LOCH K. JOHNSON

Congress and the American Experiment in Holding Intelligence Agencies Accountable

This article examines the problem of maintaining control—accountability—over the secret intelligence organizations of the U.S. government: seventeen major agencies with histories of independence from one another, as well as (until recently) from close supervision by overseers in Congress, the judiciary, and even the executive branch. It focuses especially on the difficulties faced by lawmakers who seek to ensure the spy agencies stay within the white lines of the law and propriety. Ever since the nation's beginnings and all the way until 1975, government officials have treated intelligence as an exceptional case placed outside the normal framework of constitutional checks-and-balances. This special status came to an end, however, when official investigations revealed the involvement of intelligence services in illegal activities at home and questionable operations abroad. These revelations led to the establishment of new rules in the late 1970s that were designed to rein in the hidden side of government.

The new rules have been under great pressure since the 9/11 terrorist attacks against the U.S. homeland and the ongoing threats presented by global jihadists. As incidents of terrorism rose in frequency around the world, a philosophical and political struggle gripped Washington, pitting those who seek to relax restrictions on and reviews of intelligence activities—the security school of thought (which highly values secrecy and efficiency in combating America's foes)—against those who prize America's experiment in bringing democracy into the darkened corridors of government—the civil liberties school (which values privacy and transparency, but is certainly mindful that security is important, too). The objective here is to explore Congress's struggle

THE JOURNAL OF POLICY HISTORY, Vol. 28, No. 3, 2016.
© Donald Critchlow and Cambridge University Press 2016
doi:10.1017/S0898030616000191

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

to achieve a workable balance between security and liberty, both vital objectives in a democratic society.

This search for a sensible equilibrium that honors each school of thought has produced novel achievements in modern governance, yet the experiment remains a work-in-progress with serious disagreements and limitations remaining in play. First, this article looks briefly at the state of intelligence accountability in the United States before 1975. During this long stretch of time, from the signing of the Constitution in 1787 to the middle of the Cold War, Congress was content to maintain a largely hands-off approach to espionage activities, relying on intelligence officers to carry out their work without many guidelines in an uncertain and often dangerous world—the norm followed in all other countries, too. Then, in the wake of the Watergate affair (1973), the souring of the Vietnam War (1968–1973), and a shocking domestic spying scandal (1974), lawmakers decided the time had come to extend constitutional principles into the shadowy domains of the executive branch. The Congress would try to apply the Constitution's normal checks-and-balances to the once sacrosanct secret agencies—a profoundly new direction in governance for the United States and one unprecedented in world history.

INTELLIGENCE AND DEMOCRACY

In a sequence of arduous, spirited, and productive meetings in Philadelphia over a three-and-a-half-month period in 1787, the framers sought to create a government in which the people would rule—a revolutionary idea in a world that, at the time, knew only monarchies and dictatorships.[1] Among the fifty-seven founders, perhaps no one surpassed James Madison when it came to deep thinking about the future of the American polity. At the core of his antipower philosophy was the conviction that "power, lodged as it must be in the hands of men, is ever liable to abuse."[2] Today, these words are etched in the marble on the wall of the Madison Wing in the Library of Congress. In The Federalist No. 51, written in defense of the new Constitution, Madison explained the importance of the safeguards crafted in Philadelphia: "If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government to be administered by men over men, the great difficult lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[3]

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

By "dependence on the people," Madison was referring to regular elections; the essence of democracy lies in the opportunity for citizens to "throw the rascals out" through the workings of the ballot box. But what about in between elections—that span of time wherein much mischief can occur before the judgment of the voters is delivered? Here is where "auxiliary precautions" came into the picture. Madison foresaw the need for democratic controls beyond the voting booth, what today we would refer to as government "checks-and-balances." The idea was to hold those with power accountable through a variety of methods, from regular congressional hearings to rare impeachment proceedings. Vital, too, was the doctrine of the separation of powers: the notion of dispersing power across the three branches of government to avoid its concentration into the hands of any one branch or official. Congress would have authority to enact appropriation laws, which implied a right as well to supervise and investigate agencies within the executive branch to ensure the funds were properly spent.

Looking back at the work of the founders more than a century later, Supreme Court Justice Louis Brandeis commented on Madison's approach to governance. "The doctrine of the separation of powers was adopted by the Convention in 1787," Brandeis wrote in *Myers v. United States* (1926), "not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy."[4] In the roadmap for democracy laid out in Philadelphia, liberty trumped security (although the founders were anything but naïve about the need to have a strong defense, too); a republic—however messy—won out over the idea of a perhaps more efficient, but dangerous, hierarchical rule by crown or charisma. As well, a free press and an active citizenry would evolve as important components of constitutional democracy. Nothing remained so central to democracy's success, though, as fair elections and the steady review of the government activities (accountability or, in the awkward phrase of political scientists, "oversight").

INTELLIGENCE EXCEPTIONALISM

Yet from the beginning of the country's history, officials allowed a conspicuous exception to the philosophy of checks-and-balances. Madison's safeguards were never applied to America's intelligence agencies. Around the world and throughout history, states have treated their intelligence apparatus as something unique, set apart from the rest of government. These agencies

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

wear a cloak of secrecy, have favored access to decision-makers, and are given considerable leeway to carry out unsavory duties without the usual evaluations (in democracies at least) of programs, personnel, and budgets by lawmakers, presidential aides, and the judiciary. The country's leaders averted their eyes as their secret services broke laws overseas (a routine occurrence) and engaged in dubious activities, even assassination plots and coups d'état that would be deemed inappropriate for other government agencies. Thomas Jefferson may have advised "binding down" the government "with the chains of the Constitution,"[5] but America's intelligence operatives have long enjoyed a philosophy of laissez faire.

In 1787, the new Republic faced ongoing hostilities with European powers and with Native Americans; as a consequence, the government was willing to cede broad discretionary powers to its intelligence officers—the country's first line of defense—who were expected to provide warnings about impending perils. This approach of government noninterference (for the most part) in the affairs of espionage agencies carried over into the modern era. In the 1940s, for instance, the struggle against the Axis powers—and, soon after, against the challenge of the Soviet Union and global communism—further encouraged bespoke rules for the secret services. As a top-secret White House study panel, the Doolittle Commission, reported to the Eisenhower Administration in 1954: "We are now facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever cost. There are no rules in such a game. Acceptable norms of human conduct do not apply. We must develop effective espionage and counterespionage services. We must learn to subvert, sabotage, and we must destroy our enemies by more clear, more sophisticated, and more effective methods that those used against us."[6]

This exceptionalism for spies was reinforced by a new, existential danger that loomed on the horizon beginning in the early 1950s: the possibility of a nuclear holocaust between the United States and the Soviet Union. Indeed, just such a conflagration nearly erupted between the superpowers during the Cuban missile crisis of 1962. An all-out war would have left Washington, New York City, Moscow, and other obvious targets smoldering in heaps of radioactive rumble. Shaken by this unnerving slide toward the rim of Armageddon, leaders in Washington as well as the public at large began to comprehend more completely how the United States might not survive another surprise attack in the Nuclear Age like the one that shook the country at Pearl Harbor in 1941. Given the global conditions of hostility and uncertainty, along with the burgeoning arsenals of highly destructive weaponry, the modern American

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

intelligence establishment—under the leadership of the Central Intelligence Agency (CIA), established by the National Security Act of 1947—would have to be unleashed secretly to fight the communists "in the back alleys of the world," as Secretary of State Dean Rusk in the Kennedy and Johnson administrations often described this hidden side of the Cold War.[7] The intelligence agencies would have to be as tough and unyielding as anything the Soviets could marshal, and perhaps just as unfettered by checks-and-balances or other democratic principles.

This is not to say the CIA and its companion services were given carte blanche in the struggle against global communism. Most of what they did from 1947 onward was based on decisions approved by the White House and reported, in broad outline at least, to a few members of Congress and their aides. Nevertheless, the approvals for intelligence operations often amounted to sweeping grants of authority; and the reporting to lawmakers from intelligence officials proved irregular, perfunctory, sketchy, and usually of only passing interest to members of Congress, most of whom who were content to let the "honorable men" of the intelligence agencies proceed as they must to vanquish the communist foe.[8] Model democracy or not, the United States would mimic the practice of other countries—open societies and dictatorships alike—in placing its espionage agencies outside the regular framework of government supervision. If Americans were to be secure, a world bristling with nuclear weapons and well-armed Red armies demanded no less.

Then, in the mid-1970s, came a dramatic sea change in attitudes toward the proper place of secret services in the American polity. For the first time since the founding of the Republic, the lamplight of Madison's philosophy of accountability would be carried by lawmakers into the hidden recesses of government.

THE YEAR OF INTELLIGENCE

In 1974, *New York Times* intelligence exposés, presented in a series of articles written by reporter Seymour M. Hersh, rocked the United States. "Huge CIA Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years" screamed one of the newspaper's headlines, above the photographs of three intelligence leaders staring out grimly at the reader.[9] The *Times* reporting alleged that the CIA had engaged in "massive" espionage against American citizens, in clear violation of its 1947 charter—conducting spy operations against the very people the organization had been created to protect. Further, the articles disclosed, the agency had carried out extreme

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

measures meant to topple the presidency of Salvador Allende, a candidate chosen democratically by the people of Chile in fair and open elections.

The revelations about the Allende plot alone would not have enraged the American public; after all, this was foreign policy and the mentality of the Cold War continued to favor an aggressive intelligence response to perceived threats abroad. Spying on U.S. citizens, though, was another matter. This news carried echoes of gestapo tactics used by the Nazis and stirred Orwellian nightmares of possible government repression in the United States. Arriving soon after, the Watergate scandal drove President Nixon from office in 1974, and fueled by a widespread public anxiety that the U.S. presidency had grown too dominant during the Vietnam War era, the charges of government snooping at home caused an intense political outburst in Washington during the waning days of 1974 and into the New Year.

The shock effect of these domestic spying allegations traveled rapidly across the country and across party lines. In early 1975, both Democrats and Republicans called for immediate investigations and set up special committees of inquiry in the Senate (the Church Committee) and in the House (the Pike Committee). Gerald R. Ford, a former member of Congress from Michigan and relatively new as vice president, had suddenly risen to the presidency when Nixon resigned from office. The new president, not wishing to be viewed as complacent by the public, responded quickly to the congressional initiatives by establishing a presidential commission of his own to evaluate the charges. With three different investigative panels in place—within the Senate, the House, and the White House—the "Year of Intelligence" was under way (or "the Intelligence Wars," as many intelligence officers painfully recall this time of turbulence).

For sixteen months, the Church Committee, led by Senator Frank Church (D-Idaho), for whom I served as special assistant), looked into the broad spectrum of the intelligence agencies, not just the CIA; for nine months, the Pike Committee in the House, led by Representative Otis Pike (D-N.Y.), focused chiefly on the CIA; and for five months, the presidential panel, the Rockefeller Commission, led by Vice President Nelson Rockefeller (R-N.Y.), also concentrated on the CIA, though narrowly on its violations of mail-opening and other forms of surveillance inside the United States. At the time, these probes represented the most intensive examination of America's secret agencies ever undertaken.

The Church Committee was by far the largest, longest serving, and most searching of the inquiries. In a recent scholarly study of the top one-hundred investigations carried out by the U.S. government since 1945, political scientist

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

Paul C. Light concluded that "it is impossible to single out one investigation in this book as the best of the best, but I often return to the Church Committee's 1975 investigation of intelligence abuse as a model of the high-impact investigation."[10] Eleven senators (six Democrats and five Republicans) and a staff of more than 150 professional investigators—primarily lawyers and political scientists—guided the committee. It began by looking into the *Times* allegations, but soon came across many other questionable activities that consumed its attention: from hitherto unknown CIA assassination plots against foreign leaders, to covert activities carried out by the Federal Bureau of Investigation (FBI) against civil rights activists and antiwar protesters inside the United States, to operations by the National Security Agency (NSA), the Defense Intelligence Agency (DIA), and military service intelligence units that also involved domestic spying. In some cases, the White House—under both parties—had given its blessing to these espionage operations against American citizens.

Leaving to the Church Committee the questions of controversial legal transgressions at home and dubious covert actions abroad (like the attempted Allende coup), Representative Pike and his colleagues concentrated on the inability of the intelligence agencies (especially the CIA) to adequately collect and analyze information about foreign threats. The Pike Committee's findings revealed a litany of intelligence failures. Unfortunately, though, its top-secret report leaked anonymously to CBS reporter Daniel Schorr, who then passed it along to a New York City newspaper. This publication of highly classified materials further crippled the committee's already injured state for failing to handle secret and top-secret documents properly.[11] In contrast, the Rockefeller Commission produced a serious, highly critical dissection of the controversial CIA domestic espionage programs, issuing a report that was not at all the whitewash many observers predicted would be the response of the Ford White House.[12]

The Church Committee, with its much larger staff and broader legislative mandate, fanned out across the broad terrain of America's secret agencies. The scope of the intelligence abuses uncovered by the committee was startling: illegal mail openings; telephone wiretaps for political purposes; the interception of international communications sent or received by U.S. citizens; intelligence files gathered on over a million Americans; improper drug experiments, as well as the unlawful sequestering of banned chemicals and biological materials; a master spy plan to conduct surveillance against Vietnam War protesters in the United States; espionage directed against a broad spectrum of educational and civic groups in American society, from universities

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

to religious and media organizations; the incitement of violence within African-American groups and other civil rights activists (the FBI's Operation COINTELPRO); CIA covert actions aimed not just at communist regimes and other autocracies overseas, but also at some democratically elected governments (as with the Allende regime); and murder plots against Fidel Castro of Cuba and Patrice Lumumba of Congo, among other targets in the developing world.

These findings pointed to a core conclusion: Madison, Jefferson, Brandeis, and all the other sage observers who had warned through the years about the corrosive potential of unchecked power were exactly right—perhaps doubly so when it came to the risks presented by secret power. A new experiment in the evolution of American society was about to begin: bringing greater transparency into the dimly lit world of espionage operations. Proponents of reform argued the time was long overdue for the introduction of greater sunlight into the hallways of America's spy agencies; the shielding of citizens against improper surveillance by their own Argus-eyed government depended on it. Yet, in response, opponents of intelligence reform warned that allowing more light into the opaque side of government would result in exactly the opposite outcome; ironically, the security of citizens would be undermined by hobbling intelligence agencies with the usual strictures of democracy. The intelligence agencies would be placed at a disadvantage in the struggle against terrorists and other enemies, who had no qualms about the use of unobstructed—even brutal—clandestine activities aimed at the United States and its allies.

LEAVING BEHIND THE ERA OF INTELLIGENCE: BENIGN NEGLECT

The Church Committee had greater success than its House counterpart in negotiating with the executive branch over access to documents, witnesses for hearings, and the declassification of papers necessary for preparing its final report to the public. The difference lay chiefly in the willingness of Senator Church, as well as the panel's co-chair, John Tower (R-Tex.), and other committee members, to exercise patience in dialogues with the White House and the intelligence agencies as lawmakers pursued the information they needed.

These negotiations did not always have a successful outcome for the Church Committee. Gaining access to documents on CIA operations to manipulate foreign governments (covert action) was, for example, a major sticking point, and the committee decided to back away from some requests rather than

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

spend months spinning its wheels. Moreover, at times, the committee seemed on the verge of collapsing because of its disputes with the executive branch, or its own sometimes heated internal disagreements. Nevertheless, less ideologically driven than the strongly anti-CIA Pike panel, and guided by leaders of national stature—Church, Tower, Philip A. Hart (D-Mich.), Barry Goldwater (R-Ariz.), Howard H. Baker Jr. (R-Tenn.), and Charles McCurdy Mathias Jr. (D-Md.), among them—the Church Committee managed to stay on track and move forward. Eventually, it produced an avalanche of public reports (as well as many studies that remain classified). These reports laid out in substantial detail the domestic abuses committed by the intelligence agencies, along with an in-depth examination of the CIA's use of covert action against Chile and several of the agency's assassination plots, along with many other topics.[13]

The committee discovered that the *Times* articles had only scratched the surface of abuses by the secret agencies. Its reports chronicled a history of disquieting operations directed against American citizens, including the CIA's Operation CHAOS to spy on Vietnam War dissenters and—in some ways the most chilling finding of all—the FBI's COINTELPRO activities. The bureau's program involved not only spying against Americans, but clandestine efforts to destroy the jobs, the marriages, and the reputations of individuals whose "sin" had been to engage in activities protected by the First Amendment, whether protesting against the war in Vietnam or joining the civil rights movement. Troubling, too, were the multiple covert actions against the Allende regime as well as assassination plots aimed at the nationalist leaders of poor African and Latin American countries.

The Church Committee recommended almost a hundred reforms for the Intelligence Community, most fashioned to keep these agencies within the boundaries of the law and American values. No longer would the espionage services stand outside the framework of checks-and-balances; they would be as much a part of the U.S. government as the Departments of Agriculture and Commerce, subject in the same way to regular budget reviews, recurring hearings (even if most would have to be in executive or closed session, because of the sensitivity of intelligence tradecraft), on-site inspections, and all the other tools of accountability.

The reform initiatives drafted by the Church Committee soon became law, such as setting a ceiling of ten years on how long an FBI director could serve (J. Edgar Hoover, the enabler of COINTELPRO and other controversial operations, held that office for forty-eight years). The Foreign Intelligence Surveillance Act of 1978, initially drafted by the Church Committee, required warrants for electronic surveillance against Americans in national-security

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

investigations (telephone wiretapping, for instance)—operations that, before, could be carried out at the whim of a president or one of his aides. Sometimes in the past warrantless wiretaps had been used for purely political purposes, as incumbent presidents attempted to learn more about the strategies and tactics of the opposition party.[14] Both chambers of Congress also created standing oversight panels for intelligence: the Senate Select Committee on Intelligence (SSCI, pronounced on Capitol Hill as "sis-see") in 1976 and the House Permanent Select Committee on Intelligence (HPSCI or "hip-see") in 1977. With these entities in place, the hope was not so much that Congress had come up with a nostrum for all future intelligence ills, but that at least accountability over the nation's spies would no longer be as lax and episodic as it had been in the years preceding the Church Committee.

It was a time in which the United States attempted to bring at least some semblance of democracy into the veiled world of espionage. Soon thereafter, in a ripple effect, other democracies—among them, the United Kingdom, Canada, Australia, New Zealand, and the Netherlands—would adopt measures to improve the level of accountability over their own espionage services, an intelligence-reform movement that is ongoing today.

While the work of the Church Committee has been widely heralded as a success, not everyone agrees with this assessment. Several of the intelligence officers I have interviewed over the past four decades recall the "Intelligence Wars" as a disastrous intrusion into the vital and delicate operations of the intelligence agencies, so critical to America's defense against communism during the Cold War and now against terrorists and rogue states. Some critics have gone so far as to suggest that the terrorist attacks against the United States in 2001 were able to happen because the Church Committee had weakened the country's intelligence capabilities. In fact, Senator Church and his colleagues endeavored to strengthen intelligence in 1975, not hamper it. As a former Army intelligence officer in World War and II, at the time of his committee inquiry, a senior member of the Senate Foreign Relations Committee (which he would soon chair), Church understood the global dangers facing the United States and the importance of good intelligence. His most important speech during the investigation addressed the question of how to improve intelligence analysis.[15] What he and his colleagues, Republicans and Democrats alike, found unacceptable was lawlessness by the secret agencies.

Whether the Church Committee was of value to the United States or a liability is a matter for the reader to judge. I would only note here that each of the succeeding Directors of Central Intelligence (DCI), with the exception of William J. Casey of the Reagan presidency, has endorsed and even praised the

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

"new oversight." They have viewed the post–Church Committee rules of accountability as an opportunity for the intelligence agencies to understand better what their operational boundaries are; moreover, the intelligence chiefs have been relieved to share their heavy responsibilities with lawmakers and the courts. The well-regarded former DCI, Robert M. Gates, has made this observation about the new era of intelligence accountability: "Some awfully crazy schemes might well have been approved had everyone present not known and expected hard questions, debate, and criticism from the Hill. And when, on occasion, Congress was kept in the dark, and such schemes did proceed, it was nearly always to the lasting regret of the Presidents involved."[16]

ACCOUNTABILITY OF THE SECRET AGENCIES SINCE THE YEAR OF INTELLIGENCE

The Church Committee investigation represented an especially strong commitment to intelligence accountability in the United States. Occasionally thereafter members of Congress have exhibited a willingness to review with serious intent major intelligence programs: the Iran-*contra* inquiry (1987); the search for explanations about the failure to warn the public about the 9/11 attacks, and why the assessment that Iraq had weapons of mass destruction (WMDs) proved wrong (2004–5); and the probe into the use of torture by the CIA as a method of intelligence collection (2009–14). None of these inquiries, though, approached the scope of the Church Committee studies.

This is not to slight the importance of evaluations that have taken place since 1975. For example, SSCI displayed a rare tenacity in its examination of the CIA's use of torture against suspected terrorists in the wake of the 9/11 attacks—a form of tradecraft the agency prefers to refer to as "E.I.Ts" ("Enhanced Interrogation Techniques") or, in an earlier version of cosmetic labeling, "intelligence educements."[17] Six members of the committee's staff—all from the Democratic side of the aisle (after GOP leaders called their staff off the investigation)—spent five years trying to determine the origins of the authorization for torture; the nature of the interrogation techniques, which ran from waterboarding to confinement in cramped coffinlike boxes, along with sleep deprivation that sometimes lasted eleven days; and whether these methods had elicited useful information that effectively shielded the United States against further terrorist attacks.

On this key question of effectiveness, the findings pointed overwhelmingly toward a "no" answer. The long-understood principle that anyone being tortured will lie to prevent further pain could be seen at work again in these

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

protracted interrogation sessions at agency prisons abroad and at Guantánamo. In contrast to the use of "abuse interrogation," attempts to win over a prisoner through a more benign approach to questioning known as "rapport interrogation" have demonstrated, according to FBI counterterrorism experts, a better chance of success.[18] Even if torture may work in some isolated cases—and might have to be tried no matter what in an extreme (and unlikely) "ticking bomb" scenario—the question of its legitimacy and its effect on America's reputation in the world remain significant and still unresolved issues.

The Senate Committee's torture investigation, while not matching the Church Committee in scope, certainly stands as an example of serious-minded intelligence accountability in recent years. It may not have answered every question about the agency's torture activities—such as why SSCI's members themselves failed to halt the program, once some of them found out about it (a few years after its initiation). Nevertheless, the report did place the topic of "harsh interrogations" before the public, allowing a national debate about the value of this approach to intelligence gathering. Valuable, as well, were the inquiries into the intelligence errors related to 9/11; and to the hypothesis about unconventional weaponry in Iraq. Thanks to these probes, Americans have learned critical lessons that should provide benefits in the future. Among them are the need for policy officials to take intelligence more seriously (the CIA's Counterterrorism Center warned policymakers as early as 1995 about the risks of "aerial terrorism," whereby commercial airliners might be hijacked and flown into skyscrapers);[19] the need to improve CIA-FBI sharing of information about terrorists bound for the United States; and, with respect to the question of Iraq WMDs, the wisdom of double-checking intelligence sources rather than relying excessively on foreign-intelligence organizations to provide information to the CIA, as happened during the second Bush administration with the German source known as "Curveball" (who emphatically swore that Iraq had advanced weaponry—falsely, it turned out).[20]

The Iran-*contra* inquiry was important, too, although—like all of these cases of scandal and failure—enormously painful to the country. Some have discounted this Reagan administration scandal as of little significance, perhaps most prominently former Vice President Dick Cheney, who had served as a member of the panel (the Inouye-Hamilton Committee) that investigated the scandal. He seems to think that the investigative committee was little more than, to borrow a phrase from Henry James, a hippopotamus rolling a pea. Yet this affair unmasked the CIA—or at least some important elements within the agency—at its worst. (One cannot fairly indict the entire organization

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

for the misdeeds of a relatively few CIA officers, although those culpable included the organization's top leadership.) Just looking at the *contra* side of the scandal alone, the administration bypassed the Congress and conducted a privately funded covert action against the Sandinista regime in Nicaragua, despite a clear law (the Boland Amendment of 1983) to curb such activities. Harvard University law professor Laurence Tribe has spelled out the chilling implications: "Congress's control over the purse would be rendered a nullity if the President's pocket could conceal a slush fund dedicated to purposes and projects prohibited by the laws of the United States."[21]

When lawmakers asked the administration's national security adviser, Vice Admiral John M. Poindexter, during public hearings why the executive branch had chosen to ignore the Congress, he offered this explanation: "We didn't want any outside interference."[22] Put another way, he did not believe in the safeguards of intelligence accountability put into place just a few years earlier by the Church Committee, supported by a bipartisan majority in both chambers of Congress.

THE UNSETTLED FUTURE OF INTELLIGENCE ACCOUNTABILITY

If the Church Committee investigation can be viewed as intelligence accountability at high tide, the Iran-*contra* scandal represented a low tide. Yet that scandal is hardly the only worrisome illustration of intelligence missteps in the modern era. For those seeking meaningful oversight for America's secret agencies, some hopes have been shattered (as with the total dismissal of the new accountability rules during the Iran-*contra* affair) and others have been realized (SSCI's confirmation hearings for DCIs and DNIs, for instance, have been thorough inspections into the fitness of candidates).

On a much smaller scale than Iran-*contra*, but still unsettling, are many examples of the secret agencies failing to keep the Congress well informed of its activities, as required by the Hughes-Ryan Act of 1974 (for covert action), as well as the Intelligence Oversight Acts of 1980 and 1991 (for everything else of importance). All too often, instead of briefing SSCI and HPSCI in their full complement, intelligence managers have merely whispered into the ears of a few members, say, the chairman and vice chairman of the oversight committees, cautioning them not to discuss the "briefing" with anyone else—even their top intelligence staff aides. Sometimes there have been no briefings at all, not even solitary whispers; instead, SSCI and HPSCI members have found out about controversial intelligence operations in the media. "I don't think the intelligence community has ever lied to us," said David Durenberger

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

(R-Minn.), a SSCI chairman. "The problem is what they don't tell us."[23] Despite Senator Durenberger's experience, clearly at times—especially in the lead-up to the Iran-*contra* investigation—intelligence officers in fact have lied to the intelligence oversight committees.[24]

The CIA's recent break-in to computers used by the SSCI staff during their torture inquiry, along with other forms of harassment against the committee's investigators, have raised further doubts about the agency's fidelity to oversight laws and expectations. These unprecedented violations were carried out with apparent impunity, despite a strong, even angry denouncement delivered in a press conference by the committee's Chair, Diane Feinstein (D-Calif.). A CIA-appointed panel established to look into the charges (with three CIA officers among its five members) decided the whole episode was just a "misunderstanding," as the agency absolved itself of any real blame.[25] Other media reports revealed that two outside psychologists selected to set up a private company to guide the CIA torture program were paid $81 million over four years. According to the *Times*, the chief of the CIA unit that initially supervised the torture program and helped found the company soon retired from the agency to become its chief executive officer.[26]

As valuable as a Church Committee inquiry and other forms of investigative oversight can be, this approach is arguably not the best means of intelligence accountability. Special inquiries occur *ex post facto*, coming after a failure or scandal has occurred, too late to close the barn door. Better is *ante facto* accountability, in which lawmakers steadily examine—day in, day out—intelligence programs in advance of their implementation, with an intent to improve America's secret agencies and their programs along the way; to maintain the levels of privacy expected by citizens living in a democracy; and, to the extent possible, to anticipate future threats to the United States.

Political scientists Matthew McCubbins and Thomas Schwartz use a vivid metaphor to frame models of congressional oversight behavior based on "police-patrolling" and "firefighting"—what one might think of, respectively, as routine inspections by overseers, on the one hand, in contrast to their engagement in intensive investigations of failures and wrongdoing, on the other hand.[27] When on police patrol, a member of Congress routinely but aggressively searches for program information and indications of wrongdoing or inefficiencies—sniffing for fires through, say, the detailed questioning of an agency's managers during hearings. The idea is not to wait until things go wrong, but to ensure through continuous questioning and observation that America's laws and regulations are being honored by intelligence officials. Alternatively, in the role of a firefighter, a member of Congress may have to

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

jump on the hook-and-ladder truck to investigate a major mistake or scandal—an "alarm" often set off by media coverage of a breaking scandal or major intelligence failure. Police-patrolling consists of sustained, normal inspecting activities; firefighting is more episodic and event driven.

Since the Church Committee inquiry in 1975, the Congress has had to respond to five major "fire alarms" related to intelligence scandals or failures: the Iran-*contra* scandal (1987); the treason of Aldrich H. Ames within the CIA (1994); the 9/11 failures (2001); the Iraqi WMD failures (2002); and the revelations in the *New York Times* that the NSA had bypassed the Foreign Intelligence Surveillance Act (FISA) of 1978 and its court warrant procedure for intelligence wiretaps (2005). Other flaps have been important, too, such as the torture disclosures and the NSA bulk "metadata" collection program (2013); but they have not risen to the same threshold of national concern and attention from the media, or from both sides of the aisle in Congress, as did these earlier Big Five.

One can imagine in each of these cases how SSCI and HPSCI lawmakers, as dedicated police-patrollers, might have warded off the conditions that eventually led to traumatizing fire alarms. With Iran-*contra*, for instance, what if lawmakers had followed through—more energetically and with a stronger dose of skepticism—on the rumors in Washington that the Boland Amendment was being secretly ignored by the Reagan administration? The chairmen of SSCI and HPSCI did question national security adviser Robert C. McFarlane and Iran-*contra* point-man Lt. Col. Oliver L. North of the National Security Council (NSC) staff about the rumors, but the chairmen too easily accepted their false denials.[28]

Or what if extensive hearings had been held by SSCI and HPSIC, behind closed doors, into counterintelligence (CI) before the Ames disaster? Perhaps such hearings would have caused the agency to take the question of ferreting out possible "moles" inside its walls more seriously, checking the bank accounts of Ames and other top agency officers (now a standard practice in the aftermath of this scandal).

What if the Intelligence committees had examined CIA-FBI liaison relations before the 9/11 attacks, a fairly obvious subject of interest for those interested in an effective, coordinated response to global terrorist threats? The committees would have discovered a fractured relationship, which would soon manifest itself tragically in September 2001, when these agencies failed to communicate effectively about the entry of 9/11 terrorists into the United States (at least two of whom the CIA knew about).[29] What if the committees had held hearings and looked more deeply into the agency's Counterterrorism

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

Center report on aerial terrorism in 1995?[30] Might that have led to tighter airport security, perhaps along with the better protection of cockpit doors, the arming of pilots, and more sky marshals onboard commercial airliners?

What if the committees had probed into the quality of the data for the Iraqi WMD hypothesis? Surely they would have raised questions about its obvious softness, especially in light of dissents to the hypothesis expressed by the Bureau of Intelligence and Research (INR) in the State Department, the intelligence unit in the Energy Department, and U.S. Air Force Intelligence.[31] What if lawmakers or their staff had asked why Saddam Hussein, the leader of Iraq, might have wanted to claim possession of WMDs, even if this assertion were untrue? That may have led them to consider how highly threatened Iraq felt by Iran, and how Saddam Hussein might be trying to keep this enemy at bay by fooling Tehran's leaders into believing he possessed a nuclear deterrent. As it was, Congress—not to mention the Bush administration—failed to demand even the writing of a National Intelligence Estimate (NIE) on Iraq, until the very eve of America's invasion into that country. When finally requested by lawmakers, the intelligence agencies threw the NIE together hastily, with the dissent from INR, Energy, and the Air Force buried deep in the report. Adding insult to injury, the NIE was apparently never read by most members of Congress.[32]

What if SSCI and HPSCI had conducted routine police-patrolling hearings into the activities of the Foreign Intelligence Surveillance (FAS) Court in the aftermath of the 9/11 attacks? They may have discovered, long before word come out in the *Times* in 2005, that the White House and the NSA were violating the FISA rules for wiretap warrants.[33]

Such questions underscore how vital intelligence accountability can be. Dedicated police-patrollers on SSCI and HPSCI are in a position to spare the country much grief—even tragedy, as the casualties from the 9/11 attacks and the extended war in Iraq remind us—along with the costs, turmoil, and embarrassment of major *ex post facto* inquiries.

ROGUE ELEPHANTS AND DISTRACTED OVERSEERS

Early into the Church Committee inquiry, Senator Church offered the consideration on a national television talk show that the CIA may have become "a rogue elephant." It was a line that had come to him from McGeorge Bundy, the former national security adviser during the Kennedy administration. Over breakfast that same morning before the television show, the two men had discussed in general terms the course of the intelligence investigation.

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

Church had complained to Bundy about the Huston Plan of 1970, a White House scheme that called upon the agency and its sister services to spy on Vietnam War protesters; and about how the CIA had continued to engage in domestic spying even when President Nixon rescinded the plan just a few months after his approval.[34] The chairman was dismayed, too, by his committee's discovery of shellfish toxins and other highly poisonous substances still stored at the agency and military facilities, even though they had been banned by an international treaty and supposedly destroyed during the Nixon administration. Bundy opined that the CIA seemed like "a rogue elephant on a rampage." When Senator Church went on television and repeated this characterization, he perhaps had in mind as well the CIA's use of LSD against one of its own scientists as an experiment, without his knowledge; the scientist committed suicide soon after taking the drug.[35]

Despite these fragments of evidence about "roguish" agency behavior, Church clearly had spoken prematurely in public, before the committee had really had a chance to dig deeply into its research assignments. The chairman's colleagues reprimanded him at the next committee meeting; and he would be hounded by the statement thereafter. Church never again talked about rogue elephants, but he did stick to his view that the CIA lacked proper supervision. As many years later as 2014, columnist David Ignatius wrote that the SSCI's torture report "revives the notion of the CIA as a 'rogue elephant' that was propounded by Frank Church's committee in the 1970s but has been rebutted by many historians."[36] In this column, Ignatius unfairly shifted an off-the-cuff, Sunday morning talk-show remark by Senator Church onto the shoulders of the entire Church Committee and its final report. In fact, closer to the mark is the conclusion of Ignatius's op-ed, which embraces a position well documented by the Church Committee's reports. "The real story of intelligence abuses in the 1950s and '60s," Ignatius wrote, "is that they were ordered by presidents or their henchmen, who didn't want to know the dirty details."

Still, the CIA and the other intelligence agencies have in fact displayed moments in which they seemed to be inadequately supervised within the executive branch, let alone by Congress. For example, recall how several agency witnesses have misled the Congress over the years since the Church Committee inquiry, as with the agency's denial that it was involved in the Iran-*contra* affair, only later to come clean when presented with documentary evidence to the contrary.[37] Moreover, the NSA failed to inform SSCI and HPSCI adequately about its bypassing of FISA, as well as about the scope of its metadata program (revealed by leaker Edward J. Snowden in 2013).[38] Questions regarding authority and supervision arise, too, with respect to the

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

use of torture methods by U.S. military intelligence at the Abu Ghraib prison in Baghdad during the Second Persian Gulf War, the agency's torture program, and the targeting procedures for CIA killer drones—especially when aimed at American citizens.[39] The CIA's destruction of its torture videotapes without congressional approval, plus its search of SSCI computers and threats to the Senate staff, are further instances of questionable adherence to oversight expectations.

All this is to argue that intelligence accountability begs to be taken more seriously—by lawmakers, by presidents and their aides, by judges, and, most of all, by the public—than has been the case usually since the Church Committee investigation. The intelligence agencies are indispensable to the security of the United States, and intelligence officers are among the brightest and most dedicated public servants. More than one hundred CIA officers have given their lives in the cause of shielding the United States from harm, such as Johnny Michael "Mike" Spann, a paramilitary operative and America's first casualty in the post-9/11 hunt down of al-Qaeda and Taliban terrorists in Afghanistan. Over the years, the overwhelming majority of America's intelligence officers have been patriotic, competent, and law-abiding. Yet one can hardly dismiss Operation CHAOS, COINTELPRO, Iran-*contra*, lapses in counterintelligence (Ames, for one, tracking the 9/11 terrorists for another), faulty analysis from time to time, and the gaming of Congress as if it were a foreign country to be manipulated rather than a valued partner in the nation's defense.

A study of the Church Committee published in 1986 ended with an expression of concern that intelligence accountability "may well be too demanding, as well as devoid of an outside constituency, to stir [lawmakers] into a struggle against the strong forces in the executive—and within Congress itself—that resist change."[40] The soon-breaking Iran-*contra* scandal confirmed the fragility of the accountability system put in place by the Church Committee. As with all statutes (as against homicide, for instance), the legal scaffolding for intelligence oversight remains vulnerable to individuals and institutions who elect to flout the law. The only remedy in such instances is to discover the transgressions and apply the appropriate legal penalties.

Ever since lawmakers established meaningful intelligence accountability in the mid-1970s, Congress has fallen short periodically in its responsibilities to review and assess spy activities. Yet this system has also operated well at times (as with SSCI's confirmation proceedings); and even the sluggish approach to accountability by Congress in recent years stands as an improvement over the dark ages of oversight—overlook—that preceded the Year of

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

Intelligence in 1975. The core hopes of intelligence reformers remain alive today: that the United States will find an effective equilibrium between the goals of security and liberty; and that SSCI and HPSCI will evolve into panels of dedicated police-patrollers, not just fire-fighters, steadfastly monitoring the world of spies.

University of Georgia

NOTES

1. See Edward J. Larson, *The Return of George Washington, 1783–1789* (New York, 2014); and David Robertson, *The Original Compromise: What the Constitution's Framers Were Really Thinking* (New York, 2013).

2. James Madison, "Speech before the Virginia State Constitutional Convention" (1 December 1829).

3. James Madison, "Federalist Paper, No. 51" (8 February 1788), reprinted in *The Federalist* (New York, 1937), 337.

4. 272 U.S. 52.293 (1926), emphasis added.

5. Thomas Jefferson, "Draft of the Kentucky Resolutions" (October 1798), in *Thomas Jefferson: Writings*, ed. Merrill D. Peterson (New York, 1984), 455.

6. Quoted in Loch K. Johnson, *America's Secret Power* (New York, 1989), 10, drawing on the *Final Report*, Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee), Sen. Rept. No. 94–755, Vol. 1, U.S. Senate, 94th Cong., 2nd sess. (Washington, D.C., 1976), 9.

7. For example: Church Committee, *Final Report*, ibid., 9.

8. One of the intelligence chiefs during the Cold War era, William E. Colby, entitled his memoir *Honorable Men: My Life in the CIA* (New York, 1978), with Peter Forbath. On the limited degree of intelligence oversight during these years, see David M. Barrett, *The Congress and the CIA: The Untold Story from Truman to Kennedy* (Lawrence, Kans., 2005), and "Congressional Oversight of the CIA in the Early Cold War, 1947–1963," in *Essentials of Strategic Intelligence,* ed. Loch K. Johnson (Santa Barbara, 2015), 367–86; Harry Howe Ransom, *The Intelligence Establishment* (Cambridge, Mass., 1970); L. Britt Snider, *The Agency and the Hill: CIA's Relationship with Congress, 1946–2004*, Center for the Study of Intelligence (Washington, D.C., 2008); and J. L. Walden, "The C.I.A.: A Study in the Arrogation of Administrative Power," *George Washington Law Review* 39 (1970): 66–101.

9. *New York Times*, 22 December 1974, A1.

10. Paul C. Light, *Government by Investigation: Congress, Presidents, and the Search for Answers, 1945–2012* (Washington, D.C., 2014), 193.

11. "The CIA Report the President Doesn't Want You to Read: The Pike Papers," *Village Voice,* 16 February 1976. Despite an intensive FBI investigation, it was never determined who leaked the top-secret Pike Committee report. The CIA pointed a finger at the committee; some committee members pointed back at the CIA, saying it had tried to further disparage the panel by accusing it of the leak. Schorr admitted to the role he played in

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

passing along the committee's report, but he refused to reveal his source; see Daniel Schorr, *Clearing the Air* (New York, 1977).

12. See *Commission on CIA Activities within the United States*, Report to the President (Washington, D.C., 1975).

13. Church Committee *Final Report*, as well as *Alleged Assassination Plots Involving Foreign Leaders*, An Interim Report, Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the Church Committee), 94th Cong., 1st sess. (November 1975). For a summary of the Church Committee's findings, see Loch K. Johnson, "Congressional Supervision of America's Secret Agencies: The Experience and Legacy of the Church Committee," *Public Administration Review* 64 (January–February 2004): 3–14; and Frederick A. O. Schwartz Jr. and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New York, 2007). Schwartz served as chief counsel of the Church Committee.

14. See Church Committee, *Final Report*, Book II, Intelligence Activities and the Rights of Americans (1976), 227–38.

15. *Congressional Record* (11 November 1975), which is summarized in Loch K. Johnson, *A Season of Inquiry: The Senate Intelligence Investigation* (Lexington, Ky., 1986), 119–20.

16. Robert M. Gates, *From the Shadows* (New York, 1996), 559.

17. Loch K. Johnson, "Educing Information: Interrogation, Science and Art," *Studies in Intelligence* 51 (December 2007): 43–46.

18. See Jane Mayer, *The Inside Story of How the War on Terror Turned into a War on American Ideals* (New York, 2008); and Joe Navarro [a twenty-five-year FBI agent and supervisor], "Why CIA Interrogations Report Matters: Torture Doesn't Work and Americans Need to Know," FoxNews.com (9 December 2014).

19. Loch K. Johnson, *The Threat on the Horizon: An Inside Account of America's Search for Security After the Cold War* (New York, 2011).

20. See Robert Jervis, *Why Intelligence Fails: Lessons from the Iranian Revolution and the Iraq War* (Ithaca, 2010).

21. Laurence H. Tribe, "Reagan Ignites a Constitutional Crisis," *New York Times*, 20 May 1987, A31.

22. *Hearings*, Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition and House Select Committee to Investigate Covert Arms Transactions with Iran, 100th Cong., 1st sess. (1987), Washington, D.C., 159, chaired by Senator Daniel K. Inouye (D-Hawaii) and Representative Lee H. Hamilton (D-Ind.), respectively, and known as the Inouye-Hamilton Committees.

23. Quoted in Malcolm Byrne, *Iran-Contra: Reagan's Scandal and the Unchecked Abuse of Presidential Power* (Lawrence, Kans., 2014), 253.

24. When further queried about his misleading answers to lawmakers on the Iran-*contra* investigative panel, a high-ranking CIA officer replied that he had been "technically correct, [if] specifically evasive" (*Hearings*, Inouye-Hamilton Committees, 142). An important, if reluctant, witness to the unfolding affair was Secretary of State George Shultz of the Reagan administration. Shultz admonished the vice president at the time, George H.W. Bush, who was aware of the expanding Iran-*contra* operations, that he ought to exercise greater caution in dealing with the NSC staff plotters. Bush said he would be careful in what he said publicly about their activities, leading Shultz to emphasize to him (according to

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press

notes taken by the Secretary's aide): "You can't be *tech[nically]* right, you have to be right" (Byrne, *Iran-Contra,* 257)—good advice that some in the CIA failed to understand.

25. See Mark Mazzetti and Matt Apuzzo, "C.I.A. Officers Are Cleared in Senate Computer Search," *New York Times,* 15 January 2015, A8.

26. See James Risen and Matt Apuzzo, "C.I.A. on Path to Torture, Chose Haste over Analysis," *New York Times,* 16 December 2014, A4.

27. Matthew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols and Fire Alarms," *American Journal of Political Science* 26 (1984): 165–79.

28. See Byrne, *Iran-Contra*. Lee Hamilton, HPSCI Chair at the time of the Iran-*contra* affair, recalls: "They [McFarlane and North] lied to me. So did Elliott Abrams" [an assistant secretary in the State Department also caught up in the Iran-*contra* scheme], in a remark to Loch K. Johnson during Representative Hamilton's visit to the University of Georgia, Athens (9 April 2008).

29. See *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (New York, 2004).

30. See Johnson, *Threat on the Horizon*, 123–24.

31. Loch K. Johnson, "A Framework for Strengthening U.S. Intelligence," *Yale Journal of International Affairs* 2 (February 2006): 116–31.

32. Paul R. Pilar, *Intelligence and U.S. Foreign Policy: Iraq, 9/11, and Misguided Reform* (New York, 2009).

33. James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *New York Times*, 16 December 2005, A1.

34. On the Huston Plan, see Johnson, *America's Secret Power*, chap. 7; and Loch K. Johnson, "National Security, Civil Liberties, and the Collection of Intelligence: A Report on the Huston Plan," in *Supplementary Detailed Staff Reports on Intelligence and the Rights of Americans*, Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book III, U.S. Senate (23 April 1976), 921–86.

35. These subjects are discussed in depth in the Church Committee's *Final Report*.

36. David Ignatius, "The Senate's CIA Report Is a Necessary Public Accounting," *Washington Post,* 11 December 2014, A18.

37. See note 23. For other illustrations, see Byrne, *Iran-Contra,* as well as William S. Cohen and George Mitchell, *Men of Zeal: A Candid Inside Story of the Iran-Contra Hearings* (New York, 1988); Johnson, *Threat on the Horizon*; and the *Report of the Congressional Committees Investigating the Iran-Contra Affairs* (the Inouye-Hamilton Committees).

38. See Loch K. Johnson, ed., "An INS Special Forum: Implications of the Snowden Leaks," *Intelligence and National Security* 29 (December 2014): 793–810; and William Bendix and Paul J. Quirk, "Secrecy and Negligence: How Congress Lost Control of Domestic Surveillance," *Issues in Governance Studies* 68, Brookings Institution (2 March 2015): 1–19.

39. See Mark Mazzetti, *The Way of the Knife: The CIA, A Secret Army, and a War at the Ends of the Earth* (New York, 2013).

40. Johnson, *Season of Inquiry*.

https://doi.org/10.1017/S0898030616000191 Published online by Cambridge University Press