For want of a majority-binding doctrine of foreign policy, it is hardly surprising that oversight of intelligence should give way to the tendency, under separation of powers, to muddle along. However, separation of powers, properly understood, also provides a possible remedy. Through the establishment of an independent, unitary executive, the system invites (though it does not guarantee) the exercise of presidential leadership. The presidency is, as Theodore Roosevelt pointed out, a "bully pulpit."

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Bully pulpit or not, only the presidency holds the potential for setting in place a coherent foreign policy which might attract a solid, secure consensus.<sup>42</sup> Establishment of such a set of principles is key to defining the premises from which those charged with oversight may best deliberate. Lacking a clear idea of exactly what operative principles underlie American foreign policy today, oversight naturally reflects that incoherence in its disposition of intelligence issues. To those involved a decade ago in challenging the "impérial" presidency it may seem ironic, but the invigoration of the current intelligence oversight process is likely to require a vigorous and sustained assertion of presidential leadership.

<sup>42</sup> This, however, is not to underestimate the difficulty of building and sustaining such a consensus. Consider, for example, Walter Lippman's appraisal of the viability of Kennan's policy of containment given American political culture. *The Cold War: A Study in US Foreign Policy* (New York: Harper and Brothers, 1947), pp. 15ff.