



# Congressional Oversight of Intelligence: Current Structure and Alternatives

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## Summary

Interest in congressional oversight of intelligence has risen again in recent Congresses, in part because of disputes over reporting to Congress by intelligence community (IC) components on sensitive matters, including developments generated by the wars in Iraq and Afghanistan. The changes in the oversight structure adopted or proposed in recent Congresses, however, also reflect earlier concerns, such as increasing independent auditing authority for the Government Accountability Office (GAO) over the intelligence community, adding offices of inspectors general (OIGs), clarifying reporting requirements to Congress, and restructuring Congress's oversight mechanisms. Along these lines, the House Democratic majority had pledged in the 110<sup>th</sup> Congress to enact the remaining recommendations from the U.S. National Commission on Terrorist Attacks Upon the United States, commonly known as the 9/11 Commission. The Commission's unanimous 2004 report set the stage for a reconsideration of congressional oversight, concluding that it was "dysfunctional." The commission proposed two distinct solutions: (1) creation of a joint committee on intelligence, modeled after the defunct Joint Committee on Atomic Energy, with authority to report legislation to each chamber; or (2) enhanced status and power for the existing select committees on intelligence, by making them standing committees and granting each one both authorization and appropriations power. Neither of these occurred, although Congress has made a number of changes in its structure, organization, and authority to oversee this area. Despite these changes, several reports released during the 112<sup>th</sup> Congress by outside groups—the Bipartisan Policy Center's National Security Preparedness Group, Commission on Weapons of Mass Destruction, and Council on Foreign Relations—still concluded that oversight of intelligence remained "dysfunctional" and "counterproductive."

Proposals to create a joint committee on intelligence (JCI) date to 1948 and the early years of the cold war, when the Central Intelligence Agency (CIA) and Director of Central Intelligence (DCI) were established. Similar plans have emerged in the meantime, although the lion's share were made before the establishment of the Senate Select Committee on Intelligence (SSCI) in 1976 and the House Permanent Select Committee on Intelligence (HPSCI) a year later. The numerous proposals for a JCI, which would end the two existing intelligence panels, moreover, vary and raise competing viewpoints over practical matters and matters of principle.

Although Congress adopted neither of these 9/11 Commission proposals, the legislature has pursued other options to its intelligence oversight structure and capabilities. The House and Senate, for instance, have each altered the relationships between the intelligence committee and the appropriations committee. Other changes were incorporated in the FY2010 Intelligence Authorization Act (P.L. 111-259): clarifying the audit authority of GAO over the intelligence community; changing IC reporting and notification requirements; increasing the coordinative capabilities and reporting of relevant inspectors general (IGs); and adding a new IG covering the entire intelligence community as well as other IGs in four Defense Department entities. These changes were not without controversy and inter-branch conflict. In fact, this legislation was threatened with a presidential veto, although it was not exercised. Another veto threat arose over reporting proposals in the FY2012 Authorization Act, but the veto was not exercised, in part because these were substantially modified in the final version of the act (P.L. 112-87).

This report, to be updated as events dictate, describes the current select committees on intelligence; characteristics and a model for a possible joint committee; recent actions by Congress; and obstacles affecting legislative oversight in the field.

# Contents

Introduction.....	1
Intelligence as a Multi-Faceted Phenomenon.....	1
Proposals for a Joint Intelligence Committee.....	2
Continuing Concerns About Congressional Oversight.....	2
Controversy, Conflict, and Recent Developments.....	3
Coverage of This Report.....	5
House and Senate Select Committees on Intelligence.....	5
Jurisdiction and Authority.....	6
Membership and Leadership.....	7
Secrecy Controls.....	7
Joint Committee on Atomic Energy as a Model.....	8
Proposed Joint Committee on Intelligence Characteristics.....	9
Methods of Establishment.....	9
Jurisdiction and Authority.....	10
Membership.....	10
Terms and Rotation.....	10
Leadership.....	11
Secrecy Controls.....	11
Staffing.....	11
Budget and Funding.....	12
Pros and Cons.....	12
Pros.....	12
Cons.....	14
Alternatives to a Joint Committee.....	16
Changing the Select Committees' Structure and Powers.....	16
Senate Action.....	17
House Action.....	20
Concerns about Restructuring the Intelligence Committees.....	20
Improving Coordination Between the Two Intelligence Panels.....	22
Joint Hearings.....	22
Leadership Meetings.....	23
Constraints on Coordination.....	23
Enhancing Interchanges with Other Panels and Members.....	23
Goals.....	23
Techniques.....	24
Limitations.....	24
Other Options.....	25
Increasing the Use of Congressional Support Agencies.....	25
Clarifying GAO's Authority to Audit the IC.....	25
Enhancing the Inspectors General.....	30
Changing Notification and Reporting Requirements.....	32
Applying GPRA Requirements to the CIA.....	33
Observations on Oversight of Intelligence.....	33
Obstacles to Oversight.....	33
Secrecy Constraints.....	34

Perceived Limited Appeal of Intelligence Oversight .....	34
Overcoming the Obstacles.....	35
Objectives and Goals.....	35
Proposals for Change .....	35

## **Contacts**

Author Contact Information.....	36
Acknowledgments .....	36

## Introduction

Congress has long considered various ways to oversee intelligence, an often perplexing, sometimes controversial, and always difficult responsibility. These conditions arise because of the secrecy and sensitivity surrounding intelligence findings, conclusions, dissemination, and sources and methods as well as competition between the legislature and executive for influence over and access to them.<sup>1</sup> The field has become more complicated and demanding in the aftermath of the terrorist attacks on September 11, 2001, with the need for improved information sharing to overcome the “foreign-domestic divide” that has hampered effective intelligence gathering, evaluation, and dissemination.<sup>2</sup> Congressional oversight of intelligence has evolved, especially since the mid-1970s and more recently since 9/11. Yet it continues to be criticized by some as being inadequate, ineffective, or worse, while at the same time, proposals to change it have been met with challenges both from within the legislature itself and from the executive.

## Intelligence as a Multi-Faceted Phenomenon

The current state of affairs reflects a multi-faceted phenomenon. Not only does “intelligence” overlap both foreign and domestic areas; but it also covers a diversity of subjects, agencies, and procedures within each. Oversight of intelligence, particularly in the foreign realm, is consolidated to a large degree in the House and Senate Select Committees on Intelligence. But it is not centralized there; each panel has exclusive legislative authority over only the Central Intelligence Agency (CIA) and Director of National Intelligence (DNI). A number of other

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<sup>1</sup> Among many other sources examining congressional oversight of intelligence and executive-legislative relations in the area, see Loch K. Johnson and James J. Wirtz, eds., *Strategic Intelligence: Windows Into a Secret World* (An Anthology) (Los Angeles, Roxbury Publishing Co., 2004), “Accountability and Civil Liberties,” pp. 345-427; L. Britt Snider, *The Agency and the Hill: CIA’s Relationship with Congress, 1946-2004* (Washington, Center for the Study of Intelligence, Central Intelligence Agency, 2008), and *Sharing Secrets with Lawmakers: Congress as a User of Intelligence* (Washington, Center for the Study of Intelligence, CIA, 1997); Mark M. Lowenthal, “Oversight,” *Intelligence: From Secrets to Policy* (Washington, DC, CQ Press, 2012); Frank J. Smist, *Congress Oversees the United States Intelligence Community, 1947-1994* (Knoxville, University of Tennessee Press, 1994); John M. Oseth, *Regulating U.S. Intelligence Operations: A Study in the Definition of the National Interest* (Lexington, University of Kentucky Press, 1985); David M. Barrett, *The CIA and Congress: The Untold Story from Truman to Kennedy* (Lawrence, University Press of Kansas, 2005); Anne Joseph O’Connell, “The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World,” *California Law Review*, vol. 94, 2006; Robert Jervis, “Why Intelligence and Policymakers Clash,” *Political Science Quarterly*, vol. 125, 2010; Amy Zegart, “The Domestic Politics of Irrational Intelligence Oversight,” *Political Science Quarterly*, vol. 126, 2011; Frederick M. Kaiser, “Congress and the Intelligence Community: Taking the Road Less Traveled,” in Roger H. Davidson, ed., *The Postreform Congress* (New York, St. Martins Press, 1992); and U.S. Senate Select Committee on Intelligence, *Legislative Oversight of Intelligence Activities: The U.S. Experience*, Senate Print, 103-88, 103<sup>rd</sup> Congress, 2<sup>nd</sup> sess. (Washington, GPO, 1994). A number of CRS reports dealing with the areas include CRS Report RL33742, *9/11 Commission Recommendations: Implementation Status*, by Richard F. Grimmer; CRS Report R40240, *Intelligence Authorization Legislation: Status and Challenges*, by Richard F. Grimmer; CRS Report R40136, *Congress as a Consumer of Intelligence Information*, by Richard A. Best Jr.; CRS Report RL33639, *Sources of Systemic Risk in Large Value Interbank Payment Systems*, by Edward V. Murphy; CRS Report R40602, *The Department of Homeland Security Intelligence Enterprise: Operational Overview and Oversight Challenges for Congress*, by Jerome P. Bjelopera; and CRS Report RL33616, *Homeland Security Intelligence: Perceptions, Statutory Definitions, and Approaches*, by Mark A. Randol. Broad surveys of oversight are available in two other CRS reports: CRS Report RL30240, *Congressional Oversight Manual*, by Todd Garvey et al., and CRS Report R41079, *Congressional Oversight: An Overview*, by Walter J. Oleszek.

<sup>2</sup> CRS Report RL33616, *Homeland Security Intelligence: Perceptions, Statutory Definitions, and Approaches*, by Mark A. Randol, p. 1.

committees share oversight, including the four (Appropriations, Armed Services, Foreign Affairs/Foreign Relations, and Judiciary) that have representation on their chamber's intelligence committee. These panels also hold authorization powers over select programs or agencies or, in the case of the appropriations committees, hold appropriations authority over the entire intelligence community. Additional committees with oversight or legislative jurisdiction over parts of U.S. intelligence range across a wide variety of subjects, including civil liberties, cybersecurity, government-controlled information and access to it, government organization and reorganization, homeland security, military affairs, or individual agencies that conduct intelligence themselves or rely on other entities for it. Along with these organizational arrangements, oversight of intelligence is affected by formal reporting requirements<sup>3</sup> as well as informal agreements between Members and staff in Congress and officials and staff in the executive branch. Finally, custom and tradition play a role in the oversight process.

## **Proposals for a Joint Intelligence Committee**

The first oversight proposal—to create a joint committee on intelligence (JCI)—appeared in 1948.<sup>4</sup> This was just one year after the establishment of the CIA and the Office of Director of Central Intelligence (DCI), both integral parts of the most far-reaching executive reorganization in United States history.<sup>5</sup> Numerous initiatives to change Congress's oversight structure have materialized in the meantime, including, most importantly, the creation of parallel Select Committees on Intelligence in both chambers. Nonetheless, Congress's oversight capability in this area has been questioned. The 9/11 Commission's report, released in 2004, notably, concluded that congressional oversight of intelligence was “dysfunctional” and recommended either a merger of appropriations and authorization powers into each select committee or the creation of a new Joint Committee on Intelligence.<sup>6</sup>

## **Continuing Concerns About Congressional Oversight**

Since then, the House's and Senate's actions modifying each body's own structure have followed different paths, diverging not only from the 9/11 Commission proposals but also from each other (discussed further below).<sup>7</sup> In 2010, a follow-up report from the National Security Preparedness Group, a bipartisan effort headed by the co-chairs of the 9/11 Commission, found that although

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<sup>3</sup> Reporting requirements are dealt with by Snider, *The Agency and the Hill* and *Sharing Secrets with Lawmakers*; CRS Report R40698, “*Gang of Four*” *Congressional Intelligence Notifications*, and CRS Report R40691, *Sensitive Covert Action Notifications: Oversight Options for Congress*, both by Alfred Cumming and Richard A. Best, Jr.; and Director of National Intelligence, *Reporting on Intelligence Activities to Congress*, Intelligence Community Policy Number 2005-100-3 (10 January 2006).

<sup>4</sup> H.Con.Res. 186, 80<sup>th</sup> Cong., 2<sup>nd</sup> sess., introduced by Rep. Devitt, April 21, 1948.

<sup>5</sup> The monumental National Security Act of 1947 also gave birth to the National Security Council and the National Military Establishment, later re-designated as the Department of Defense, among other organizational and procedural transformations (61 Stat. 496 et seq.).

<sup>6</sup> U.S. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report* (Washington: GPO, 2004), p. 420.

<sup>7</sup> The House and Senate have considered proposals in this broad area through their existing committees as well as a bipartisan working group in the Senate, which has recommended enhancing the powers and status of the current Intelligence Committee. Sen. Mitch McConnell, “Senators Reid and McConnell Convene Meeting of Bipartisan Working Group to Reform Congressional Oversight of Intelligence,” Press Release, October 4, 2004; Sen. Bill Frist, “Frist, Daschle Appoint Members to Working Group Evaluating 9/11 Commission Proposals,” Press Release, August 25, 2004.

Congress did not adopt either of its recommendations, “some progress has been made.”<sup>8</sup> Despite this, the group observed that in the related field of homeland security,

enduring fractured and overlapping committee jurisdictions on both sides of the hill have left Congressional oversight in an unsatisfactory state.... the jurisdictional melee among scores of Congressional committees has led to conflicting and contradictory tasks and mandates for DHS [Department of Homeland Security]. Without taking serious action, we fear this unworkable system could make the country less safe.<sup>9</sup>

The same bipartisan group found in 2011 this condition had not changed: “When we issued our 2004 report, we believed that congressional oversight of the homeland security and intelligence functions was dysfunctional. It still is.”<sup>10</sup>

Another 2010 report—this from the Commission on the Prevention of Weapons of Mass Destruction (WMD) Proliferation and Terrorism—reinforced that conclusion. It levied a harsh criticism, determining that

congressional oversight remains dysfunctional. The existing committee structure does not allow for effective oversight of crosscutting national security threats, such as WMD proliferation and terrorism.... Congress should reform its oversight both structurally and substantively to better address intelligence, homeland security, and crosscutting national security missions.<sup>11</sup>

A special report in 2011 from the Council on Foreign Relations (CFR) reached the same conclusion but expanded it to a broader horizon, the whole of the national security arena. The report, authored by the vice president for Washington Initiatives at CFR, Kay King, attributed some of the problems in national security to Congress’s “institutional dysfunction,” brought about in part by outdated rules, obsolete committee structures, relentless schedules, and diminished expertise.<sup>12</sup> The author found that “on matters of diplomacy, development, and intelligence, Congress has been inconsistent and occasionally counterproductive.”<sup>13</sup>

## **Controversy, Conflict, and Recent Developments**

Controversy and conflict have frequently accompanied congressional oversight of intelligence. In fact, the current House and Senate select committees on intelligence emerged from major investigations in the early and mid-1970s of the executive, including the Watergate scandal, and

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<sup>8</sup> Thomas H. Kean and Lee H. Hamilton, Co-chairs, Bipartisan Policy Center’s National Security Preparedness Group, Testimony, U.S. Senate Committee on Commerce, *The State of Aviation Security*, hearings, 111<sup>th</sup> Congress, 2<sup>nd</sup> sess., January 20, 2010, available at <http://bipartisanpolicy.org/library/testimony/congressman-lee-hamilton-and-governor-tom-kean>, p. 8.

<sup>9</sup> Ibid.

<sup>10</sup> Bipartisan Policy Center National Security Preparedness Group, *Tenth Anniversary Report Card: The Status of the 9/11 Commission Recommendations* (Washington, DC, September 2011), p. 16.

<sup>11</sup> U.S. Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, *World at Risk: Report*, available at <http://www.preventionwmd.gov/report>, p. 9.

<sup>12</sup> Kay King, *Congress and National Security*, Council on Foreign Relations, Special Report No. 58, November 2010, p. 7.

<sup>13</sup> Ibid., p. 6.

of the intelligence community itself.<sup>14</sup> Congress has recently embarked on a number of actions that affect its oversight structure and powers (these are discussed further below.). But again, disputes and conflicts—both within the legislature and between it and the executive—have erupted in some of these.

One new arrangement calls for three House Appropriations Committee members to participate in Intelligence Committee briefings and meetings.<sup>15</sup> This replaced a hybrid oversight advisory panel on the Appropriation Committee, which had combined members from both the parent committee and the Permanent Select Committee on Intelligence. A different approach occurred in the Senate, including a Memorandum of Agreement (MOA) in 2007, designed to improve coordination and transparency between the Intelligence Committee, which handles authorizations for the intelligence community, and the Appropriations Committee, which handles appropriations for the same. A more far-reaching recommendation—to merge the appropriations and authorization authority into the select committees on intelligence, as advanced by the 9/11 Commission—however, has not been acted upon. And a plan to set up a special Senate Appropriations Subcommittee on Intelligence, which would include members of the Select Committee on Intelligence, met with opposition from the Senate Appropriations Committee when it was advanced in the chamber. This plan remains dormant.

Other ways recently enacted to strengthen oversight in this field have been to (1) clarify and expand the authority of the Government Accountability Office (GAO) over the intelligence community (IC), particularly the CIA; (2) add a new statutory inspector general (IG) to encompass the whole IC; (3) create new statutory IGs for certain Defense Department intelligence agencies; (4) increase coordination and strengthen reporting among the relevant offices of inspector general; and (5) change IC congressional notification and reporting requirements. Although these five major statutory changes eventually reached their statutory journey's end in the FY2010 Intelligence Authorization Act (P.L. 111-259), they followed a long, winding, and obstacle-laden road. It lasted over several recent congresses (or decades in the case of the GAO authority), resulted in inter-branch conflicts, and required compromises by the legislature and executive. Along the way, the efforts ran into roadblocks and detours, including a threatened presidential veto.<sup>16</sup> The Director of the Office of Management and Budget (OMB), in a letter to the chairs of the House and Senate Select Committees on Intelligence dealing with the then-proposed FY2010 authorization act, emphasized that “[t]hree categories of provisions are so serious that the President’s senior advisors would recommend that he veto the bill if they are included in a bill presented for his signature: the Congressional notification provisions, GAO provisions, and provisions regarding amounts authorized for the National Intelligence Program.”<sup>17</sup>

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<sup>14</sup> The creation of the select committees and the previous major investigations, conducted by Congress, the executive, and a special counsel, involved the Watergate scandal as well as abuses and questionable conduct by intelligence agencies themselves. These are detailed in Snider, *The Agency and the Hill*; Smist, *Congress Oversees the United States Intelligence Community*; Barrett, *The CIA and Congress*; Kaiser, “Congress and the Intelligence Community”; and Senate Select Committee on Intelligence, *Legislative Oversight of Intelligence Activities*.

<sup>15</sup> See Chairman Rogers statement in footnote 21 and footnote 37.

<sup>16</sup> Peter R. Orszag, Director, Office of Management and Budget (OMB), presenting the views of the administration, to Hon. Dianne Feinstein and Hon. Silvestre Reyes, cover letter and *Conference Letter regarding S. 1494 and H.R. 2701, the Intelligence Authorization Act for Fiscal Year 2010*, March 15, 2010.

<sup>17</sup> Cover letter, *Ibid.*, p. 1.

An early version of the FY2012 Intelligence Authorization Act (H.R. 1892 and S. 1458, 112<sup>th</sup> Congress) was also threatened with a presidential veto. Two of the disputed provisions would have required certain sensitive information on detainees held at United States Naval Base, Guantanamo Bay, Cuba, to be submitted to the select committees on intelligence. The Statement of Administration Policy on the bills raised “issues of concern.” If the disputed provisions had remained in the bill submitted to the President, then “the President’s senior advisors would [have] recommend[ed] a veto.”<sup>18</sup> The statement elaborated on these “issues of concern”:

The Administration believes that such disclosure will have a significant adverse impact on the willingness of foreign partners, who often expressly request this information not be disseminated, to communicate frankly on these matters.... The Administration is concerned that these provisions may conflict with the Executive Branch’s constitutional authority to control the disclosure of information when necessary to preserve the Executive’s ability to perform its constitutional responsibilities.<sup>19</sup>

These provisions were substantially modified in the final version of the act (P.L. 112-87, Sections 307 and 308), helping to avert the veto.

Another reform idea that has been raised but not acted upon was to remove the CIA’s exemption from coverage of the Government Performance and Results Act (GPRA) to bring it into alignment with the other IC entities.

## Coverage of This Report

This CRS report reviews the basic characteristics of proposed joint committees on intelligence, differences among them, and perceived advantages and disadvantages. The report starts, however, with the congressional panels a JCI would replace: namely, the House and Senate Select Committees on Intelligence. Along with this is a brief review of the defunct Joint Committee on Atomic Energy (JCAE)—often cited as an organizational model for a joint intelligence panel, as it was by the 9/11 Commission. Final sections examine various actions and alternatives to a JCI available to Congress as well as the obstacles to overseeing this sensitive field.

## House and Senate Select Committees on Intelligence

A joint committee on intelligence would replace the current House Permanent Select Committee on Intelligence, established in 1977, and the Senate Select Committee on Intelligence, created a year earlier.<sup>20</sup> These units emerged after extensive, detailed congressional and executive

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<sup>18</sup> Executive Office of the President, Office of Management and Budget OMB), *Statement of Administration Policy: H.R. 1892—Intelligence Authorization Act for FY 2012* (Washington, OMB, September 7, 2011).

<sup>19</sup> *Ibid.*

<sup>20</sup> In addition to the citations in notes 1, 3, 4, and 6-11 above, the development of and proposals for congressional oversight of intelligence are examined in, among many other sources: U.S. House Select Committee on Intelligence, *Recommendations of the Final Report*, H.Rept. 94-833, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington, GPO, 1976), pp. 1-4; U.S. Senate Select Committee to Study Governmental Activities with respect to Intelligence Activities, S.Rept. 94-755, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess., Book II, *Intelligence Activities and the Rights of Americans* (Washington, GPO, 1976), p. 339; Loch K. Johnson, “Accountability and America’s Secret Foreign Policy: Keeping a Legislative Eye on the Central (continued...)”

investigations revealed widespread abuses in the IC and concluded that effective congressional oversight was lacking. SSCI and HPSCI were set up to consolidate legislative and oversight authority over the entire intelligence community, supplanting the fragmented system at the time, which relied exclusively on disparate standing committees. Although titled “Select,” the intelligence panels are hybrids of standing and select committees, adopting characteristics of both types. For instance, the panels have only temporary membership, as select committees have, because they are usually short-term constructions; yet each panel holds authority to report legislation to its own chamber, a power usually reserved to standing committees.

## **Jurisdiction and Authority**

The Intelligence Committees have broad jurisdiction and authority over the intelligence community and report authorizations and other legislation for consideration by their respective chambers. A recent change enacted in the House in 2011 places three members of the Appropriations Committee on the Intelligence Committee to participate in briefings and meetings of the panel.<sup>21</sup> It replaced a Select Intelligence Oversight Panel on the Appropriations Committee (H.Res. 35, 110<sup>th</sup> Congress).

Most of the jurisdiction of the current Intelligence Committees is shared. The select committees hold exclusive authorizing and legislative powers only for the CIA, the DNI (as it had over the now-defunct Director of Central Intelligence), and the National Foreign Intelligence Program. This leaves the intelligence components in the Departments of Defense, Homeland Security, Justice, and Treasury, among other agencies, and intelligence-related programs to be shared with appropriate standing committees. Required reports—from the President (e.g., findings for covert operations abroad) and other officials and agencies (DNI, CIA, and various other IC components)—are usually submitted to the two select committees. Some reports, however, are submitted to other committees that have overlapping jurisdictions or shared responsibilities.

The House and Senate intelligence panels have nearly identical jurisdictions for the intelligence community, except for two notable areas. The House panel’s domain also extends over an area that the Senate’s does not: “tactical intelligence and intelligence-related activities,” which covers tactical military intelligence. In another departure, the House Select Committee has been given authority to “review and study on an exclusive basis the sources and methods of entities” in the IC.<sup>22</sup>

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(...continued)

Intelligence Agency,” *Foreign Policy Analysis*, 2005, vol. 1, pp. 99-120, Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (Washington, CQ Press, 2006), Chapter 10; “Oversight and Accountability,” Center for Strategic and International Studies, *Congressional Oversight of National Security: A Mandate for Change* (Washington, CSIS, 1992); and Center for the Study of the Presidency, Project on National Security Reform, *Ensuring Security in an Unpredictable World: Preliminary Findings, July 2008*, pp. v-vii, 60-63, and 87-90, available at <http://www.pnsr.org>.

<sup>21</sup> Honorable Mike Rogers, Chairman, House Permanent Select Committee on Intelligence, “Chairman Rogers Announces Strategic Partnership with House Appropriators,” *Press release*, House Committee on Intelligence, March 23, 2011.

<sup>22</sup> House Rule 3(l), added by H.Res. 5, 107<sup>th</sup> Cong., January 3, 2001.

## Membership and Leadership

The membership of the committees has been limited in time, staggered, and connected to the standing committee system and political party system in Congress. These features, moreover, differ between the two panels. Each select committee, for instance, reserves seats for members from the chamber's committees on Appropriations, Armed Services, Foreign Affairs/Foreign Relations, and Judiciary. The specifics differ, however: the Senate requires two persons, a majority and minority Member, from each of these standing committees, while the House calls for only one Member from each standing committee with overlapping jurisdiction.

The two panels also differ in size. The House committee has 20 members, with a party ratio of 12 majority to 8 minority in the current congress. The Senate counterpart has 15 members, with an 8-to-7 party ratio. There are ex officio members on each, representing the leadership in each chamber. Tenure and other membership features, including partisan composition and leadership arrangements, also distinguish the two panels from one another. The Senate panel, since its inception, has had only one more member from the majority party than the minority (an 8-to-7 ratio); and its vice chairman, who takes over if the chair is unavailable, must come from the minority party. The House select committee, in contrast, reflected the full chamber party ratio when it was established in 1977: two-to-one plus one, resulting in an initial 9-to-4 majority-minority party membership on the panel. In the meantime, however, the minority party has been granted additional seats on the committee and the majority-minority party ratio in the full House has grown closer as the select committee membership has increased. The result had been a House committee party ratio of 12-to-8 in the 112<sup>th</sup> Congress. The House panel, unlike the Senate counterpart, has no position of vice chairman dedicated to a minority party member.

## Secrecy Controls

The committees also have different secrecy arrangements regarding controls over their classified holdings. Secrecy oaths distinguish the two chambers. All Members of the House, including, of course, those on the Intelligence Committee, must swear or affirm not to disclose classified information, except as authorized by the rules of the chamber; the current oath is modeled after a previous one which had been required only for the members of the House Permanent Select Committee on Intelligence. The Senate does not impose a similar obligation on its Members.<sup>23</sup>

Non-member access to classified materials also separates the two panels. The House committee has a more detailed and exacting set of requirements for non-members than its Senate counterpart.

In addition, the Senate panel is authorized to disclose classified information publicly on its own.<sup>24</sup> Such actions are to follow elaborate procedures in which the President and the full Senate have an opportunity to act. (For whatever reasons, it appears that the Senate Select Committee on

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<sup>23</sup> For further discussion and citations, see CRS Report RS20748, *Protection of Classified Information by Congress: Practices and Proposals*, by Frederick M. Kaiser.

<sup>24</sup> The select committee's charter provides for three responses from the full Senate to an Intelligence Committee request to release classified information, if the President objects to it. The chamber can (1) approve the disclosure; (2) disapprove the disclosure; or (3) "refer all or any portion of the matter back to the committee, in which case the committee shall make the final determination with respect to the public disclosure of the information in question" (Sec. 8(b)(5), S. Res. 400, 94<sup>th</sup> Cong., 2<sup>nd</sup> sess.).

Intelligence has *not* disclosed such information on its own over its history.) By comparison, the House select committee cannot release classified information on its own, if the President objects to its disclosure; in such a case, the House itself makes the determination by majority vote.

## Joint Committee on Atomic Energy as a Model

The Joint Committee on Atomic Energy (JCAE)—set up by the Atomic Energy Act of 1946, along with the Atomic Energy Commission (P.L. 585, 60 Stat. 772-773)—is often cited as an appropriate organizational model for a joint committee on intelligence, a reference the 9/11 Commission also adopted.<sup>25</sup> The JCAE, an 18-member panel composed of an equal number of Members from each house of Congress, held authority to report legislation to the floor of both chambers, a power unique among joint committees.<sup>26</sup> Many reasons have been offered for considering the JCAE as a model:

- favorable record for keeping highly confidential material secret;
- largely bipartisan approach to policy-making;
- considerable unity among its members;
- close working relationship with the executive (here, the Atomic Energy Commission) in this secretive and sensitive area;
- consolidated jurisdiction for a growing field;
- explicit, comprehensive oversight mandate, supported by a then-unprecedented directive that the executive keep the joint committee “fully and currently informed”; and
- ability to streamline the legislative process in general and to act rapidly, if necessary, in particular instances.

Given these attributes, the joint committee became a formidable congressional panel. In its prime, JCAE was even considered by some as “probably the most powerful congressional committee in the history of the nation.”<sup>27</sup> Despite this—or perhaps because of it—the JCAE was abolished in 1977, nearly 30 years after its birth. It was evidently the victim of a number of reinforcing developments: concerns inside and outside Congress about JCAE’s close, some thought cozy, relationship with the executive agency it was overseeing; changing executive branch conditions, especially the breakup of the Atomic Energy Commission into the Nuclear Regulatory

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<sup>25</sup> For background and further citations on the JCAE, see CRS Report RL32538, *9/11 Commission Recommendations: Joint Committee on Atomic Energy—A Model for Congressional Oversight?*, by Christopher M. Davis; Harold P. Green and Allen Rosenthal, *Government of the Atom: The Integration of Powers* (New York: Atherton Press, 1963); and Kaiser, “A Proposed Joint Committee on Intelligence,” pp. 138-141.

<sup>26</sup> One caveat to the unique status of the JCAE is the Temporary Joint Committee on Deficit Reduction; it was authorized to report legislation but only on a narrow subject and on a case-by-case basis. In contrast to the JCAE, this joint panel was a short-term, periodic addition to Congress, set up by the Gramm-Rudman-Hollings Act of 1985 (GRH). The panel could come into existence only when legislation on budget sequestration was needed and was empowered to report only a joint resolution setting forth specified reports from the Directors of the Office of Management and Budget and the Congressional Budget Office. P.L. 99-177, 99 Stat. 1037, 1100 (1985). This provision apparently was never activated and was not included in the 1987 revision of GRH.

<sup>27</sup> Green and Rosenthal, *Government of the Atom*, p. 266.

Commission and the Energy Research and Development Administration, now the Department of Energy; new rivals in Congress, as the expanding nature of atomic energy and nuclear power extended into the jurisdictions of a number of House and Senate committees; efforts in the Senate at the time to realign and consolidate standing committee jurisdictions and reduce the number of assignments for each Member; and a relatively high number of vacancies on the JCAE (six of the 18 seats).<sup>28</sup>

## **Proposed Joint Committee on Intelligence Characteristics**

Recommendations to create a joint committee on intelligence have surfaced over more than six decades, beginning in 1948, and most proposals predate the establishment of the two select committees on intelligence in 1976 and 1977.<sup>29</sup> Although many of these suggestions, including that from the 9/11 Commission, have followed the design of the Joint Committee on Atomic Energy, not all have. Consequently, the specifics in the blueprints have varied in a number of fundamental ways. Differences extend to (1) the range and exclusivity of the panels' jurisdiction; (2) makeup of their membership; (3) selection and rotation of chairmen; (4) possibility of and characteristics of a vice chairmanship; (5) requirements for representation of certain other committees as well as at-large members; (6) special secrecy requirements for members and staff, including a secrecy oath and security clearances; (7) staff size, method of selection, and restrictions on activities; (8) official disclosures of classified information; (9) mechanisms for investigating suspected unauthorized disclosures of such information; and (10) access by non-members to the joint committee's classified holdings. Even suggested methods of establishment have varied.

## **Methods of Establishment**

A joint committee on intelligence could be created by a concurrent resolution, a joint resolution, or a regular bill. The Joint Committee on Atomic Energy, for instance, was established by public law through the regular bill process (i.e., the Atomic Energy Act of 1946, P.L. 580, 60 Stat. 772-773).

A concurrent resolution has the advantage (for its proponents) of requiring only the approval of Congress, while a joint resolution or regular bill must be signed by the President or his veto overridden. A joint resolution or a bill, however, may offer certain benefits to its supporters over a concurrent resolution. A number of existing provisions in public law, especially ones dealing with intelligence reporting requirements to Congress, designates the House and Senate Select Committees on Intelligence as recipients (e.g., the intelligence oversight provisions and the reporting requirements for the CIA Inspector General, codified at 50 U.S.C. 413-415 and 50

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<sup>28</sup> Kaiser, "A Proposed Joint Committee on Intelligence," pp. 140-141.

<sup>29</sup> Additional coverage of JCI recommendations, characteristics, and perceived advantages and disadvantages, which are detailed below, is available in U.S. House Committee on Rules, Subcommittee on Rules of the House, *House Rule XLVIII*, hearing, 101<sup>st</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1990); Frederick M. Kaiser, "A Proposed Joint Committee on Intelligence: New Wine in an Old Bottle," *Journal of Law and Politics*, vol.5, fall 1988, pp. 127-186; and Independent Task Force, Council on Foreign Relations, *Making Intelligence Smarter: The Future of U.S. Intelligence* (New York: Council on Foreign Relations, 1996), pp. 32-33.

U.S.C. 403q, respectively). A bill or joint resolution, when creating a joint committee, could amend these statutory provisions, whereas a concurrent resolution could not do so directly. But a concurrent resolution, although solely a congressional device, could have the same effect. By changing the rules of both chambers, a concurrent resolution could recognize that the powers, authority, and jurisdiction of the former select committees would be transferred to a new joint committee.

## **Jurisdiction and Authority**

A joint intelligence committee could consolidate jurisdiction for the entire intelligence community, extending to all intelligence entities as well as intelligence and intelligence-related activities, including significant anticipated activities (i.e., covert operations). Legislative authority over intelligence could be shared for all entities with overlapping jurisdiction; or, as is now the case in the House and Senate, it could be held exclusively for certain specified components (e.g., CIA and DNI), while being shared for others.

## **Membership**

A bicameral body requires equal membership from both the Senate and House. In addition to bicameralism, a joint committee on intelligence could be directed to accommodate three other criteria: bipartisanship, representation of specified standing committees, and at-large selection of members.

For example, the membership from each chamber could be required to have representatives from standing committees with overlapping jurisdiction (e.g., Appropriations, Armed Services, Foreign Affairs/Foreign Relations, and Judiciary), as both the House and Senate Intelligence Committees do now. Or a JCI could add to these members from the House Homeland Security Committee and the Senate Homeland Security and Governmental Affairs Committee. This selection might include both a majority and a minority party member from each represented committee. A JCI could also call for a specified number of members selected at-large, as the Senate intelligence panel does now. As an illustration, an 18-member JCI could include nine Senators and nine Representatives, with five majority and four minority party members from each chamber. At least one member, but not more than two, could come from each of the four committees with overlapping jurisdiction now on each select committee; this option (a maximum of eight from each chamber) would still allow for one selection at large from each house. By comparison, a larger committee or a panel requiring only a single member from each of the specified standing committees would allow for more members to be selected at-large.

Provision could also be made for *ex officio* members, particularly the majority and minority party leaders from the Senate and the Speaker and minority leader from the House.

## **Terms and Rotation**

Membership on the joint committee could have no term limits or be given a maximum length of service (six or eight years, as the House and Senate Intelligence Committees have had, or shorter or longer terms). Under term limits, the total time on the committee might be measured either by continuous service or by non-continuous service accumulated over a specified number of Congresses (e.g., a total of eight years over six Congresses). If a JCI had maximum lengths of

service, it could be treated as a temporary assignment, which might not count against other standing committee assignments in each chamber. By comparison, membership on the JCI could be permanent.<sup>30</sup> If so, it might be treated as if it were a standing committee in each chamber, counting against other committee assignments.

Member terms could also be staggered, so that new members would arrive with each new Congress. Staggered terms, however, would mean that a portion of the original membership could not serve the maximum period, at least not as part of the original composition.

## **Leadership**

The chair, selected at the beginning of each Congress or each session (as some proposals called for), could alternate between the two chambers or political parties. A vice chairmanship could also be established; this officer would replace the chair when he or she is absent (as occurs now on the Senate Intelligence Committee). The vice chair could be a member of the other body and/or the other political party.

## **Secrecy Controls**

Various types of secrecy controls could be applied to a joint committee on intelligence to regulate access to its classified holdings by non-committee members, protect against the unauthorized disclosure of classified information, and allow its authorized release. Such controls could (1) set requirements for determining access by non-members; (2) require security clearances, oaths, and/or secrecy agreements for committee members and staff; and (3) provide for investigation of suspected security breaches, conducted by the House and Senate ethics committees.

Controls could also spell out procedures for disclosing classified information to which the President objects, either by a joint committee itself, by a joint committee in concert with either or both chambers, or by either or both chambers as the final arbiter. One of five distinct options might be adopted: (1) the joint committee on intelligence could act alone; (2) the panel could act only after one house responded to a request from it to release classified information; (3) the JCI could act only after both houses responded; (4) a single house could disclose the information; or (5) both chambers would have to agree to do so. Currently, disclosure procedures differ between the House and Senate intelligence panels. The House select committee does not have authority to release classified information on its own. The full House must act to disclose it, at the request of its intelligence panel, if the President objects to the release. On the Senate side, the select committee may disclose classified information on its own, after both the President and full Senate have acted. It appears that this procedure has not been used by the Senate panel.

## **Staffing**

The number of staff on a new JCI would presumably be smaller than the combined total for both the House and Senate Intelligence Committees. Hiring could be accomplished in seven different

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<sup>30</sup> The 9/11 Commission—referring to both a joint committee on intelligence and a new standing committee in each house—recommended that “Members should serve indefinitely on the committees, without set terms, thereby letting them accumulate expertise.” 9/11 Commission, *Report*, p. 421.

ways: (1) by the majority party on the full JCI; (2) by the majority party from each chamber on the committee; (3) by full committee vote; (4) by the majority party and minority party separately; (5) by the chair alone; (6) by the chair and vice chair/ranking minority member together; or (7) by individual members (with each legislator selecting a single staff member). Additionally, staff could be selected by a combination of several compatible ways (e.g., individual member selections for some plus committee-wide selections for others). The staff could also be required to meet certain agreed upon criteria set by the committee, such as fitness for the duties and without regard to party affiliation.<sup>31</sup>

Staffers could be required to have an appropriate security clearance (for Top Secret and access to Sensitive Compartmented Information), as is now mandated by both House and Senate select intelligence committees. They could also be directed to sign a nondisclosure or secrecy agreement not to reveal classified information, again a requirement for the staff of both intelligence panels.

## **Budget and Funding**

The budget for a joint committee on intelligence would presumably be smaller than the combined budgets of the House and Senate intelligence panels. Funding could be shared by both chambers, deriving equally from the contingent funds of the Senate and House.

## **Pros and Cons**

Differences over the establishment of a joint committee on intelligence tie into practical matters as well as matters of principle.

### **Pros**

Supporters of a joint committee on intelligence argue that it would make for a more effective and efficient overseer than the current arrangement, which the 9/11 Commission concluded “is now dysfunctional,” because of limitations on the two select committees.<sup>32</sup> According to its proponents, a single joint committee, housing fewer members and staff than the two existing ones combined, would:

- Strengthen oversight of intelligence for four primary reasons. The executive would be more open and forthright with a single, small oversight body than with two with a larger combined membership; the legislators and staff on the JCI, recognizing that there is no other authorizing panel to conduct oversight, would

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<sup>31</sup> The 9/11 Commission, for instance, recommended that the “staff of this committee should be nonpartisan and work for the entire committee and not for individual members.” 9/11 Commission, *Report*, p. 420.

<sup>32</sup> Competing views on a joint committee on intelligence are available from Members and committees of Congress, among other sources. Supportive arguments are included in: U.S. Senate Temporary Select Committee to Study the Senate Committee System, *Report* (Washington: GPO, 1984), pp. 13-14; Sen. Howard Baker and Rep. Henry Hyde, statements before the Temporary Select Committee, *Senate Resolution 127, To Study the Senate Committee System* (Washington: GPO, 1984), part 1, pp. 5-11 and part 2, pp. 83-85; Rep. Henry Hyde, statement before the Joint Committee on the Organization of Congress, *Committee Structure*, hearings, 103<sup>rd</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1993), pp. 832-841; and Minority, Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and House Select Committee to Investigate Covert Arms Transactions with Iran, *Report*, S.Rept. 100-216 and H.Rept. 100-433, 100<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1987), p. 583.

attach a greater importance to this responsibility; a committee composed of legislators from both chambers could better integrate and take advantage of congressional expertise and experience in the field; and a JCI could be established with fewer restraints and restrictions than the separate select committees now have.

- Improve coordination, cooperation, and comity between the House and Senate and among other relevant committees (with overlapping jurisdiction) in both chambers. A joint committee could serve as a conduit of information and advice and as a facilitator for policy formulation between the two chambers as well as between the political parties; a JCI could also encourage mutual respect and trust between the chambers and parties; this could occur by treating all of its members equally in committee leadership posts and voting, by merging the stands of Members of both houses in committee deliberations and decisions, by taking a joint committee consensus on legislation, endorsed by Members of both chambers, to the floor of each house, and by providing an opportunity for House Members to be involved, if only marginally and informally, in a Senate function (i.e., confirmation of presidential nominees).
- Streamline the legislative process, because only one committee, rather than two, would have to consider and report legislative proposals and authorizations to the floors of both chambers; members from the same joint committee, moreover, might comprise all or a majority of the membership of conference committees, which might be less necessary in the first place because of the bicameral, bipartisan makeup of a joint committee.
- Respond rapidly to investigate a major development, when conditions dictated.
- Increase the stature of overseeing and legislating on intelligence matters and, thus, make serving on an intelligence panel more attractive and important than on either select committee. This could result from making the joint committee the equivalent of a standing committee, by granting it permanency and authority to report legislation to each chamber and giving the members indefinite tenure. A JCI with these characteristics would be unique in the current era, the first of its kind since 1977, and apparently one of only a few in the history of Congress, also elevating its stature.
- Improve the protection of classified information in Congress's possession. A smaller number of legislators and staff on a joint committee would have access to it, and a single office would be easier to secure.
- Make for more efficient government. A single panel, versus two, would probably reduce the amount of time that the Administration and intelligence officials would spend on Capitol Hill testifying, briefing, notifying, and meeting with members and panels.
- Make for more effective government by encouraging trust between Congress and the executive in this sensitive field. This could occur by reducing the number of panels, Members, and staff with access to such highly classified information and by easing cooperative relationships between the branches by way of a single committee, instead of two. This, in turn, could improve comity and mutual understanding—if not agreement—between the legislature and executive.

- Pinpoint responsibility in Congress for oversight and legislation affecting intelligence, thereby avoiding any confusion or uncertainty about it.
- Cut back the total number of committee seats for legislators in the House and Senate combined, by replacing the two panels with a single committee with fewer seats; for instance, a new 18-member joint committee with nine Senators and nine Representatives would be half the size of the combined total of 37 on the two select committees. The replacement would modestly help reduce the number of legislators holding too many committee assignments and/or being “spread too thin.” Reducing the number of seats available for Representatives and Senators would allow them to concentrate on one less committee assignment.
- Reduce costs, because of fewer staff and a single suite of offices.

## Cons

Critics of proposals for replacing the current House and Senate Intelligence Committees with a single joint committee contend that it would weaken oversight and compromise a fundamental feature of the Congress, namely, two different (and sometimes competing) bodies.<sup>33</sup> As viewed by its opponents, a JCI would:

- Adversely affect oversight of intelligence. This would occur by reducing the number of legislators and staff who have an incentive and opportunity to conduct oversight and by reducing the number of separate panels, with different characteristics and incentive structures, to conduct it; in this regard, the number of committees to which the President reports covert action plans is now only two (the select committees on intelligence), having been reduced from eight in 1980, at the request of the executive.
- Undercut the legislative benefits (e.g., longer deliberation time and different viewpoints) of relying on two committees from separate and distinctive chambers. This usual situation allows two panels—each reflecting different chambers, types of constituencies, and electoral schedules—to examine the same legislation and authorizations and conduct oversight from different vantage points, based on their own priorities and demands; the loss of a second view would be felt not only in the initial committee deliberations but also in later conference committee action, which might be dominated by joint committee members.
- Cause a loss in continuity, stability, and experience. This would be especially evident in joint committee leadership, if the chair (and ranking member or vice chair) rotated every two years; this in turn would make membership on the joint committee less desirable than on other panels; the turnover could also extend to

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<sup>33</sup> Criticisms and concerns are voiced by Rep. Dan Glickman, Rep. Larry Combest, and Sen. Dennis DeConcini, statements before the Joint Committee on the Organization of Congress, *Committee Structure*, hearings, 103<sup>rd</sup> Cong., 1<sup>st</sup> sess., pp. 64-79 and 406-412; Rep. Larry Combest, Chairman of the House Permanent Select Committee on Intelligence, *IC21—The Intelligence Community in the 21<sup>st</sup> Century, The Intelligence Community Act of 1996*, March 4, 1996, p. 7; U.S. House Permanent Select Committee on Intelligence, *IC21: Intelligence Community in the 21<sup>st</sup> Century* (staff study), committee print, 104<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1966), pp. 316-318 and 328; House Select Committee on Committees, *Final Report* (Washington: GPO, 1980), p. 416; and Majority, Senate and House Select Committees Investigating the Iran-Contra Affair, *Report*, p. 427.

staff, because of the frequent change in leadership; finally, this loss of stability and experience could hamper Congress's ability to influence public policy and compete with the executive.

- Result in a more acute impact on Congress if a joint committee develops a close and supportive relationship with the executive entities it oversees, rather than a neutral and critical one. With a single panel, Congress would have only one locus for oversight and checks on the executive, not two; if this happens, the impact on Congress, on oversight, and on legislation would be more extensive and significant, because of the absence of a possible balance from a second committee.
- Operate contrary to the long-term tendency to end reliance on joint committees, either by abolishing them or not establishing them in the first place.<sup>34</sup> A JCI, if authorized to report legislation to the floor of both houses, would be unique currently; it would be the only such empowered joint committee since 1977 (when the JCAE was abolished), and one of the few in the history of the Congress; a joint committee on intelligence would also raise the prospect of similar panels for other policy areas, including homeland security, which have wide-ranging jurisdictions that cross a number of executive agencies and programs along with congressional committee jurisdictions.
- Harbor uncertainty regarding confirmation of presidential nominees. It might be unclear whether House Members should play any role at all in the process or, if so, perhaps only at certain stages (e.g., in initial meetings and interviews with the nominees, background inquiries, and formal hearings, but not in a vote for confirmation).
- Artificially make the political parties equal or nearly so. This could occur, even though the differences in party ratios in each chamber could be substantial, as they have been in the past.
- Artificially make the two chambers equal on the joint committee. The number of Members from each chamber would be the same, even though the House is more than four times larger than the Senate; because of this situation, Representatives would have proportionately fewer opportunities to serve on a joint committee than Senators.
- Cut back the possibility of serving on an intelligence panel for all Members of Congress, especially if there are no term limits on JCI membership. This reduction in numbers would, in turn, reduce the diversity and representational characteristics of the membership compared to two separate committees.
- Bring about a change in the different jurisdictions that the current select committees now hold, the House panel having a broader jurisdiction than its Senate counterpart.

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<sup>34</sup> The 9/11 Commission (p. 421), for instance, did not advocate a joint committee for homeland security. Instead, it called for consolidating jurisdiction in a permanent standing committee in each chamber. For additional discussion on such a transformation, see CRS Report RS21901, *House Select Committee on Homeland Security: Possible Questions Raised If the Panel Were to Be Reconstituted as a Standing Committee*, by Judy Schneider.

- Not necessarily improve protection of classified information over the current two select committees. Their controls over it are exacting and their reputations in this regard are good; a JCI could also require new procedures for the public release of classified intelligence information held by the joint committee; this would raise the prospect of (and cause disagreement over) whether the joint committee alone could do so, whether one chamber could do so, or whether both houses must act together as the final arbiter.
- Add confusion and conflict over investigations of suspected unauthorized disclosures of classified information. This could arise, for instance, if the ethics committee from one chamber conducted investigations which involved members of the other body, even if only tangentially and in an initial inquiry.
- Raise practical difficulties in setting meeting schedules, times, and locations for panel members from two different chambers of Congress.

## **Alternatives to a Joint Committee**

There are other options which might enhance and regularize congressional oversight of intelligence. These changes, both formal and informal, could have an impact not only on the structure of the current select committees on intelligence, but also on their relationship with other committees and Members in its respective chamber and its counterparts in the opposite chamber, as well as the relationship between the legislature and the executive.

### **Changing the Select Committees' Structure and Powers**

One of the most direct and immediate among the options to increase and improve oversight of intelligence would be ways to enhance the status, stature, and resources of the existing select committees on intelligence or replace them with true standing committees.<sup>35</sup> This might be accomplished through several different (and sometimes competing) means:

- Grant the current select committees status as standing committees, along with indefinite tenure for their membership, to reduce turnover; increase experience, stability, and continuity; and make membership on the panel more attractive.
- Expand the authority of such committees, giving them power to report appropriations as well as authorizations and to hold subpoena authority on their own.
- Place members of each chamber's Select Committee on Intelligence on their chamber's Appropriations Subcommittee on Defense or create a new

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<sup>35</sup> The 9/11 Commission emphasized the need for "substantial change" in congressional oversight, either by establishing a joint committee or by creating "a single committee in each house of Congress, combining authorization and appropriating authorities ...." Each panel would be a standing committee and hold subpoena authority. The membership would be relatively small and serve without term limits. Its composition would be nearly equal between the parties, with the majority having only one more member than the minority, and representing four panels with overlapping jurisdiction (i.e., Armed Services, Judiciary, Foreign Affairs, and the Defense Appropriations Subcommittee) with one seat each on the new committee. 9/11 Commission, *Report*, p. 420-421. For further information and analysis, see CRS Report RS21908, *Senate Select Committee on Intelligence: Term Limits and Assignment Limitations*, by Judy Schneider.

Appropriations Subcommittee on Intelligence, which could include Intelligence Committee members, with comprehensive jurisdiction over IC appropriations.

- Establish a special advisory and oversight body on the Appropriations Committee, combining Intelligence Committee and Appropriations Committee members, as the House did in 2007; under this plan, the new panel would report its findings and recommendations for IC funding to the defense or other appropriate subcommittee, thereby modestly expanding the effective jurisdiction and influence of the select committee.<sup>36</sup> A replacement of this advisory hybrid occurred in 2011, with the addition of three Appropriations Committee members to the House Intelligence Committee to participate in hearings and briefings.<sup>37</sup>
- Add professional staff, hire temporary consultants, set up short-term task forces, and/or increase the use of congressional support agencies, especially in fields where the panels might require new or expanded expertise and skills.

Although neither the House nor the Senate adopted the 9/11 Commission recommendations for intelligence oversight, other changes have occurred through a variety of mechanisms. These include the chambers' leadership, existing committees, and a Senate bipartisan working group; these efforts have led to the Senate's restructuring its oversight panels and each chamber instituting new working arrangements between its intelligence and appropriations panels.

## **Senate Action**

The Senate's response to the 9/11 Commission and other recommendations for oversight of intelligence has proceeded through several phases.

### ***Initial Changes in 2004***

Several of these suggestions were approved by the Senate on October 9, 2004, when it agreed to S.Res. 445 (108<sup>th</sup> Congress) affecting its oversight of intelligence. The resolution eliminated certain restrictions on serving on the select committee, reduced the number of members (from 17 to 15), and modified security procedures regarding the public disclosure of classified information. S.Res. 445, however, did not transfer authority and jurisdiction over intelligence appropriations to the Intelligence Committee.

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<sup>36</sup> This proposal materialized in 2007 in the House with members of the Intelligence Committee serving on a special oversight panel on the Appropriations Committee (H.Res. 35, 110<sup>th</sup> Congress). The concept was raised in late 2006 by Rep. Nancy Pelosi, then House Minority Leader and prospective Speaker of the House. Tim Starks, "Pelosi Wants Intelligence Appropriations Oversight Panel," *CQ.com*, December 14, 2006; David Rogers, "Pelosi Plans Panel to Oversee Spy-Agency Funds," *Wall Street Journal*, December 14, 2006, p. A3; and "Pelosi Looks to Boost Oversight of Intelligence and Ethics," *Washington Post*, December 15, 2006. It was disbanded in 2011. See Honorable Mike Rogers, Chairman, House Permanent Select Committee on Intelligence, *Chairman Rogers Announces Strategic Partnership with House Appropriators*, Press Release, March 23, 2011, p. 30; and Chris Strohm, "House Democrats want panel overseeing intelligence spending reinstated," *Government Executive*, January 19, 2011, p. 1.

<sup>37</sup> Representative Rogers, *Chairman Rogers Announces Strategic Partnership*. The chairman emphasized that this new arrangement was approved unanimously by the HPSCI members.

### ***Structural Changes Involving the Committees on Intelligence and Appropriations in 2007***

Additional steps were taken in the 110<sup>th</sup> Congress. A prominent one is a Memorandum of Agreement (MOA), designed to improve coordination and transparency between the Intelligence Committee and Appropriations Committee.<sup>38</sup> The MOA—signed by the chairman of the select committee (but not its ranking minority member) and the chairs and ranking minority members of the Senate Appropriations Committee and its defense subcommittee—advanced several changes to accomplish this:

- notify staff and allow them to attend the intelligence hearings of the other body;
- allow each Intelligence Committee member who is also an appropriator to bring his or her intelligence staff members to Appropriations Committee hearings and markups;
- permit all Senators and cleared staff of one committee to review the bill, report, and classified annex of the other before action is taken; and
- give the chairmen and ranking minority members of each committee the opportunity to appear before the other panel to present their views prior to the markup of either the intelligence authorization or appropriations bills.<sup>39</sup>

Notwithstanding the effort, the effectiveness of the new arrangements under the Memorandum of Agreement has elicited differing impressions. The chairman of the Senate Intelligence Committee emphasized that the agreement “has made great strides toward bringing our committees together in a unity of effort that was lacking before.”<sup>40</sup> A competing interpretation was offered by the Intelligence Committee’s ranking minority member, who was also an appropriator at the time. He determined that the MOA was “ineffective,” adding that “in my experience I’ve seen more evidence of the need for a better synthesis of the two.”<sup>41</sup>

### ***Subsequent Proposed Changes Involving the Senate Committees on Intelligence and Appropriations***

In March 2008, 14 of the 15 members of the Senate Select Committee on Intelligence (SSCI)—led by Chairman Rockefeller and Vice Chairman Christopher S. Bond—offered another proposal to the Senate leadership.<sup>42</sup> It called for the establishment of a Subcommittee on Intelligence on the Appropriations Committee, which would include members of the Intelligence Committee and

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<sup>38</sup> Hon. John D. Rockefeller, Chairman, Opening Statement, in U.S. Congress, Senate Select Committee on Intelligence, *Congressional Oversight*, hearing, 110<sup>th</sup> Cong., 1<sup>st</sup> sess., November 13, 2007, p. 2. See also, letter to Hon. Harry Reid, Senate Majority Leader, and Hon. Mitch McConnell, Senate Minority Leader, on changes in Senate oversight of intelligence, by Hon. John D. Rockefeller, Chairman, Senate Select Committee on Intelligence, and others, February 28, 2007.

<sup>39</sup> Senator Rockefeller, Opening Statement, *Congressional Oversight*, pp. 2-3.

<sup>40</sup> *Ibid.*, p. 3.

<sup>41</sup> Hon. Christopher S. Bond, Opening Statement, in Senate Intelligence Committee, *Congressional Oversight*, pp. 4-5.

<sup>42</sup> Hon. John D. Rockefeller, Chairman, and Hon. Christopher S. Bond, Vice Chairman, Senate Select Committee on Intelligence, and others; letter to Hon. Harry Reid, Senate Majority Leader, and Hon. Mitch McConnell, Senate Minority Leader, on proposals to change Senate oversight of intelligence, March 6, 2008, pp. 2-3. Reprinted in *Congressional Record*, vol. 154, September 11, 2008, pp. S8419-S8420.

would appropriate all funds for the National Intelligence Program (NIP), as opposed to the current situation where such appropriations are divided among several appropriations subcommittees. In defense of this option, Senators Rockefeller and Bond reminded the Senate leadership that the 9/11 Commission's bolder recommendation—to consolidate authorization and appropriations authority in the SSCI—"was considered and rejected by the Senate during consideration of S.Res. 445 in October 2004."<sup>43</sup>

This plan for a new Appropriations Intelligence Subcommittee was opposed by the leadership of the Senate Appropriations Committee. Its chairman then, Robert C. Byrd, and ranking member, Thad Cochran, noted that other changes in oversight, including those by way of the 2007 MOA, have been put into effect.<sup>44</sup> They argued that the proposed Intelligence Appropriations Subcommittee, "led by members of the Intelligence Committee," would prove counterproductive: "We strongly believe that consolidating authority over intelligence in a smaller group of Senators is precisely the wrong way to improve the Senate's oversight of intelligence."<sup>45</sup> The Senators added that the separation of authorization and appropriations functions should be maintained and that consolidating appropriations for the entire NIP in one subcommittee would have an adverse impact on other policies, such as foreign policy, that are handled by different subcommittees.<sup>46</sup>

Despite this opposition, a formal proposal to create a new Appropriations Subcommittee on Intelligence (S.Res. 655, 110<sup>th</sup> Congress) was introduced on September 11, 2008, by the vice chairman and chairman of the Senate Intelligence Committee.<sup>47</sup> In addition to placing the two Intelligence Committee members from Appropriations on this new Appropriations Subcommittee on Intelligence, S.Res. 655 would also have added the chairman and ranking member of the Defense Appropriations Subcommittee and, as *ex officio* members, the chairman and vice chairman of the Intelligence Committee. In introducing the resolution, Senator Bond emphasized that "on the seventh anniversary of 9/11, it is noteworthy that there remains one unaddressed 9/11 Commission recommendation, and that is to reform the legislative branch's oversight of intelligence and terrorism activities which the commission rightly described as 'dysfunctional'."<sup>48</sup> As an alternative to the "bolder" 9/11 Commission recommendations, which had been rejected, the Senator argued that "many of us believe there is a better, less disruptive way to achieve reform through a carefully constructive intelligence appropriations subcommittee."<sup>49</sup> Another proposal along this line appeared in the House but would have affected both chambers. H.R. 334, 110<sup>th</sup> Congress, would have required each chamber to establish an Appropriations Subcommittee on Intelligence with jurisdiction over intelligence and intelligence-related activities.

A different proposal (S.Res. 164) had been introduced in the 111<sup>th</sup> Congress. Following the 9/11 Commission recommendation, it would transfer appropriations power to the Senate Select

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<sup>43</sup> Senators Rockefeller and Bond, letter on proposed changes, 2008, p. 1.

<sup>44</sup> Hon. Robert C. Byrd, Chairman, and Hon. Thad Cochran, Ranking Member, Senate Committee on Appropriations, Letter to Hon. Harry Reid, Senate Majority Leader, and Hon. Mitch McConnell, Senate Minority Leader, in response to the proposal from the Senate Select Committee on Intelligence, April 5, 2008, p. 1.

<sup>45</sup> *Ibid.*, p. 2.

<sup>46</sup> *Ibid.*

<sup>47</sup> S.Res. 655, 110<sup>th</sup> Cong., 2<sup>nd</sup> sess., introduced by Hon. Christopher S. Bond, for himself, and Hon. John D. Rockefeller and Hon. Sheldon Whitehouse, "Senate Resolution 655—To Improve Congressional Oversight of the Intelligence Activities of the United States," *Congressional Record*, vol. 154, September 11, 2008, pp. S8416-S8417.

<sup>48</sup> *Ibid.*, p. S8418.

<sup>49</sup> *Ibid.*, p. S8419.

Committee on Intelligence. The resolution's sponsor, Senator Russell Feingold, noted that "this effort to reform and improve congressional oversight has a long bipartisan history," recognizing earlier plans to accomplish this from Senators John McCain and Richard Burr, two of the 2009 proposal's co-sponsors.<sup>50</sup> S.Res. 164 was not approved.

## **House Action**

Several different approaches have been considered or tried in the House. One option was to consolidate authority, by reserving seats for Intelligence Committee members on the Defense Appropriations Subcommittee; it was raised at the end of the 109<sup>th</sup> Congress by Representative Nancy Pelosi, then House Minority Leader and presumptive Speaker of the House in the 110<sup>th</sup> Congress.<sup>51</sup> The final product was a variation on this theme. H.Res. 35 (110<sup>th</sup> Congress), which passed the House on January 9, 2007, created a new Select Intelligence Oversight Panel on the Appropriations Committee. It consisted of 13 members, with an eight-to-five inter-party ratio; three of the members are representatives from the Intelligence Committee joining 10 from Appropriations, including the chairman and ranking minority member of the full committee, the chairman and ranking minority member of the Defense Subcommittee, and six additional members from appropriations. This special panel was authorized to study and make recommendations to all appropriations subcommittees on relevant areas and specifically the annual intelligence appropriations to the Defense Subcommittee. The new panel, however, was not authorized to report the appropriations to the full committee, a power which was retained by the Defense Subcommittee.

In the 110<sup>th</sup> Congress, a bill (H.R. 334) was introduced that would have taken the proposal further. Instead of an advisory panel, H.R. 334 would have required each chamber to establish by law a separate Subcommittee on Intelligence in its Appropriations Committee, with appropriations jurisdiction over intelligence and intelligence-related activities.<sup>52</sup> No further action occurred on the bill.

In 2011, a different arrangement replaced the advisory panel on Appropriations. The current approach includes three Appropriations Committee members (two Republicans and one Democrat) who participate in Select Committee hearings and briefings. According to the HPSCI chairman, "this partnership will knit together the Intelligence Committee with the Appropriators and will allow key appropriators important insights into the intelligence community which they fund."<sup>53</sup>

## **Concerns about Restructuring the Intelligence Committees**

The set of changes producing a restructured and strengthened Intelligence Committee in each chamber, as called for by the 9/11 Commission, might also generate concerns and criticisms. A new standing committee—smaller than the existing select committees in each chamber (if

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<sup>50</sup> Hon. Russell Feingold, Statement on behalf of S.Res. 164, 111<sup>th</sup> Congress, 1<sup>st</sup> sess., June 2, 2009, *Congressional Record*, vol. 155, pp. S5950-S5951.

<sup>51</sup> Sources in footnote 36.

<sup>52</sup> See Honorable Michael Castle, *2009 Intelligence Authorization Act Needs More Oversight*, Press release, July 17, 2008, available at <http://www.castle.house.gov/News/DocumentSingle.aspx?DocumentID=106799>.

<sup>53</sup> Representative Rogers, *Chairman Rogers Announces Strategic Partnership*.

combined), with representation from four standing committees with overlapping membership and indefinite tenure for its members—would substantially reduce (1) the number of Members in each chamber serving on an intelligence panel at any one time; (2) the number of at-large seats available; (3) the number of vacancies available over time; and, thus, (4) the likelihood of a Member finding a seat on the committee. These changes in tandem would also lead to fewer former members from the committee, thus, reducing the ability of the full chamber and non-members to be knowledgeable about how the intelligence community operates and intelligence policy; and it could result in a decline of the ability to question if not challenge the committee (as well as the executive). Arguably, this could result in the prospect of a closed system, making it easier for the intelligence panels to dominate the agenda and debate in their respective chambers and in the full Congress.

A second set of cautions might surround the proposed new authority, particularly, adding appropriations to its authorizing control and independent subpoena power. Such subpoena authority, which could cover either or both materials and individual testimony, would be held (and used) without needing approval in each instance by the chamber. This might be seen as infringing on an important full-chamber power and removing a check on this particular committee, which would be already subject to fewer constraints than the current select committees have.

The addition of appropriations approval would apparently produce a unique situation in the contemporary Congress and a rarity in its entire history. A reversal of this plan—placing Intelligence Committee members on the defense appropriations subcommittee—also appears to be a rare, if not unprecedented action; this revamped panel could better coordinate and complement the actions of both committees. This change, moreover, could indirectly increase the power of the select committee. By reserving seats for its members on the relevant appropriations subcommittee, the Intelligence Committee would play a more direct and influential role in appropriating IC funds than it does now. At this time, no other committee has a comparable guarantee of seats on a relevant appropriations subcommittee. Consequently, the left-out authorizing committees, particularly those dealing with sensitive national security matters, might make the same appeal as intelligence: that is, to have seats reserved on the appropriate appropriations subcommittee. Following either avenue, the intelligence panel's power would be enhanced if it held both appropriations and authorization authority, either directly or indirectly (via its members on the defense appropriations subcommittee).

In either event, however, the intelligence panel might be perceived as too powerful. It would hold two impressive and reinforcing powers and would no longer be subject to a check and competition from a significant outside source in its chamber (i.e., the Appropriations Committee). At the same time, the transfer of appropriations to the Intelligence Committee would remove an important part of the Appropriations Committees' jurisdiction. Reserving seats for Intelligence Committee members on defense appropriations could also reduce competing viewpoints and an independent check on IC appropriations. Either change might encourage other authorizing committees to request the same treatment, that is, to control both appropriations and authorizations. Although the appropriations and authorization processes are parallel to one another, they are not identical and not always reinforcing or complementary. The combined authority could result in substantially more work for the Intelligence Committee in each session, with the need to “scrub” the intelligence budget twice each year. Or, alternatively, the transfer could lessen its examination of the appropriations and authorization, if each were to occur only in alternate sessions within a single Congress. The potential increase in the panel's workload could

have two adverse ramifications: (1) short-change either the appropriations or authorization process, or both; or (2) reduce the panel's time for other legislative and oversight efforts.

By comparison to these two proposed changes—consolidating authorization and appropriations in the Intelligence Committee or reserving seats on the Defense Appropriations Subcommittee for Intelligence Committee members—the establishment of the special intelligence oversight panel on the House Appropriations Committee was more limited in its impact. Only three of its 13 seats were reserved for Intelligence Committee members; and the new panel was only able to make recommendations to the Defense Appropriations Subcommittee, which continued to report the annual intelligence community appropriations. The current approach—allowing three appropriators to participate in the HPSCI hearings and briefings—is also more limited than that called for by the 9/11 Commission.

## **Improving Coordination Between the Two Intelligence Panels**

Such changes would affect the Intelligence Committees' individual structure and powers. Others could be designed to increase coordination and shared responsibility between the two intelligence panels—so as to avoid duplication, encourage cooperation, develop working relationships across chambers, enhance understanding, and share expertise, information, and knowledge—while at the same time, maintaining the distinct characteristics of each panel. These might include joint hearings and cross-committee leadership meetings, which may already exist on a regular basis.

### **Joint Hearings**

One option along these lines is to schedule joint hearings for relatively routine and regular matters, such as the initial annual authorization briefings from the executive. Another opportunity for a joint session would occur when the inspectors general in the intelligence community, especially at the CIA, submit their semiannual reports to Congress. These shared enterprises could allow the combined membership to receive the same information and data as each panel would individually, establish working relationships among the two groups of members, encourage cross-fertilization among them, and reduce duplication for the executive. Of course, follow-up hearings could be handled separately by the two panels and may even be stimulated by such joint efforts. The shared experience over the initial budget submission could also help to avoid duplication of effort over some modest matters, while helping to set priorities for more significant ones.

Joint hearings could also be conducted into critical events, as they were with the select Intelligence Committees' combined inquiry into 9/11 attacks.<sup>54</sup> Another example of an inquiry with panels from both chambers was the Iran-contra affair, an investigation conducted by two temporary committees working together and issuing a joint report.<sup>55</sup>

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<sup>54</sup> U.S. Senate Select Committee on Intelligence and U.S. House Permanent Select Committee on Intelligence, *Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001*, S.Rept. 107-351 and H.Rept. 107-792, 107<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 2002).

<sup>55</sup> U.S. Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, and U.S. House Select Committee to Investigate Covert Arms Transactions with Iran, *Report on the Iran-Contra Affair*, S.Rept. 100-216 and H.Rept. 100-433, 100<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1987).

## **Leadership Meetings**

Another means of encouraging inter-chamber cooperation is for the leadership of the two panels to meet regularly to discuss issues, concerns, and priorities (recognizing, of course, the practical and political limitations on such exchanges). These efforts might include only the full committee chairs or might extend to subcommittee heads and majority and minority members. These sessions could be supplemented by meetings of senior staff on both panels, at the direction of the leadership. Whatever the arrangement, a number of different opportunities exist to enhance awareness of common concerns and cooperation in examining them between the two panels.

## **Constraints on Coordination**

Coordination between two panels from different chambers may encounter practical and political problems. Scheduling meetings and hearings, especially if a large number of members is involved, for instance, runs into several hindrances. These include (1) different priorities and meeting arrangements for each committee; (2) competing chamber and committee responsibilities for Members, especially Senators, each of whom serve on more committees than Representatives; and (3) different electoral and campaign requirements, which affect the demands on Members and the time they spend in the capital. In addition, rival political affiliations and policy stands, along with competition between the chambers for influence over public policy, might make cooperative ventures few and far between.

## **Enhancing Interchanges with Other Panels and Members**

Other approaches to increasing the powers of each panel and their cooperative ventures might be considered: ease the exchange of information with non-committee members, allow for more oversight by other committees, and/or increase contacts among members of the appropriations and authorizing panels. Along these lines, the 9/11 Commission wrote: the “new committee or committees should conduct studies of the activities of the intelligence agencies and report problems relating to the development and use of intelligence to all members of the House and Senate.”<sup>56</sup>

Placing Intelligence Committee members on the defense appropriations subcommittee or on a special appropriations intelligence oversight panel, as the House has done, also eases interchanges between these two committees. Other ways of increasing coordination between the appropriations and authorizing committees—through formalized member and staff involvement in the other panel’s hearings, for instance—have been advanced in the Senate, as noted above.

## **Goals**

This type of change could reduce the challenge of intelligence oversight on the select committees, bring different viewpoints to bear on intelligence matters, expand the knowledge of Members not on the panels, and allow for their informed judgments on intelligence policy and programs as well as on committee activities and operations. Strict controls over the classified information would have to be maintained. The current committee rules—which on the House side are more stringent

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<sup>56</sup> 9/11 Commission, *Report*, p. 420.

than on any other committee—might be modified to accommodate additional sources for review and oversight. Such a revision could begin with a comparison of access controls by other panels, particularly the committees with overlapping membership. In addition, House and Senate chamber rules authorizing secret or closed sessions might be used more often to allow for an open exchange of information between the Intelligence Committees and all the Members of a particular chamber. Along with this, committee members might be allowed to present “declassified” versions of sensitive or otherwise classified reports to their colleagues, in secret or open sessions.

## **Techniques**

Several potential techniques to expand non-committee involvement and non-member access to information follow:

- Ensure that relevant information is appropriately and expeditiously shared with committees with overlapping membership.
- Give greater allowance for other committees to conduct oversight of intelligence components, activities, and programs, including standing committees without overlapping membership.<sup>57</sup>
- Ease access for non-members to Intelligence Committee holdings, by reducing the exacting requirements over the availability of the classified.
- Encourage the Intelligence Committees, on their own initiative, to share information as appropriate with the full membership of their house.
- Make more information available to non-members by securing declassification of certain intelligence reports or by providing classified and declassified versions of IC reports (for the committees and for the general membership, respectively); the agencies proper or their inspectors general (charged with preventing and detecting waste, fraud, and abuse) might do either or both, possibly at the request or directive of the Intelligence Committees.

## **Limitations**

Interchanges between the Intelligence Committees, on the one hand, and other panels and Members, on the other, might be limited for several reasons. Concerns about the unauthorized disclosures of classified information might be raised as the possibility of leaks rises, because of the increased number of individuals with access to sensitive information. Along with this, intelligence agencies would likely be reluctant to respond to congressional requests for sensitive and classified information, even from the Intelligence Committees, if the agencies anticipate that all or some of it will be disclosed outside the sequestered Intelligence Committee rooms, possibly to the floors of both houses.

Another possibility, which might retard information-sharing by the Intelligence Committees, could be a concern about a reduction in their control over the intelligence agenda and debate. As more Members and panels became familiar with the relevant information and policies, more questions might arise relating to the committees’ policy positions. This development might be

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<sup>57</sup> See especially House Subcommittees on Efficiency and on National Security, *CIA Refusal*, 2001.

seen as weakening the committees, a condition that might reduce their (and, in turn, Congress's) influence over intelligence agencies and policies in dealings with the executive.

## **Other Options**

Several other options might be seen as enhancing congressional oversight over the intelligence community, either by augmenting Congress's own powers and capabilities or by placing additional responsibilities on the executive.

### **Increasing the Use of Congressional Support Agencies**

One approach is to increase the use of the legislative support agencies—Congressional Budget Office, Congressional Research Service, and Government Accountability Office (GAO), formerly the General Accounting Office—where appropriate.<sup>58</sup>

### **Clarifying GAO's Authority to Audit the IC**

A supplemental (and controversial) proposal, considered in both the 110<sup>th</sup> and 111<sup>th</sup> Congresses, has been to clarify and expand GAO's authority to audit, evaluate, or investigate all components of the intelligence community, particularly the CIA. New statutory authority along this line, which modified the proposal, was included in the FY2010 Intelligence Authorization Act. It provided that

The Director of National Intelligence, in consultation with the Comptroller General [CG] of the United States, shall issue a written directive governing access of the Comptroller General to information in the possession of an element of the intelligence community.<sup>59</sup>

The provision also allows the DNI, again in consultation with the CG, to amend the guidelines. Along with such access, GAO is to ensure the confidentiality of the information, meaning, in part, that GAO audit personnel have appropriate security clearances and abide by provisions governing unauthorized disclosure of such information.<sup>60</sup>

The DNI's follow-up directive covers a number of elements, including its purposes, pursuant to the 2010 Intelligence Authorization Act; applicability to elements of the intelligence community and GAO's requests; the IC's broad policy in this regard; and the roles and responsibilities of each IC element.<sup>61</sup>

The directive includes guidelines, operational instructions, and allowances for GAO access, as well as caveats or limitations on it. ICD 114, for example, provides that

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<sup>58</sup> The oversight roles of the support agencies are spelled out in CRS Report RL30240, *Congressional Oversight Manual*, by Todd Garvey et al.

<sup>59</sup> P.L. 111-259, sec. 348.

<sup>60</sup> Ibid.

<sup>61</sup> Director of National Intelligence, *Intelligence Community Directive Number 114, Comptroller General Access to Intelligence Community Information (Effective: 30 June 2011)*, issued 29 April 2011 (ICD 114).

Nothing in this Directive is intended to diminish the scope of support that IC elements have provided to GAO. For IC elements within departments, this Directive complements departmental policies governing GAO access to departmental information to the greatest extent possible. Departmental policies shall have primacy except for requests for national intelligence information related to activities and programs funded wholly or in part by the National Intelligence Program (NIP). Nothing in this Directive shall be construed to authorize the Comptroller General or GAO to audit or examine records and expenditures made under the authority of 22 U.S. Code 2396(a)(8), 10 U.S. Code 127, 7231, or 50 U.S. Code 403j(b).<sup>62</sup>

The directive's policy statement recognizes that

It is IC policy to cooperate with the Comptroller General, through the GAO, to the fullest extent possible, and to provide timely responses to requests for information. To the extent consistent with national security policy and the protection of intelligence sources and methods, the IC elements shall provide GAO access to information that relates to matters that are the subject of announced GAO reviews.<sup>63</sup>

## **Background**

Concerns about severe restrictions and prohibitions on GAO access in the past have existed for half a century, since the early 1960s.<sup>64</sup> And legislative proposals to increase GAO's independent auditing power over IC elements, particularly the CIA, date to the mid-1970s.<sup>65</sup> These, however,

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<sup>62</sup> ICD 114, C. Applicability.

<sup>63</sup> ICD 114, D. Policy.

<sup>64</sup> GAO has been limited in its independent authority to audit and investigate the CIA, because of provisions in public law and congressional rules as well as tradition and precedents. The CIA, however, appears to be the only intelligence component which makes such an across-the-board claim. See GAO, *Central Intelligence Agency: Observations on GAO Access to Information on CIA Programs and Activities*, statement by Henry J. Hinton, GAO-01-975T (Washington: GAO, 2001); *Information Sharing*, GAO-06-385, (Washington: GAO, 2006), pp. 6-7; and *DOD Personnel Security Clearances*, Letter to Hon. George V. Voinovich, Chairman, Senate Subcommittee on Oversight of Government Management, June 14, 2006, p. 1. See also U.S. House Government Reform Subcommittees on Government Efficiency and on National Security, *Is the CIA's Refusal to Cooperate with Congressional Inquiries a Threat to Effective Oversight of the Federal Government*, hearings, 107<sup>th</sup> Cong., 1<sup>st</sup> sess (Washington: GPO, 2001); Frederick M. Kaiser, "GAO Versus the CIA: Uphill Battles Against an Overpowering Force," *International Journal of Intelligence and Counterintelligence*, vol. 15 (2002), pp. 330-389; and other citations in footnote 68 below.

<sup>65</sup> Other agencies have denied or restricted GAO access—on a selective basis—including the Federal Bureau of Investigation (FBI), which itself had been absent from GAO audits until the mid-1970s. Recent FBI restrictions on the Government Accountability Office arose in May 2009, when the Office initiated a review of the FBI counterterrorism positions. Bureau cooperation in a similar 2002-2004 endeavor, according to one Senator overseeing its operations, changed markedly in 2009: "However, GAO has been essentially blocked from conducting its current work. The DoJ [Department of Justice] Office of Legal Counsel (OLC) is arguing that GAO does not have the authority to evaluate the majority of FBI counterterrorism positions, as these positions are scored through the National Intelligence Program (NIP) Budget." See "Responses of Robert S. Mueller, III to questions submitted by Senators Schumer, Whitehouse, Kaufman, Specter, Franken, Grassley, Kyle, Sessions and Coburn," in U.S. Senate Committee on the Judiciary, *Oversight of the Federal Bureau of Investigation*, hearings, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., September 16, 2009 (Washington, GPO, 2009), p. 63. Director Mueller's written response (*ibid.*, p. 64) follows:

The FBI cooperated with GAO inquiries in 2002-2004 that focused generally on the FBI's post-9/11/01 transformation rather than narrowly on the FBI's counterterrorism activities. However, with the post-2004 inclusion of FBI counterterrorism positions in the Intelligence Community, aspects of the review GAO proposed in 2009 would have constituted intelligence oversight. It is the longstanding position of the Intelligence Community to decline to participate in GAO reviews that evaluate intelligence activities, programs, capabilities, and operational functions. This position should not, however, significantly interfere with GAO's review of the FBI's human capital.

had been regularly and successfully opposed by the executive. The result had been that GAO was denied or restricted in its access to the CIA and other IC elements, except in selective cases (primarily when it was operating under the instructions of a congressional committee).

The congressional proposals along this line are the result of a fundamental disagreement between GAO and the IC with regard to the office's authority and jurisdiction over all of them. GAO possesses nearly unfettered jurisdiction to audit and investigate the federal government. GAO's access, however, may be precluded in certain situations: by the President, if it involves sensitive or classified records, such as foreign intelligence and counterintelligence activities; in instances where records are statutorily exempted from disclosure; or in cases where an executive agency holds competing powers which are used to prevent GAO access.<sup>66</sup>

The last of these obstacles to full access has led to conflicts between GAO and the IC, particularly the CIA. The CIA views its own statutory authority as keeping it off-limits to independent GAO audits and investigations. Under this interpretation, the CIA has declined to participate in GAO reviews, as well as in some congressional oversight hearings held by panels other than the Select Committees on Intelligence. And the agency has, on occasion, attempted to enlist other IC components to do the same.<sup>67</sup>

GAO has taken exception to the CIA's position, emphasizing that the office has authority to audit the agency independently but lacks enforcement power.<sup>68</sup>

In contrast to the CIA's position, however, other IC entities have not asserted the same across-the-board proscription against GAO audits. For example, the Department of Defense, which houses the largest number of intelligence units, has issued the following instructions:

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<sup>66</sup> Central Intelligence Agency Act of 1949, 63 Stat. 213; General Accounting Office Act of 1980, 94 Stat. 311; 31 U.S.C. 716(d); and 31 U.S.C. 716(b) and 3524(c).

<sup>67</sup> See House Government Reform Subcommittees on Government Efficiency and National Security, *CIA's Refusal to Cooperate*, pp. 1-8. The subcommittee chairmen emphasized that the CIA had initially agreed to participate in a GAO survey of computer security programs but later declined. The Agency also attempted, unsuccessfully as it turned out, to have other IC entities follow suit. Finally, the CIA declined to participate in any of the subcommittees' hearings or meetings, even if held in executive or secret session.

<sup>68</sup> Elaboration of GAO's support for such new authority and the DNI's (and the previous DCI's) opposition appears in a number of sources: David M. Walker, Comptroller General, letter to Hon. John D. Rockefeller, Chairman, and Hon. Christopher S. Bond, Vice Chairman, Senate Select Committee on Intelligence, March 1, 2007; J. M. McConnell, Director of National Intelligence, letter to Hon. John D. Rockefeller, Chairman, and Christopher S. Bond, Vice Chairman, Senate Select Committee on Intelligence, March 7, 2007; and Gene L. Dodaro, Acting Comptroller General, letter to Hon. Charles E. Grassley and Hon. Richard Shelby, June 15, 2010. For further competing views of the disputes over independent GAO access, which date to the earliest days of the CIA, see U.S. Central Intelligence Agency, *DCI Affirmation of Policy for Dealing with the General Accounting Office (GAO)*, Memorandum for the Director of Central Intelligence, from Stanley L. Moskowitz, Director of Congressional Affairs, 7 July 1994; Office of Legal Counsel, Department of Justice, *Investigative Authority of the General Accounting Office*, Memorandum Opinion for the Executive Secretary National Security Counsel, August 16, 1988 (12 Op. O.L.C. 171); GAO, *Central Intelligence Agency: Observations on GAO Access to Information on CIA Programs and Activities*, statement of Henry J. Hinton, GAO-01-975T (2001); letters from the Comptroller General to the Director of National Intelligence (DNI), April 27, 2006, and to the Chairman and Ranking Minority Member of the Senate Committee on Homeland Security and Governmental Affairs, May 15, 2006, disputing the DNI's position that the "review of intelligence activities is beyond the GAO's purview," as stated in *Information Sharing*, GAO-06-385 (2006), pp. 6 and 71; Senate Subcommittee on Oversight of Government Management, *Government-wide IC Reform*; OMB Director, *Conference Letter Regarding the FY2010 Intelligence Authorization Act*, p. 2; and Gene L. Dodaro, Acting Comptroller General, GAO, *Letter to Honorable Dianne Feinstein and Honorable. Silvestre Reyes* (disputing the OMB Director's stand on this matter), March 18, 2010. See also Kaiser, "GAO Versus the CIA."

It is DoD policy that the Department of Defense cooperate fully with the GAO and respond constructively to, and take appropriate corrective action on the basis of, GAO reports.... [But DoD is also to] be alert to identify errors of fact or erroneous interpretation in GAO reports, and to articulate the DoD position in such matters, as appropriate.<sup>69</sup>

A 2010 Defense Department directive recognized the Government Accountability Office's access to the most highly classified Special Access Programs (SAPs) under two conditions:

General [sic] Accountability Office personnel shall be granted SAP access if: a. The Director, DoD SAPCO, concurs after consultation with the chair and ranking minority member of a defense or intelligence committee. b. The GAO nominee has the appropriate security clearance level.<sup>70</sup>

### ***Recent Developments***

Provisions to enhance GAO audit authority over the IC had been incorporated in both the House and Senate versions of the FY2010 Intelligence Authorization Act. These, however, incurred the Obama Administration's objections and a threatened presidential veto, which has resulted in a removal of the Senate provision. A parallel proposal was added in the FY2011 Defense Department Authorization Act.<sup>71</sup> The three versions, however, differ; and as noted above, a modified provision was incorporated in the final enactment.

The House version of the Intelligence Authorization Act of 2010 (Section 335 of H.R. 2701, 111<sup>th</sup> Congress) calls on the Director of National Intelligence to ensure access to authorized GAO personnel, when responding to a request of either select committee on intelligence, to necessary information to conduct an analysis, evaluation, or investigation of an IC component program or activity. The DNI is authorized to restrict such access when necessary to protect vital U.S. national security interest; when so doing, the DNI is to notify the Comptroller General and, within seven days, the intelligence committees of the reasons.

A parallel provision was added to the FY2011 Defense Authorization bill (Section 923 of H.R. 5136) by an amendment approved on the House floor.<sup>72</sup> This section would have required the Director of National Intelligence to provide GAO with all information necessary to conduct an analysis, evaluation, or investigation requested by either congressional intelligence committee. In addition, the section provides that the results of any GAO analysis, evaluation, or investigation requested by other committees with appropriate jurisdiction that involves a matter related to

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<sup>69</sup> Department of Defense Instruction 7650.02, November 20, 2006.

<sup>70</sup> DOD, *Special Access Programs*, Department of Defense Directive 5205.07, July 1, 2010, p. 9.

<sup>71</sup> Sec. 335 in each H.R. 2701 and S. 1494, 111<sup>th</sup> Congress, 1<sup>st</sup> sess. for the Intelligence Authorization bills; and sec. 923, H.R. 5136, which was added as a floor amendment to the DOD FY2011 authorization act. For further discussion, see U.S. House Permanent Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2010*, H.Rept. 111-186, 111<sup>th</sup> Congress, 1<sup>st</sup> sess., sec. 335 (Washington, GPO, 2009); U.S. Senate Select Committee on Intelligence, *Intelligence Authorization Act for Fiscal Year 2010*, S.Rept. 111-55, 111<sup>th</sup> Congress, 1<sup>st</sup> sess., sec. 335 (Washington, GPO, 2009), and *Intelligence Authorization Act for Fiscal Year 2010*, S.Rept. 111-223, 111<sup>th</sup> Congress, 2<sup>nd</sup> sess. (Washington, GPO, 2010); Hon. Daniel K. Akaka, "Statement on S. 385," *Congressional Record*, February 5, 2009, vol. 155, pp. S1680-S1681, and "Senate Passes Intelligence Community Audit Act," Press release, September 17, 2009; "Sec. 923. Audits of the Intelligence Community by the Government Accountability Office," introduced by Mr. Eshoo and approved 218-210 on May 27, 2010, *Congressional Record*, 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., May 27, 2010, vol. 156, pp. H4025-H4035; and OMB, *Conference Letter regarding S. 1494 and H.R. 2701*, p. 3.

<sup>72</sup> Sec. 923, H.R. 5136, 111<sup>th</sup> Cong., 2<sup>nd</sup> sess., *Congressional Record*, May 27, 2010, vol. pp. H4025-H4035.

covert actions or intelligence sources and methods may be redacted by the DNI and provided only to the select committees on intelligence. When exercising this authority, the DNI is to inform the requesting committee about the redaction.

The Senate version of the FY2010 Intelligence Authorization Act (Section 335 of S. 1494, 111<sup>th</sup> Congress), since removed, was more expansive, incorporating the language of the Intelligence Community Audit Act (S. 385, 111<sup>th</sup> Congress), an earlier version of which had been considered in the 110<sup>th</sup> Congress.<sup>73</sup> In introducing the bill, Senator Daniel Akaka emphasized that

GAO has well-established expertise that should be leveraged to improve the performance of the Intelligence Community. In particular, GAO could provide much needed guidance to the IC related to human capital, financial management, information sharing, strategic planning, information technology, and other areas of management and administration. By employing GAO's expertise to improve IC management and operations while carefully protecting sensitive information, this bill would reinforce the Intelligence Community's ability to meet its mission.<sup>74</sup>

This provision would have allowed for management-related audits of the IC by any congressional committee of jurisdiction (not just the intelligence panels); supported GAO audits of areas focused on intelligence sources and methods, but only upon the request of either intelligence committee; established security procedures between GAO and the intelligence committee requesting such audits; and prohibited the arbitrary limitation on GAO's ability to audit the IC without specific statutory language restricting such access.

The Obama Administration stated its opposition to the proposal for enhanced GAO audit powers, however, on several occasions. In July 2009, it wrote that

Section 335 would fundamentally shift the long-standing relationship and information flow between the IC and intelligence committee members and staff... The Administration would welcome the opportunity to more fully address this matter before fundamental changes to the oversight process are legislated.<sup>75</sup>

The Administration added to this in March 2010, when it objected to the Senate-passed version of the 2010 Intelligence Authorization Act. The GAO audit provision, cited as a principal reason for a possible presidential veto of the bill,

would amend current law and provide GAO unprecedented authority to conduct intelligence oversight ... current law expressly exempts intelligence and counterintelligence activities from GAO review ... these [proposed] provisions would fundamentally change the statutory

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<sup>73</sup> For action in the 110<sup>th</sup> Congress on similar plans, see the Intelligence Community Audit Act, H.R. 978 and S. 82, 110<sup>th</sup> Congress. Hearings and press coverage include U.S. Senate Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, *Government-wide Intelligence Community Reform*, hearing, 110<sup>th</sup> Congress, 2<sup>nd</sup> sess., February 29, 2008 (Washington, GPO, 2008); Chris Strom, "Panel witnesses press for GAO audits of intelligence agencies," *Government Executive*, available at [http://www.govexec.com/story\\_page.cfm?filepath=/dailyfed/0208/022908cdpm2.htm](http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0208/022908cdpm2.htm), February 29, 2008; Paul Kane, "GAO Seeks Review of Spy Agencies," *Washington Post*, March 7, 2008, p. A15; M.Z. Hemingway, "GAO wants more muscle," *Federal Times*, March 26, 2007, p. 1; and "GAO Seeks Greater Role in Oversight of Intelligence," *Secrecy News*, October 3, 2007, available at <http://www.fas.org>.

<sup>74</sup> Senator Akaka, "Statement on S. 385," p. S1680.

<sup>75</sup> U.S. Office of Management and Budget, *Statement of Administration Policy: H.R. 2701—Intelligence Authorization Act for Fiscal Year 2010*, July 8, 2009, p. 2.

framework for oversight of the IC through the intelligence oversight committees and alter the long-standing relationship and information flow between the IC and intelligence committee members and staff. Committee oversight, precisely because it is conducted by the committees through a cadre of knowledgeable and experienced staff, is a valuable contribution to improving the quality of intelligence and the effective, efficient operation of the IC.<sup>76</sup>

GAO took exception to the Administration's stand, asserting that it contained "several misstatements of law and fact."<sup>77</sup> GAO argued that it has

well-established authority to evaluate agency programs and investigate matters related to the receipt, disbursement, and use of public money.... and to access agency records.... The proposed legislative provisions in essence reaffirm GAO's existing authority to address the lack of cooperation GAO has received from certain elements of the IC in carrying out work at the specific request of the intelligence committees and other committees of jurisdiction.... GAO does not agree with the Administration's view, originating in a 1988 opinion of the Department of Justice's Office of Legal Counsel, that the creation of the congressional intelligence oversight structure (codified at 50 U.S.C. 413) implicitly exempted reviews of intelligence activities from the scope of GAO's existing authority.<sup>78</sup>

Nonetheless, the Senate Intelligence Committee removed the section for GAO audits, in light of the Administration's objections to it and threatened veto, because of this provision (and two others in the bill).<sup>79</sup> This removal plus a change in the congressional notification provision in the Senate version resulted in an impasse between the two chambers that prevented the provisions from going forward in the House at the time.<sup>80</sup> A compromise version later materialized, augmenting independent auditing authority for GAO over IC elements.

## **Enhancing the Inspectors General**

A different set of alternatives has brought about changes in the offices of inspector general (OIGs) in the intelligence community. The existing federal offices, which exist in more than 70 federal agencies, are statutorily created in several different types of agencies and under different pieces of legislation, although the Inspector General Act of 1978, as amended,<sup>81</sup> covers the overwhelming majority. The agencies which have statutory inspectors general are in executive "establishments" (all the cabinet departments, including the Defense Department, and larger federal agencies); in "designated federal entities" (the usually smaller boards, commissions, foundations, and government corporations, and now extending to four Defense Department intelligence agencies); in the CIA (under its own statute);<sup>82</sup> and for the whole intelligence community (also under separate legislation).<sup>83</sup>

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<sup>76</sup> OMB, *Conference Letter regarding the 2010 Intelligence Authorization Act*, p. 2.

<sup>77</sup> Dodaro, Letter to the Hon. Dianne Feinstein and Hon. Silvestre Reyes, March 18, 2010, regarding the OMB letter of March 15, 2010, p. 1.

<sup>78</sup> *Ibid.*, p. 2.

<sup>79</sup> Senate Intelligence Committee, *FY2010 Intelligence Authorization Act*, S.Rept. 111-223, pp. 1-2.

<sup>80</sup> Chris Strom, "House inaction dooms fiscal 2010 intelligence bill," *CongressDaily*, August 10, 2010, at [http://www.govexec.com/story\\_page.cfm?article=45874&dcn=e\\_gvet](http://www.govexec.com/story_page.cfm?article=45874&dcn=e_gvet).

<sup>81</sup> Inspector General Act of 1978, as amended (5 U.S.C. Appendix). For background, see "Statutory Offices of Inspector General," CRS Report RL30240, *Congressional Oversight Manual*, by Todd Garvey et al.

<sup>82</sup> P.L. 101-193. The public availability of the CIA IG's reports and other communications is, as expected, restricted, (continued...)

The IGs are empowered to combat waste, fraud, and abuse and to keep the agency head and Congress fully and currently informed about these matters. One change occurred through passage of the Inspector General Reform Act of 2008; it eases and increases coordination among the IGs through a new Council of the Inspectors General on Integrity and Efficiency (CIGIE), which includes the IGs for the intelligence community; from the CIA and the Departments of Defense, Justice, and State, and from the four separate intelligence entities in DOD, among CIGIE's more than 70 other offices.<sup>84</sup>

Legislation in the 111<sup>th</sup> Congress—again, the Intelligence Authorization Act of 2010 (P.L. 111-259)—made significant changes in the IGs in the intelligence community. It added statutory IGs in four Defense Department intelligence agencies and established “within the Office of the Director of National Intelligence an Office of the Inspector General of the Intelligence Community” with comprehensive jurisdiction over the intelligence community, following that of the DNI.<sup>85</sup> The new IG is appointed by the President, with Senate confirmation (PAS), and could be removed only by the President, not the DNI.<sup>86</sup> The IG's powers are comparable—but not identical—to the “establishment” IGs.

The Obama Administration had issued the following statement about the addition of an intelligence community-wide IG:

The Administration supports the important work undertaken by Inspectors General ... and would like to work with the Congress on the optimal approach and authorities for carrying out the important functions of Inspectors General in the context of the IC.<sup>87</sup>

The Administration later took exception to the new IC IG post, along with several other offices, being PAS positions. A statement from the OMB Director stated that “consistent with the recommendations” of the 9/11 Commission,

we believe that if these provisions were to become law, critical national security positions would likely remain unfilled for significant periods of time, which could be disruptive across the IC. It would be particularly unfortunate if confirmation of these officials were delayed as a result of disputes over unrelated matters pending in the Senate.<sup>88</sup>

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(...continued)

usually transmitted only to the Director and to the select committees on intelligence. However, the FY 2012 Intelligence Authorization Act (P.L. 112-87, sec. 414) requires that the CIA establish and maintain on its public website information relating to the CIA Office of Inspector General, including means of contact.

<sup>83</sup> P.L. 111-259, sec. 405. The Fiscal Year 2011 Intelligence Authorization Act added a specific directive to the IC's set of responsibilities: to study and report on recruitment and retention of racial and ethnic minorities employed in professional positions in the intelligence community. P.L. 112-18, sec. 404.

<sup>84</sup> Inspector General Reform Act of 2008 (P.L. 110-409; 122 Stat. 4305-4313).

<sup>85</sup> Intelligence Authorization Act for Fiscal Year 2010, P.L. 111-259, sec. 405.

<sup>86</sup> The FY 2010 Intelligence Authorization Act—built on H.R. 2701, sec. 406, and S. 1494, sec. 407—modifies ones offered in the two previous congresses. The FY2008 Intelligence Authorization Act (H.R. 2082, 110<sup>th</sup> Cong.) was vetoed by President Bush and his veto sustained. *Congressional Record*, vol. 154, March 11, 2008, pp. H1503-H1514. A similar recommendation was included in the FY2009 Intelligence Authorization Act (H.R. 5959, 110<sup>th</sup> Cong.), also meeting objections from the Bush Administration. See Office of Management and Budget, *Statement of Administration Policy: H.R. 5959—Intelligence Authorization Act for FY2009*, July 6, 2008.

<sup>87</sup> OMB, *Statement of Administration Policy: H.R. 2701* (2009), p. 2.

<sup>88</sup> OMB, *Conference Letter regarding S. 1494 and H.R. 2701*, p. 3.

Nonetheless, the final version of the Intelligence Authorization Act for FY2010 created the IC-wide IG as a PAS position.<sup>89</sup> And it added inspectors general to four DOD agencies: Defense Intelligence Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, and National Security Agency.<sup>90</sup> These agencies, by comparison to the IC-wide IG, are considered “designated federal entities” and, as such, each one’s inspector general is appointed by and removable by the head of the agency.

Notwithstanding its overarching jurisdiction, the new office does not replace the existing counterparts in various departments and agencies. The IC inspector general, however, has authority to resolve jurisdictional conflicts among the existing statutory OIGs within IC elements and otherwise coordinate their reviews, audits, and investigations.<sup>91</sup> Along with this, the IC inspector general chairs the Intelligence Community Inspectors General Forum, which consists “of all statutory or administrative inspectors general with oversight responsibility for an element of the intelligence community.”<sup>92</sup> A separate coordinative mechanism exists in the Department of Defense, that is, the Defense Council on Integrity and Efficiency, composed primarily of DOD audit and investigative units and chaired by the DOD inspector general.

## **Changing Notification and Reporting Requirements**

Congress receives numerous reports and information from and about the intelligence community; and the select committees on intelligence are the primary recipients.<sup>93</sup> In fact, the basic statute requires that the “President shall ensure that the intelligence committees are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this title.”<sup>94</sup>

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<sup>89</sup> Earlier considerations—before the adoption of an IC-wide IG—would have augmented the authority, jurisdiction, independence, and reporting requirements of the inspector general in the ODNI. That small office, with limited authority and jurisdiction, however, no longer exists. The DNI, under authority establishing the post and office (P.L. 108-458), had full discretion over the creation and construction of an OIG in his office, based on provisions that the DNI selected from the Inspector General Act of 1978, as amended. In 2006, the director established an inspector general post in his office. U.S. Office of the Director of National Intelligence, *Report on the Progress of the DNI in Implementing the Intelligence Reform Act of 2004*, May 2006. Afterwards, however, the House and Senate Intelligence Committees raised questions about this IG’s independence, capabilities, jurisdiction, and reporting to Congress. U.S. Congress, House Permanent Select Committee on Intelligence, *Intelligence Authorization Act for 2007*, H.Rept. 109-411, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess.

<sup>90</sup> The FY2010 Intelligence Authorization Act (P.L. 111-259, sec. 431) reiterated sections of the two previous authorizations acts, enacted or proposed.

<sup>91</sup> P.L. 111-259, sec. 405.

<sup>92</sup> P.L. 111-259, sec. 405.

<sup>93</sup> 50 U.S.C. 413. As a caveat, the President’s findings to support a covert operation abroad—the significant anticipated intelligence activity—first arose in 1974, well before the two select committees were created. The Hughes-Ryan Amendment (50 U.S.C. 413b) called for such notification to the House Committee on Foreign and the Senate Committee on Foreign Relations and other appropriated panels. By the end of the decade, the recipient committees reached eight; in addition to the two specified in the law, the six others were the House and Senate Committees on Intelligence, Armed Services, and Appropriations. Such advance notice was later required only to the intelligence panels. This was part of a quid pro quo with the executive in 1980, when the President was required to notify the two recipients in advance, ending an indefinite time for such notification. Other modifications have also occurred over the intervening years. For further discussion and sources, see the citations in footnote 3 above.

<sup>94</sup> *Ibid.*

Other provisions have extended, refined, and modified some reporting requirements, regarding the IC components as well as the relevant inspectors general and about various activities and operations.

The FY2010 Intelligence Authorization Act reflects this development. Among other matters, it calls for changes in the notification requirements affecting certain covert operations; certification of compliance with oversight requirements; reporting on detention and interrogation activities; summarizing intelligence related to terrorist recidivism of detainees held at the U.S. Naval Station, Guantanamo Bay, Cuba; providing a report and a strategic plan on biological weapons; notification of cybersecurity programs and oversight; foreign language proficiency in the intelligence community; plans to increase diversity within the IC; reporting on intelligence community contractors; review of FBI exercise of enforcement jurisdiction in foreign nations; report on the threat from dirty bombs; and the creation of a space intelligence office.<sup>95</sup>

The FY2012 Intelligence Authorization Act added requirements with regard to two sensitive areas: (1) updates of intelligence relating to terrorist recidivism of detainees held at the U.S. Naval Station, Guantanamo Bay, Cuba; and (2) notification of transfer of a detainee held there.<sup>96</sup>

### **Applying GPRA Requirements to the CIA**

A different scheme would affect the executive directly: placing the CIA expressly under the requirements of the Government Performance and Results Act, commonly referred to by its initials (GPRA) or as the Results Act. This 1993 enactment emphasizes assessing agencies based on outcomes (that is, their performance and results) rather than outputs (for instance, meeting certain deadlines, quotas for issuing grants, or expenditure levels).<sup>97</sup> The CIA remains the only significant explicit exemption to GPRA's mandates. These include developing a broad mission statement; a five-year strategic plan flowing from it; an annual performance plan, setting specific objectives and ways to carry out the strategic plan; and a follow-up evaluation of the agency's accomplishments, failures to meet expectations, and reasons for both. These GPRA reports from the CIA could be submitted to the House and Senate Intelligence Committees in a classified version.

## **Observations on Oversight of Intelligence**

### **Obstacles to Oversight**

Congressional oversight of intelligence meets obstacles that are not usually present in other subject and policy areas.<sup>98</sup>

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<sup>95</sup> P.L. 111-259, secs. 331-346.

<sup>96</sup> P.L. 112-87, secs. 307-308.

<sup>97</sup> P.L. 103-62, 107 Stat. 285.

<sup>98</sup> See citations in footnotes 1 and 3 above.

## Secrecy Constraints

The most significant constraint is the high degree and pervasiveness of secrecy surrounding intelligence policy, information, activities, operations, resources, and personnel. For Congress, this means that the legislature, its committees, and its Members are circumscribed in a number of ways: what they know; who receives the information, how, and in what form and forum; who provides it; what information can be shared with other Members and panels, how, and in what detail; and what non-governmental sources can contribute to legislators' knowledge, to what degree, and in what ways.

The secrecy imperative results in a system that is often closed to outsiders—not just the general public but also Representatives and Senators who do not have seats on the select committees on intelligence. The impact of official secrecy is evident in the restrictions on access to and disclosure of classified information in the panels' custody as well as on restraints covering what the select committee members themselves can discuss outside its confines.<sup>99</sup> These restrictions and their demanding requirements not only slow down or prevent access by non-members, because of an anticipated lengthy delay in complying with the procedures, but might also harbor a “chilling effect” for some, because of the strict limitations on disclosure and use of the information among colleagues outside the Intelligence Committees. As noted above, moreover, other access controls adopted by the executive or even authorized in legislation still set limits on the Government Accountability Office, Congress's chief audit and investigative agency.

Reinforcing secrecy's constraints is the institutionalized system determining eligibility for access to classified national security information, which for the most part is governed by executive orders and directives that determine what information is to be classified and at what levels. These limitations can restrict the availability of information among Members of Congress, even though they (as with other constitutional officers) are *not* required to hold security clearances to be eligible for access.<sup>100</sup> Yet other constraints exist because of formal agreements as well as informal arrangements between legislators on the one hand and executive officials on the other to control access among Members and staff.

The impacts and implications of secrecy are extensive and burdensome. The 9/11 Commission summarized the effects this way: “Secrecy stifles oversight, accountability, and information sharing.”<sup>101</sup>

## Perceived Limited Appeal of Intelligence Oversight

In addition to secrecy's constraints is the perceived limited appeal of overseeing intelligence and making intelligence policy, including authorizing the budget. This view appears because

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<sup>99</sup> CRS Report R40691, *Sensitive Covert Action Notifications: Oversight Options for Congress*, and CRS Report R40698, *“Gang of Four” Congressional Intelligence Notifications*, both by Alfred Cumming.

<sup>100</sup> See CRS Report RS20748, *Protection of Classified Information by Congress: Practices and Proposals*, by Frederick M. Kaiser. Similarly, other constitutional officers—the President, Vice President, and Supreme Court Justices—are not required to hold clearances. By comparison, legislative staffers are required to have the appropriate clearance to be eligible for access.

<sup>101</sup> 9/11 Commission, *Report*, p. 24.

congressional efforts in overseeing and authorizing intelligence activities remain largely hidden and may have only marginal direct effects on Members' constituencies, districts, or states.<sup>102</sup>

## **Overcoming the Obstacles**

### **Objectives and Goals**

The impact of these limitations on Congress's oversight of intelligence is that it is significantly more difficult than in other fields. And the usual incentives for Members to serve on certain committees and conduct oversight appear to be more modest or even non-existent for intelligence.

Steps have been taken, however, to increase Congress's ability to overcome these hurdles. Prospects along this line include (1) heightening the appeal of serving on the intelligence panel; (2) enhancing the expertise and knowledge of Members (both on and off the panels); (3) reinforcing the shared responsibilities between an Intelligence Committee, on the one hand, and panels with overlapping memberships, on the other; (4) expanding the contacts and coordination between the intelligence authorizers and appropriators; (5) changing the relationship between the two chambers on intelligence matters, through, for instance, a joint committee or increased contacts between the existing committees; and (6) developing new connections between Congress and the executive that could contribute to more effective oversight.

### **Proposals for Change**

Growing out of these general goals are a number of specific recommendations to strengthen oversight of intelligence, one of which (i.e., for a Joint Committee on Intelligence) first arose more than six decades ago, when the modern intelligence community began. Recent ones have emerged (or re-emerged) from legislators and others, prominently the 9/11 Commission, which proposed two distinct alternatives.

#### *Establishing a Joint Committee on Intelligence*

One 9/11 Commission recommendation in 2004, whose origins date to 1948, was to create a joint committee on intelligence. Yet over the years, the drafts for a JCI have differed in important respects: membership, leadership, jurisdiction, authority, staffing, and controls over classified information, among other matters. Moreover, rationales for a JCI have met with competing objections and concerns.

#### *Enhancing the Powers and Status of the Intelligence Committees*

A second major option advanced by the 9/11 Commission was to enhance the powers and status of the Intelligence Committee in each house, along with realigning committee jurisdiction over intelligence appropriations, with the prospect of merging authorizing and appropriations in one committee in each chamber: namely, the Select Committees on Intelligence. The Senate—in S.Res. 445 (108<sup>th</sup> Congress), approved October 9, 2004—followed this path, but only part of the way, when it removed the term limits on serving on its intelligence panel and reduced the number

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<sup>102</sup> Ibid., pp. 420-421.

of members. In separate action, leaders on the Senate Intelligence and Appropriations Committees issued a Memorandum of Agreement in 2006, designed to improve coordination and transparency between the two panels. In the meantime, the Senate Intelligence Committee leaders advanced a proposal to create an Appropriations Intelligence Subcommittee. It would have comprehensive jurisdiction for the intelligence budget and its membership would include Intelligence Committee members who are already on Appropriations, the chairman and ranking minority member of the Defense Appropriations Subcommittee, and the chairman and vice chairman of the Intelligence Committee as *ex officio* members. The Senate Appropriations Committee leaders, however, opposed this plan.

The House has traveled two different routes. It initially created a Select Intelligence Oversight Panel on its Appropriations Committee, which included members of the Intelligence Committee, to serve as an advisory body. In 2011, a substitute arrangement, approved unanimously by HPSCI, calls for three appropriators to participate in intelligence committee hearings and briefings.

### ***Augmenting Congress's Oversight Capabilities in Other Ways***

Other approaches to change legislative oversight of intelligence have been advanced or adopted, including several that affect the executive directly as well as Congress's own capabilities. Among these are plans and proposals to increase the use of congressional support agencies and further enhance GAO's independent authority to audit intelligence community elements. Another suggestion is to require the CIA to meet the GPRA planning and reporting obligations, as other IC components do. Several other routes that can assist congressional oversight have been added: a new inspector general with jurisdiction over the entire intelligence community with reporting requirements to the DNI and to Congress; statutory IGs in four Defense Department intelligence agencies with parallel reporting obligations; as well as new coordination devices and opportunities among the IC inspectors general. Intelligence community reporting requirements have also been added or refined. A final development—which has encountered controversy and inter-branch conflict over the years—has been to clarify and enhance further notification procedures and practices dealing with sensitive IC activities and operations to Congress.

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