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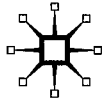
# **The Impact of 9/11 and the New Legal Landscape**

## ***The Day That Changed Everything?***

**Edited by  
Matthew J. Morgan**

**with a Foreword by  
Senator Bob Graham**

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*For those who dream of a more perfect and glorious State, and who do not what is expedient, but what is right, cost what it may*

30. See Iran-Contra Report, *supra*, 448–452; 457–460.
31. Nixon quoted in Derek Jinks and David Sloss, “Is the President Bound by the Geneva Conventions?” *Cornell Law Review* 90 (2004): 97, 149.
32. Vice President’s Remarks to the Traveling Press, December 20, 2005, emphasis added; available at <http://www.whitehouse.gov/news/releases/2005/12/20051220-9.html>.
33. The argument is rehearsed in nontechnical terms in Frederick A. O. Schwarz and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New York: New Press, 2007), 151–184.
34. For example, see John Yoo, “Transferring Terrorists,” *Notre Dame Law Review* 79 (2004): 1183, 1202–1203.
35. McDonald, *Novus Ordo Seclorum*, 248.
36. U.S. Const., art. I §8.
37. Barron and Lederman, “The Commander in Chief at the Lowest Ebb,” 946.
38. One of the most interesting treatments of this problem is Bruce Ackerman, *We the People: Foundations* (Cambridge: Belknap Press, 1993).
39. See Bruce Ackerman, “The Living Constitution,” *Harvard Law Review* 120 (2007): 1737.
40. Neal Katyal, “Internal Separation of Powers: Checking Today’s Most Dangerous Branch from within,” *Yale Law Journal* 115 (2006): 2314, 2342, 2316.
41. See Mark Mazzetti, “Spymaster Tells Size of Secret Spy Force,” *New York Times*, April 21, 2006, A21; Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (Washington: CQ Press, 2000), 24–39.
42. Andrew Rudalevige, *The New Imperial Presidency: Renewing Presidential Power after Watergate* (Ann Arbor: University of Michigan Press, 2005), 43.
43. Barton Gellman and Jo Becker, “A Different Understanding with the President,” *Washington Post*, June 24, 2007, A1.
44. Elena Kagan, “Presidential Administration,” *Harvard Law Review* 114 (2001): 2245, 2246–2248.
45. William G. Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton: Princeton University Press, 2003), 1–7.

II

## Intelligent Oversight

Anne Joseph O’Connell\*

The structure of the American intelligence community has shifted in significant ways in recent years, moving from decentralized and redundant agencies to a more unified system. In 2004, Congress established the Director of National Intelligence (DNI) position and provided that person with some budgetary and personnel authority over the nation’s 16 intelligence agencies. Congressional oversight of the intelligence community, however, has largely remained fragmented in the aftermath of September 11, 2001. There is no primary oversight committee in either the House of Representatives or the Senate, with the Appropriations, Armed Services, and Intelligence Committees all exercising significant power.

The stability of congressional oversight structures, even before the 2001 attacks, cuts against the recommendations of many commentators. The National Commission on Terrorist Attacks upon the United States and the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction—more commonly known as the 9/11 and WMD Commissions, respectively—forcefully called on members of Congress to consolidate their overlapping committees tasked with intelligence matters. Congress made some efforts to address these proposals after the Commissions issued their reports and again after the Democrats took control of both chambers in the November 2006 election. But those efforts produced relatively minor changes.

In this chapter, I detail the Commissions’ recommendations for reform of congressional oversight and subsequent congressional responses. I then

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discuss whether the suggested reforms are desirable, both in terms of protecting our nation's safety and fostering the rule of law. Finally, I explain why members of Congress have not adopted significant changes and propose several alternative reforms for congressional oversight that likely will improve national security, promote democratic values, and are more politically feasible to implement.<sup>1</sup>

### Calls for Reform and Congressional Response

The 9/11 Commission, after reviewing more than 2.5 million pages of documents, conducting more than 1,200 interviews, and holding 19 days of prominent hearings, concluded that both the executive and legislative branches' intelligence efforts should be more centralized.<sup>2</sup> One of the Commission's five major proposals focused on congressional oversight: "unifying and strengthening congressional oversight to improve quality and accountability." Seventeen committees appear to wield power over at least one intelligence agency.<sup>3</sup> The Commission called for a joint intelligence committee for the House of Representatives and the Senate, or, in the alternative, for a single committee to replace the multiple committees in each chamber.<sup>4</sup> This was not the first appeal for a joint committee on intelligence. That came in 1948 from Representative Edward Devitt (R-MN),<sup>5</sup> and it has been repeated throughout the intervening decades.<sup>6</sup>

Ideally, in the Commission's view, this joint committee (or separate committee in each chamber) would have the "power of the purse," controlling authorizations and appropriations.<sup>7</sup> If that were not possible, the 9/11 Public Discourse Project, a nonprofit organization formed by the members of the 9/11 Commission, recommended that each chamber's Appropriations Committee form a new intelligence subcommittee. The Commission also wanted the Intelligence Committees to abolish term limits for membership and to reduce their size.<sup>8</sup>

The WMD Commission endorsed the 9/11 Commission's call for consolidation of congressional oversight. The WMD Commission also offered several "more modest" proposals. Like the 9/11 Public Discourse Project, it recommended that each chamber create an intelligence subcommittee in its Appropriations Committee. It also counseled that the Senate Intelligence Committee be given the same authority over joint military intelligence programs and tactical intelligence programs that the House Intelligence Committee now possesses. Those programs and the national intelligence program make up the entire intelligence community's budget. The WMD Commission also stressed the need for more expertise and cooperation—between the two parties on the Intelligence Committees

and between the Committees and the intelligence community. To this end, it recommended, among other items, that each chamber's Intelligence Oversight Subcommittee be restricted to forward-looking "strategic oversight" and that the Intelligence Committees abolish term limits.<sup>9</sup>

The 9/11 Commission report, in particular, garnered significant attention and contributed to the enactment of the Intelligence Reform and Terrorism Prevention Act in December 2004.<sup>10</sup> The Act, in addition to other mandates, established a DNI with cabinet rank and created a National Counterterrorism Center.<sup>11</sup> The major legislation did not, however, change congressional oversight. Congressional reform, to the extent it has occurred, has been far more piecemeal.

Before the shift in party control of Congress from the Republicans to the Democrats in January 2007, the House of Representatives had adopted fewer reforms than the Senate. In 2002, the House created a Homeland Security Committee. Initially established as a select committee, it became a standing committee in January 2005. The Committee does not, however, have exclusive jurisdiction over any issue, including intelligence.<sup>12</sup> The House Intelligence Committee also formed a subcommittee devoted to oversight.<sup>13</sup> Some House members backed more extensive changes. In October 2004, Representative Carolyn Maloney (D-NY) proposed that the House elevate its Intelligence Committee from a select committee to a standing committee and give it exclusive jurisdiction over the intelligence community, including members within the Department of Defense.<sup>14</sup> In July 2006, Representatives Jeff Flake (R-AZ) and Adam Schiff (D-CA) called for the House Intelligence Committee to disclose considerable classified information to at least eight other House committees.<sup>15</sup> Neither proposal was voted out of committee.

Two months before the adoption of the Intelligence Reform and Terrorism Prevention Act, the Senate made several internal changes to its oversight of the intelligence community.<sup>16</sup> For its Intelligence Committee, the Senate reduced the number of members from seventeen to fifteen, gave party leaders the power to choose the chairman and vice chairman, eliminated the eight-year term limits for members, established an oversight subcommittee, and promoted the committee to category "A" status (generally senators can serve on no more than two "A" committees). It voted to create an intelligence subcommittee of its Appropriations Committee, but as of September 2008 that subcommittee did not exist. The Senate also changed the name of its Governmental Affairs Committee to the Committee on Homeland Security and Governmental Affairs. The significance of these reforms is unclear. The Congressional Research Service termed them "the most significant change in Senate [Intelligence] committee operations since 1977,"<sup>17</sup> but the *New York Times* editorial staff labeled them "cosmetic."<sup>18</sup>

In 2005, the 9/11 Public Discourse Project awarded Congress a "D" for intelligence oversight in the organization's final report card for the implementation of the 9/11 Commission's recommendations, finding that the House of Representatives and the Senate "have taken limited positive steps, including the creation of oversight subcommittees" but that congressional oversight "is still undermined by the power of the Defense Appropriations subcommittees and the Armed Services committees."<sup>19</sup>

The 2006 election created a critical opportunity for congressional reform. Many Democrats campaigned on a promise to implement the remaining recommendations of the 9/11 Commission. But after the Democrats won majorities in both chambers, House Speaker Nancy Pelosi (D-CA) felt that she could not ask Representative John Murtha (D-PA), chairman of the Defense Appropriations Subcommittee, to give up control of the intelligence community's budget because Murtha had just lost the contest for majority leader, despite her backing.<sup>20</sup>

The House of Representatives instead established a new Select Intelligence Oversight Panel within the Appropriations Committee in January 2007. The House's political leaders select the panel's thirteen members, three of whom have to be from the Intelligence Committee and two of whom have to be the Chairman and Ranking Minority Member of the Defense Appropriations Subcommittee. The panel oversees spending on intelligence and drafts the classified part of the Defense Appropriations bill, but the Defense Appropriations Subcommittee retains its authority to set funding levels. As part of its oversight authority, the panel can request the Appropriations Committee or Defense Subcommittee to subpoena witnesses.<sup>21</sup> House Intelligence Chairman Silvestre Reyes (D-TX), whom Pelosi had named to his position, appeared pleased with the formation of the new panel: "I believe we've had the kind of better understanding and coordination between authorizers and appropriators that we need." Amy Zegart, a national security scholar, however, noted that "it's not the same as having appropriating powers."<sup>22</sup>

The Senate did not follow the House. In March 2008, all but one of the members of the Senate Intelligence Committee wrote to Senate leaders requesting appropriations power or for the creation of an intelligence subcommittee within the Appropriations Committee. The Appropriations Committee responded, opposing those requests. Both of the Committee's suggestions have been proposed more formally: the former by Senators Richard Burr (R-NC) and Evan Bayh (D-IN),<sup>23</sup> the latter by Senators Christopher Bond (R-MO), John Rockefeller (D-WV) and Sheldon Whitehouse (D-RI).<sup>24</sup> But no action has been taken.

The 9/11 Commission had also recommended that the intelligence community's budget be made public to improve oversight and accountability.<sup>25</sup>

In 2007, Congress agreed to require the DNI to disclose publicly the size of the national intelligence program every fiscal year, unless the president waives the mandate on national security grounds. Although the administration opposed it, President Bush signed the requirement into law.<sup>26</sup>

### Desirability of Consolidation of Congressional Oversight

Intelligence commissions typically have pushed for congressional oversight to become more centralized (along with the structure of the intelligence community itself). Even Judge Richard Posner, who favors redundancy in the intelligence community to foster competition and reliability, supports more consolidation in Congress.<sup>27</sup> The American Civil Liberties Union (ACLU), however, opposes consolidation of congressional oversight.<sup>28</sup> Should congressional oversight be unified? To answer that question, the benefits and costs of different institutional arrangements for the protection of national security and democratic values must be compared.<sup>29</sup> Reformers understandably, but mistakenly, focus on the benefits of unification and the costs of fragmentation and redundancy. The proper comparison is between the net benefits of each.

Consider first the appeal of unification for congressional oversight. Most important, the consolidation of congressional jurisdiction, supporters contend, will lead to more meaningful oversight. The 9/11 Commission determined that Congress had failed to perform sufficient oversight. The Commission made much of the fact that congressional committees held only about three dozen hearings on terrorism from January 1998 to September 2001.<sup>30</sup> In light of its policy proposals, the Commission must have thought that more hearings (and thus improved oversight) would have occurred during that same period if there were a joint intelligence committee or only one committee in each chamber with exclusive authority over intelligence matters.

The reasoning behind this conclusion could derive from the perspective of the intelligence agencies or of the committees. According to former staff members of the Intelligence and Appropriations Committees, intelligence agencies "play one committee against the other, often getting the funding [they] need without the level of oversight and scrutiny that every other federal agency has come to expect."<sup>31</sup> Indeed, Congress has failed to pass annual intelligence authorization legislation, which would bring more oversight, since 2005.<sup>32</sup> Intelligence agencies might face substantially more oversight if they had to answer to one committee.

Alternatively, if there are multiple committees with jurisdiction over intelligence matters, individual committees may focus on other issues in

their exclusive jurisdiction and free-ride off the supposed efforts of other overseers. By contrast, the argument goes, members and congressional staff assigned to a committee with complete authority over the intelligence community would develop the necessary expertise and would be more diligent if they knew that no other committee could conduct oversight and consequently that they faced more accountability for their work.<sup>33</sup>

The consolidation of congressional oversight, proponents argue, also would encourage more cooperation by the White House and intelligence agencies. Even after September 11, 2001, congressional committees complained that they were not getting the information they believed they needed from particular agencies.<sup>34</sup> Supporters of a joint intelligence committee contend that the executive branch "would be more open and forthright with a single, small [joint] oversight body than with two with a larger combined membership."<sup>35</sup>

The White House and intelligence agencies may believe that the current structure of congressional oversight allows members of Congress to use their oversight powers more for political gain than for improving national security. The executive branch, in turn, treats Congress with "contempt," according to some key congressional observers.<sup>36</sup> If there were only one committee in each chamber with authority over it, the intelligence community may be less skeptical of that committee and less able to suggest that oversight is politicized. To be certain, the executive branch might find it easier to block oversight if it has to fend off only one committee, though a single committee presumably would wield more power than any one of the current multiple committees.

Finally, if we extend a primary argument made for unification of the intelligence community to Congress, the unification of congressional oversight will permit Congress to "connect the dots" in intelligence efforts. Multiple committees that split up the monitoring of the intelligence agencies may find it difficult to get a complete picture of intelligence operations. In sum, unification of congressional oversight promises more oversight, more cooperation from intelligence agencies, and better substantive outcomes.

Consider now the costs of consolidating congressional oversight. Most critically, because each committee, with its own memberships, adopts a particular perspective on intelligence efforts, a fragmented and overlapping committee structure provides, according to proponents of the status quo, necessary redundancy to avoid a national security failure and to protect core democratic values.<sup>37</sup> For instance, the Senate Homeland Security and Government Affairs Committee may emphasize a potent threat that the Senate Intelligence Committee mistakenly might ignore. Or the House Judiciary Committee, if notified, may raise questions about the legality of warrantless surveillance of international communications with people

inside the United States that the House Intelligence Committee would not challenge.<sup>38</sup>

In addition, the consolidation of congressional oversight, opponents fear, will promote uncritical monitoring if intelligence agencies or relevant interest groups are better able to "capture" their overseers, when they are fewer in number.<sup>39</sup> If congressional committees have cozy relationships with the agencies they oversee, they are less likely to press those agencies to improve national security or to foster the rule of law. Because the ALCU fears that the Intelligence Committees will not ask tough questions about the legality of intelligence activities, it wants the House and Senate Judiciary Committees to "retain jurisdiction over intelligence matters affecting legal and constitutional rights."<sup>40</sup> Having multiple committees with power over the intelligence community likely matters more when the same party controls the White House and Congress; agency capture may be less of a problem during periods of divided government.<sup>41</sup>

Finally, the unification of oversight may hinder the development of congressional expertise. Overlapping congressional committees, proponents argue, permit more members of Congress to learn about the intelligence community.<sup>42</sup> To the extent that individual members play particularly important roles in the oversight that gets conducted, redundancy in the committee system may ameliorate any negative consequences if certain members retire, fail to get reelected, or devote attention elsewhere.<sup>43</sup> In addition, because redundancy results in more committees approving an initiative, thereby encouraging consensus among members, legislation is more likely to pass when it comes to a vote.<sup>44</sup> In short, decentralized oversight has the potential to increase reliability, to avoid capture by the intelligence community, and to build expertise and consensus.

Weighing these benefits and costs to congressional consolidation is a complex task, even if we just look to structural choices between unification, on one hand, and redundancy and fragmentation, on the other. To start, the structure of the targets of oversight—here, the intelligence community—affects how Congress should organize itself. One study by scholars interested in both preserving national security and protecting civil liberties concluded that the decentralization of counterterrorism functions prior to the 2004 Intelligence Reform and Terrorism Prevention Act had prevented the emergence of a "single oversight structure, not simply in Congress, but also within the executive branch."<sup>45</sup> To the extent that the DNI now manages all of the intelligence agencies, and this assumption is contested by many experts and news accounts,<sup>46</sup> fewer congressional committees may be needed to oversee the intelligence community. Members of Congress could concentrate their oversight on the DNI's actions. Nevertheless, if we worry that there are now fewer competing voices within

the intelligence community, a redundant oversight system where committees take their responsibilities seriously may get better results from a unified intelligence community than a single committee could.

In assessing these structural choices, we want to determine which arrangement will produce better quality oversight, which may not be the same as more oversight. In Loch Johnson's words, we need more "guardians" who will seriously review the activities of the intelligence community and fewer "ostriches" who do not engage, "cheerleaders" who do not question, and "skeptics" who automatically question.<sup>47</sup> It may be possible to obtain the benefits of consolidation *and* redundancy by cutting the number of committees with jurisdiction over the intelligence community but not by as much as the 9/11 Commission desired. Some overlap but more responsibility may foster cooperation with the executive branch, increase accountability of Congress, improve reliability to avoid national security failures, and better protect democratic values. I take up this suggestion in more detail in the next section.

The number of committees, of course, is not the only choice that we should consider in institutional design. I should at least mention two other important variables. First, the composition of oversight committees and committee staff may affect national security and the rule of law more than the number of those committees. Studies on group polarization suggest that congressional oversight would be more effective if committees were evenly balanced in terms of party membership and if committee staff were nonpartisan. Furthermore, commentators have lamented the often fierce party conflict playing out in the Intelligence Committees, which maintain partisan staff, in recent years. As Zegart quips, "members are rewarded more for airing dirty laundry than cleaning it."<sup>48</sup> L. Britt Snider emphasizes the importance of bipartisanship: "Nothing will make a greater difference in terms of enhancing the effectiveness and credibility of the oversight committees than restoring bipartisanship to their operations."<sup>49</sup> Here, unlike in assessing the ideal number of committees, balancing is not necessary, at least for normative concerns of effectiveness and legitimacy: less partisanship would be beneficial. By contrast, committee term limits have competing effects. On one hand, they prevent committee members from developing expertise; on the other, they permit new insights. To foster expertise and alternative perspectives, the terms of committee members could be lengthened and staggered—an idea to which I return later.

Second, the transparency of congressional committee activities also may shape national security and democratic values in significant ways. The 9/11 Commission stressed that "[s]ecrecy stifles oversight, accountability, and information sharing."<sup>50</sup> If committee work on intelligence matters were more transparent, members may be more accountable and thus more diligent in their oversight, no matter how many committees there

are with jurisdiction over the intelligence community. On the other hand, intelligence is inherently secretive; too much transparency may harm national security efforts. A compromise might be reached, as discussed later, to increase transparency, at least within the government. The desirability of reform for national security and the rule of law is separate from its feasibility, to which I next turn.

### Feasibility of Reform

It is important to consider political realities of institutional design choices, whether of the intelligence bureaucracy or, in the case here, of Congress itself. Much of the congressional response to the oversight recommendations of the 9/11 and WMD Commissions can be explained in political terms. Simply put, committees do not want to relinquish their turf; indeed, committees often try to expand their authority.<sup>51</sup> As the *New York Times* editorial page lamented: "The main recommendation [of the 9/11 Commission], for fewer committees and a more focused panel with hands-on power over intelligence budgeting, clearly lies beyond the present level of selfishness bristling among traditional committee leaders."<sup>52</sup>

Although the 9/11 and WMD Commissions recognized, to varying degrees, the political constraints on reorganizing congressional oversight, neither explicitly explained how change might occur. They seem to have believed that the importance of national security would trump these constraints. But in the decade preceding September 11, 2001, Congress had refused to adopt any of the recommendations concerning oversight of the intelligence community made by seven commissions. As Zegart explains, "Congress was the only government entity that failed to implement a single recommendation during the decade—a record worse than either the CIA's or the FBI's."<sup>53</sup>

To the extent that they contemplated the likelihood of their reforms being adopted, the 9/11 and WMD Commissions must have thought that the tragic events of September 11, 2001 would provide the necessary jolt for Congress to modify well-established structures. The constant hammering for congressional reform by Commissioners and the media did produce some change. The 2006 election presented a second opportunity for changes in congressional oversight because the new Democratic majorities wanted to better monitor the executive branch. The House Democrats did push through some consolidation in intelligence appropriations.

More can be done, however, to improve congressional oversight. Keeping political constraints in mind, I offer five proposals, some of which draw from the Commissions' reports and all of which are targeted

at fostering national security and the rule of law. To start, the number of committees with jurisdiction over the intelligence community should be reduced, but not by as much as recommended by the 9/11 Commission. Each chamber's Intelligence, Armed Services, Judiciary, and Appropriations Committees should continue to exercise oversight, but the House and Senate Appropriations Committees should establish a subcommittee for intelligence with actual power, not just advisory input, over intelligence appropriations. By modifying appropriations, intelligence agencies will not be able to play the authorizers off the appropriators to the same extent as they do today.<sup>54</sup> We might again see authorizing legislation, in addition to annual appropriations. By preserving some redundancy and specialization, Congress can better protect national security and democratic values. The Judiciary Committees may be better suited to foster the rule of law, while the Armed Services and Intelligence Committees may be better able to protect national security. The National Security Agency's eavesdropping program, for example, raises intelligence and constitutional concerns. A single committee in each chamber likely cannot adequately address both critical goals.

To complement this reduction in the number of committees overseeing the intelligence community, the Intelligence Committees, at least, should be as evenly balanced by party as possible. In addition, staff should be nonpartisan. If the Intelligence Committees function in a bipartisan manner, the executive branch is more likely to cooperate in oversight efforts. Contrary to the 9/11 Commission's recommendation, Intelligence Committee members should have term limits, though those terms should be long enough to promote the development of helpful expertise and should be staggered so that some members always have important knowledge about the intelligence community while others contribute potentially critical new ideas.

These reforms likely could attract sufficient support to be enacted. Their most politically unpalatable component is the creation of intelligence subcommittees of the Appropriations Committees; unlike advisory panels, these subcommittees would take power away from defense appropriators (and connected authorizers on the Armed Services Committees). Because of the immense size of the nonintelligence budget they control, however, defense appropriators would lose authority over only about 10 percent of funds they currently oversee. Perhaps those members can be enticed to relinquish power by having some of them named to the new subcommittees. At the least, the eight committees that retain some oversight authority under this proposal are likely to support the stripping of jurisdiction from the other committees. Other members may support this consolidation as well because they can take credit for correcting some of the problems identified by the Commissions. Staggered term limits and near-party parity may

also generate support, if members believe they have some chance of serving on one of the consolidated committees. A member on a committee that would lose power may agree to that loss for the opportunity to serve a fixed term on a committee that oversees more of the intelligence community. In addition, members of the minority party may support consolidation if it is accompanied by better party parity on the committees that remain.

I offer three other recommendations for reform of congressional oversight. First, more members of Congress should receive notification of critical intelligence activities. Current law requires the president to notify the Intelligence Committees of covert intelligence operations before they take place. In extraordinary circumstances, the president can limit his reporting to the "Gang of Eight," which includes the chairmen and ranking minority members of the two Intelligence Committees, the speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate. Under President George W. Bush's administration, prior notification was not provided, even to the Gang of Eight, for covert operations by military special operations forces.<sup>55</sup> The law should be clarified to include those activities. The law should also extend notification in extraordinary circumstances to more key members of Congress and to critical staff—a Gang of Sixteen or Twenty-Four, perhaps. Secrecy can be protected by making the consequences to public disclosure by anyone "read in" to an operation sufficiently severe. As Heidi Kitrosser explains in proposing information funnels for national security information, the scope of disclosure should balance the need for deliberation with the need for secrecy.<sup>56</sup> This reform seems feasible to implement, with Congress motivated to strengthen its hand and with the Obama administration publicly committed to increasing transparency and protecting civil liberties.

Second, the ranking minority members of the Intelligence Committees should be able to subpoena witnesses and call hearings. Presently, no ranking minority member has that authority.<sup>57</sup> In rare circumstances, Congress has permitted deviations from this rule to foster bipartisanship and the legitimacy of oversight. When the House of Representatives established its Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, it gave the ranking minority member powers equivalent to the chairman.<sup>58</sup> By giving ranking minority members such authority, Congress is creating redundancy within the Intelligence Committees, which could offset the potential costs of consolidation for reliability and for the rule of law. It may also reduce the politicization of intelligence. To be certain, this reform calls for a fundamental change in how Congress organizes itself. Minority members should favor this proposal; members who are in the majority may also support such a proposal because they anticipate being in the minority at some point in the future or



because they believe intelligence is a unique policy area. To be certain, the recommendation may be extremely difficult to adopt.

Third, Congress should strengthen the Government Accountability Office (GAO)'s ability to investigate the intelligence community and then task the GAO to evaluate and report on intelligence activities at regular intervals. The GAO is Congress's primary auditor of the administrative state; it reviews agency programs on its own initiative, by statutory mandate, and at the request of members of Congress. The GAO, however, has officially complained that the intelligence community rarely cooperates with its investigations: "[U]nless and until we receive such cooperation [from the intelligence community], and given GAO's limited recourse, we will continue our long-standing policy of not doing work that relates directly to intelligence matters unless requested to do so by one of the select intelligence committees."<sup>59</sup> In particular, the GAO cannot obtain necessary materials from the CIA.<sup>60</sup> Congress could pass legislation requiring the CIA and other intelligence agencies to respond to GAO's requests for information, but, despite some recent attempts by Senator Daniel Akaka (D-Alaska), it has not done so.

By tasking the GAO to evaluate the intelligence community's efforts on a recurrent basis, Congress can delegate on the beat "police patrols" to its watchdog agency and then use its own scarce resources to pursue identified concerns. Currently, congressional oversight of the intelligence community depends heavily on "fire alarms" rung by the media or interest groups.<sup>61</sup> GAO reporting would help shift congressional attention from a "flood of second-guessing at the back end, after each flap, that further demoralizes and enfeebles the spies" to "scrutiny on the front end that could improve performance and check abuses."<sup>62</sup> Like increased disclosure requirements, this reform seems feasible in today's political climate, with Congress more willing to stand up for congressional oversight and with a White House at least talking about the need for greater openness. The reform also complements the previous proposal for more authority to be accorded to ranking minority members of the Intelligence Committees. The GAO is one of few tools that minority members have to monitor the bureaucracy as the GAO treats requests from chairmen and ranking minority members similarly.<sup>63</sup>

### Conclusion

The intelligence community faces many overseers, within and outside the legislative branch. As the community adapts to changes in the aftermath of September 11, 2001, so will its monitors. Congressional overseers may not change in fundamental ways desired by popular, bipartisan commissions. But legislative monitoring may change in ways that are politically palatable. Those politically attractive changes will

hopefully foster national security and the rule of law, nonpolitical values that we hold dear.

### Notes

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1. This chapter draws from my longer article on the structure of the intelligence community and its congressional overseers. See Anne Joseph O'Connell, "The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World," *California Law Review* 94 (2006): 1655-1744. By focusing on congressional oversight, I do not mean to suggest that other forms of oversight are unimportant. Within the federal government, the Privacy and Civil Liberties Oversight Board, the President's Foreign Intelligence Advisory Board, the Office of Management and Budget, Inspectors General, the White House, and the courts, among others, play important roles in intelligence oversight. Outside the government, the media and organizations such as the American Civil Liberties Union oversee, in various ways, the intelligence community. I also concentrate on oversight of the intelligence community and leave aside oversight of the non-intelligence components of the Department of Homeland Security, which has also generated considerable attention from the 9/11 Commission and others.
2. For the executive branch, the Commission recommended that the intelligence community be unified under a national intelligence director who would, among other duties, "manage the national intelligence program and oversee the agencies that contribute to it." National Commission on Terrorist Attacks upon the United States [9/11 Commission], *The 9/11 Commission Report* (New York: W.W. Norton & Co., Inc., 2004), 407.
3. Bert Chapman, *Researching National Security and Intelligence Policy* (Washington, DC: CQ Press, 2004), 234-243. The following committees in the House of Representatives have authority over at least one intelligence agency: Intelligence; Appropriations; Armed Services; Budget; Energy and Commerce; Government Reform; Homeland Security; International Relations; and Judiciary. The following Senate committees have jurisdiction over at least one such agency: Intelligence; Appropriations; Armed Services; Budget; Energy and Natural Resources; Foreign Relations; Homeland Security and Governmental Affairs; and Judiciary. In both chambers the Intelligence Committee is a select committee, not a standing committee. See O'Connell, "The Architecture of Smart Intelligence," 1662.

4. *The 9/11 Commission Report*, 400, 420.
5. Frederick M. Kaiser, *A Joint Committee on Intelligence: Proposals and Options from the 9/11 Commission and Others* (Washington, DC: Congressional Research Service RL32525, 2004), 1.
6. Glen Hastedt, "Foreign Policy by Commission: Reforming the Intelligence Community," *Intelligence and National Security* 22 (2007): 443-472.
7. No congressional committee currently has both authorization and appropriation authority.
8. *The 9/11 Commission Report*, 421.
9. Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, *Final Report* (Washington, DC, 2005), 20, 337-341.
10. *Intelligence Reform and Terrorism Prevention Act of 2004*, Public Law 108-408, *U.S. Statutes at Large* 118 (2004): 3638.
11. It is unclear how much those changes will improve the effectiveness of the intelligence community. See O'Connell, "The Architecture of Smart Intelligence"; Tim Starks, "Intel: Lost in the Reshuffle," *CQ Weekly*, May 5, 2008; Amy B. Zegart, *Spying Blind: The CIA, the FBI, and the Origins of 9/11* (Princeton: Princeton University Press, 2007).
12. 9/11 Public Discourse Project, *Final Report on 9/11 Commission Recommendations* (Washington, DC, 2005), 8-9.
13. *Ibid.*, 8.
14. *Amending the Rules of the House of Representatives to Establish a Standing Committee on Homeland Security and a Standing Committee on Intelligence*, H.R. Res. 837, 108th Congress, 2d sess.
15. *To amend the Rules of the House of Representatives to specify conditions under which the Permanent Select Committee on Intelligence of the House of Representatives shall be required to exercise its authority to make classified information in its possession available to certain standing committees of the House, and for other purposes*, H.R. Res. 5954, 109th Congress, 2d sess.
16. *To eliminate certain restrictions on service of a Senator on the Senate Select Committee on Intelligence*, S. Res. 445, 108th Congress, 2d sess.
17. Paul S. Rundquist and Christopher M. Davis, *S. Res. 445: Senate Committee Reorganization for Homeland Security and Intelligence Matters* (Washington, DC: Congressional Research Service RS21955, 2004), 5.
18. "Unfinished Intelligence Work," *New York Times*, October 11, 2004.
19. 9/11 Public Discourse Project, *Final Report*, 3.
20. Jonathan Weisman, "Democrats Reject Key 9/11 Panel Suggestion," *Washington Post*, November 30, 2006.
21. *To enhance intelligence oversight authority*, H.R. Res. 35, 110th Congress, 1st sess.
22. Starks, "Intel: Lost in the Reshuffle."
23. *Amending Senate Resolution 400, 94th Congress, and Senate Resolution 445, 108th Congress, to improve congressional oversight of the intelligence activities of the United States*, S. Res. 375, 110th Congress, 1st sess.

24. *To improve congressional oversight of the intelligence activities of the United States*, S. Res. 655, 110th Congress, 2d sess.
25. *The 9/11 Commission Report*, 416.
26. *Implementing Recommendations of the 9/11 Commission Act of 2007*, Public Law 110-153, *U.S. Statutes at Large* 121 (2007): 266.
27. Richard A. Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (New York: Rowman & Littlefield Publishers, Inc., 2005), 36, 43, 63, 97, 140.
28. Timothy H. Edgar, *ACLU Analysis of the 9-11 Commission's Recommendations for Intelligence Reform* (New York: American Civil Liberties Union, 2004), <http://www.aclu.org/natsec/emergpowers/14501leg20040730.html> (accessed October 8, 2008).
29. The 9/11 and WMD Commissions, along with Judge Posner, seem more concerned with national security. This emphasis on national security is understandable in the aftermath of September 11, 2001. But congressional oversight of the intelligence community has deep roots in the protection of the rule of law. Congress established the House and Senate Intelligence Committees in the 1970s largely because of unconstitutional actions by intelligence agencies. As a normative matter, it seems that we should want the intelligence community to work effectively within our Constitution.
30. *The 9/11 Commission Report*, 104-107; Zegart, *Flying Blind*, 144-146.
31. Denis McDonough, Mara Rudman, and Peter Rundlet, *No Mere Oversight: Congressional Oversight of Intelligence Is Broken* (Washington DC: Center for American Progress, 2006), 17.
32. Tim Starks, "Intelligence Authorization Bill Collapses amid Conflicting Explanations," *CQ Weekly*, March 23, 2009.
33. More oversight is not necessarily better than less. A similar argument could be made if multiple congressional committees engaged in too much oversight, calling agency officials to testify so frequently that the work of the agencies suffers. Commentators have suggested that such a context exists in homeland security. The Center for Strategic and International Studies and the Business Executives for National Security found that 79 congressional committees and subcommittees have "some amount of jurisdiction over various aspects of homeland security." CSIS-BENS Task Force on Congressional Oversight of the Department of Homeland Security, *Untangling the Web: Congressional Oversight and the Department of Homeland Security* (Washington, DC: Center for Strategic and International Studies, 2004), 2. Consolidating oversight would, in this context, decrease oversight and thus improve agency effectiveness.
34. Philip B. Heymann, *Terrorism, Freedom, and Security: Winning without War* (Cambridge: MIT Press, 2003), 152-156; Zegart, *Flying Blind*, 54.
35. Kaiser, *A Joint Committee on Intelligence*, 9; see also Mathew D. McCubbins and Thomas Schwartz, "Congressional Oversight Overlooked: Police Patrols versus Fire Alarms," *American Journal of Political Science* 28 (1984): 165-179.
36. Norman J. Ornstein and Thomas E. Mann, "When Congress Checks Out," *Foreign Affairs*, November/December 2006, 75.

