

And Congress Shall Know the Truth: The Pressing Need for Restructuring Congressional Oversight of Intelligence*

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On September 11, 2001, the United States witnessed devastating attacks on the nation's political and financial capitals. Almost immediately, the American people demanded answers as to how their intelligence agencies, with a workforce of almost 100,000 people¹ and a budget of over \$25 billion,² failed to anticipate and prevent a shocking series of attacks by 19 men with a budget of less than \$500,000. Although some pin responsibility for failing to prevent these disasters solely on the executive branch, many have argued that Congress directly contributed to the failures by not providing effective oversight of the intelligence community.

While proposals for reform suggest dramatic change is necessary in both the structure of the intelligence community itself as well as in congressional oversight, this piece will focus exclusively on ways to renovate Congress's structure and rules to provide more effective intelligence oversight. Part I contextualizes intelligence oversight by providing an overview of the subject. Part II identifies two models of congressional oversight. Part III discusses the unique challenges posed by conducting congressional intelligence oversight. Part IV serves as a call to action by offering a series of practical and achievable recommendations on how Congress should enhance and adapt its power to address today's unique oversight challenges.

PART I: INTELLIGENCE OVERSIGHT STRUCTURE AND RECENT EFFORTS AT REFORM

Congressional oversight of intelligence is driven by the Senate and House Select Intelligence Committees.³ With support from the Judiciary,

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¹ Scott Shane, *Government Keeps a Secret After Studying Spy Agencies*, N.Y. TIMES, Apr. 26, 2007, at A21.

² See FAS INTELLIGENCE RESOURCE PROGRAM, TRACING THE RISE AND FALL OF INTELLIGENCE SPENDING, available at <http://www.fas.org/irp/budget/index.html#6> (stating that in 1998, the DCI declassified the intelligence budget as being \$26.7 billion). In the years following September 11, annual intelligence spending mushroomed to \$44 billion. Scott Shane, *Official Reveals Budget for U.S. Intelligence*, N.Y. TIMES, Nov. 8, 2005, at A18.

³ See FRANK JOHN SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY, 1947-1994 (2d ed. 1994). The House and Senate Committees have fifteen and

Armed Services, and an array of other committees,⁴ the intelligence committees conduct oversight by structuring and funding agencies, calling agency officials in for congressional hearings, launching investigations, utilizing the GAO investigative oversight functions, and leveraging other information resources.⁵

The congressional committees' relationship to the intelligence community could hardly be characterized as robust or streamlined. One author commenting on the community's pre-September 11 structure described it as "one of multiple, decentralized intelligence agencies and multiple decentralized congressional overseers."⁶ Due to the highly redundant and dysfunctional design of intelligence systems and congressional oversight, there was a palpable sense during the 1990s that the intelligence community desperately needed reform. For example, between 1991 and 2001, at least twelve major public and private groups called for major structural reform of the intelligence agency structure.⁷

Following the September 11 attacks, the media, Congress, and the American people finally demanded a thorough inquiry into the issue. A committee of the Senate and House was convened. The Joint Committee, however, was hampered by an uncooperative White House that imposed "rigid limits on access to intelligence information."⁸

Unhappy with the success of the Joint Committee, families of the victims of the September 11 attacks lobbied for the creation of a bipartisan independent commission.⁹ As a result of their persistent efforts, Congress authorized, and the President acquiesced to, the creation of the independent, bipartisan National Commission on Terrorist Attacks upon the United States,¹⁰ commonly known as the 9/11 Commission.

The Commission issued a series of recommendations for restructuring the intelligence agencies and congressional oversight, calling for a "funda-

twenty-one members respectively. In addition to meeting in full committees, each Committee has a number of subcommittees to conduct more detailed oversight. *See generally* U.S. House of Representatives Permanent Select Committee on Intelligence, <http://intelligence.house.gov> (last visited Mar. 20, 2008); U.S. Senate Select Committee on Intelligence, <http://intelligence.senate.gov> (last visited Mar. 20, 2008).

⁴ In addition to the intelligence committees, fifteen committees "oversee at least one intelligence-related agency." Anne Joseph O'Connell, *The Architecture of Smart Intelligence*, 94 CAL. L. REV. 1655, 1662 (2006).

⁵ *Id.* at 1663.

⁶ *Id.* at 1660. O'Connell notes that, in addition to the fifteen intelligence agencies that existed prior to September 11, there were approximately seventeen congressional committees that asserted jurisdiction over some aspect of them. *Id.* at 1663.

⁷ Amy B. Zegart, *September 11 and the Adaptation Failure of U.S. Intelligence Agencies*, 29 INT'L SECURITY 78, 85-86 (2005) (identifying "six bipartisan blue-ribbon commissions, three major unclassified governmental initiatives, and three think tank task forces").

⁸ Jim Dwyer, *Families Forced a Rare Look at Government Secrecy*, N.Y. TIMES, July 22, 2004, at A18.

⁹ *Id.* (noting that "the persistent inquiries of victims' families meant that closely guarded secrets and embarrassing lapses were revealed with remarkable speed").

¹⁰ Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002); O'Connell, *supra* note 4, at 1663-64.

mental organizational shift . . . from multiple, weakly coordinated intelligence bureaucracies and overseers to a largely unified bureaucracy with just one or two congressional overseers.”¹¹ The 9/11 Commission was cognizant of the challenges and importance of restructuring and reforming congressional oversight of intelligence. In the section detailing the proposals for change, the Commission noted, “Of all our recommendations, strengthening congressional oversight may be among the most difficult and important.”¹²

In the four years since the Commission released its report, however, efforts to substantively reform Congress’s oversight role have stalled. Although the public pushed strongly for changes to the executive branch, there was substantially less interest in reforming Congress itself.¹³ Pressure from the executive branch for congressional reform was also absent; trampled on by Congress, the executive was not eager to push for further enhancements to Congress’s oversight power. Concerns that Congress would just tinker around the margins proved prescient; indeed, Congress has avoided making truly substantial changes.

PART II: POLICE-PATROL AND FIRE-ALARM MODELS OF OVERSIGHT

Congress has employed several types of intelligence oversight ranging from active, day-to-day analysis of prospective intelligence predictions to reviews of intelligence failures.¹⁴ Political scientists Matthew D. McCubbins and Thomas Schwartz have described these approaches as police-patrol and fire-alarm oversight.¹⁵

Police-patrol oversight is aimed at “detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations.” In contrast, fire-alarm oversight is largely reliant on outside influences—private individuals, interest groups, whistleblowers, and the press—to alert Congress when agencies violate their congressional mandates. Congress is often more focused on responding to fire alarms than conducting police patrols.¹⁶

¹¹ O’Connell, *supra* note 4, at 1665. Specifically, the Commission recommended the creation of a joint House and Senate committee, or alternatively a single committee in each house of Congress “combining authorizing and appropriating authorities.” NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 419–420 (2004) [hereinafter 9/11 COMMISSION REPORT].

¹² 9/11 COMMISSION REPORT, *supra* note 11, at 419.

¹³ Charles Babington, *Hill Wary of Intelligence Oversight Changes*, WASH. POST, Sept. 12, 2004, at A5 (quoting an interview with Rep. John Murtha where he noted, “I haven’t had one person at home ask me about this stuff . . . it’s a Washington thing.”).

¹⁴ See generally BOB GRAHAM, INTELLIGENCE MATTERS 13 (2004); 9/11 COMMISSION REPORT, *supra* note 11.

¹⁵ Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. OF POL. SCI. 165, 166 (1984).

¹⁶ Telephone Interview with Bob Graham, Former Chair of the Senate Intelligence Comm. (Apr. 14, 2007).

In *Congress: The Electoral Connection*, David Mayhew argues that the primary goal of members of Congress is to gain reelection, and that this motivation drives the type of work conducted by Congress.¹⁷ Therefore, rather than being focused centers of legislative and investigative expertise, oversight committees often become platforms for pork barrel politics and grandstanding on issues of the moment that will secure votes.¹⁸ This motivation results in drastic consequences for intelligence oversight, because unlike other areas addressed by Congress, intelligence oversight is often conducted behind closed doors and offers few opportunities for public credit claiming. In fact, the biggest intelligence successes are those the public never hears about—when threats to America’s security are averted. The unfortunate paradox is that only through oversight conducted during “fire-alarms” do members gain public attention for correcting failures, enabling them to bolster their popular support.

Although the intelligence committees are less prone to “typical” congressional behavior, they remain largely reactive—driven by media reports of intelligence failures—instead of proactive—trying to ask the right questions when there are no public crises.¹⁹ Under a fire-alarm system of oversight, “a congressman does not address concrete violations unless [outside forces] have complained about them.”²⁰ Due to the clandestine nature of intelligence, Congress has few outsiders on whom it can rely to pull the fire alarm. The use of the fire-alarm model of oversight is flawed if the alarm will only be raised in rare situations. The unfortunate result is that oversight is largely “feckless and episodic.”²¹

PART III: UNIQUE CHALLENGES TO INTELLIGENCE OVERSIGHT RESULTING FROM LIMITED TOOLS AND LEVERAGE POINTS

Congressional oversight of intelligence presents unique challenges due to the highly sensitive nature of the subject matter. As a result, Congress’s wide array of oversight tools, which rely on the distribution of information to the media, interest groups, and the general public, are severely limited.

Former House Intelligence Committee Chair Peter Hoekstra noted the problems with the tools available to conduct intelligence oversight:

¹⁷ DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 52 (2d Ed. 2004).

¹⁸ *Id.*

¹⁹ Telephone Interview with Bob Graham, *supra* note 16 (noting the tendency to focus on the scandals of the past, as opposed to looking towards the challenges of tomorrow). In the lead-up to the Iraq War, scant attention was paid to questionable intelligence about Saddam Hussein’s alleged acquisition of uranium from Nigeria until after the defeat of the Iraqi army. Kevin Whitelaw & David E. Kaplan, *Don’t Ask, Don’t Tell: Congress Gives Short Shrift to its Intelligence Oversight Duties*, U.S. NEWS & WORLD REP., Sept. 13, 2004, at 36.

²⁰ McCubbins & Schwartz, *supra* note 15, at 168.

²¹ Dana Priest, *Congressional Oversight of Intelligence Criticized*, WASH. POST, Apr. 27, 2004, at A1.

[W]e used public hearings, press conferences, public whippings of executive branch employees pretty frequently [during oversight of Education and Labor]. . . . [With intelligence] . . . you're not totally limited from using some of those tools . . . but you do have to be much more careful about how you do it.²²

The following subsections assess the various tools with which Congress has approached intelligence oversight.

A. *Hearings and Subpoenas*

The most dramatic difference between oversight conducted by the intelligence committees and the other authorizing committees in Congress is that the bulk of the work of the intelligence committees is conducted behind closed doors.²³ Due to their secretive nature, the use of hearings as a tool for publicity or “public whippings”²⁴ is rare. Generally, these public fire-alarm style airings of dirty laundry occur only after an intelligence failure.²⁵

Based on the limited information that is released about closed hearings, it appears that Congress’s success at police-patrol oversight is mixed. Former Senate Intelligence Committee Chair Bob Graham noted that, even in closed hearings, the Senate Committee was often focused on dealing with yesterday’s problems as opposed to anticipating future challenges.²⁶ Despite the limited publicity tools at their disposal, the intelligence committees can, and sometimes do, make effective use of hearings. For example, the ability to privately shame officials is a powerful deterrent to misbehavior.

The perception that Congress is driven by Mayhew’s credit-claiming motivation to create “gotcha” moments makes intelligence officials wary of sharing information with congressional overseers.²⁷ Former Senator Mike DeWine described a culture of passive resistance within intelligence agencies, where “[t]hey answer your questions, but you have to ask the right questions.”²⁸ These hearings can be of questionable utility if intelligence officials do not feel compelled to fully disclose available intelligence.²⁹

In the context of ordinary executive branch resistance, public pressure for an individual to appear before Congress can be applied through a wide variety of means—for example, releasing documents, calling press conferences, and conducting interviews to leverage media pressure. In the intelli-

²² Telephone Interview with Peter Hoekstra, Former Chair House Intelligence Committee (Apr. 19, 2004).

²³ Priest, *supra* note 21, at A4.

²⁴ Telephone Interview with Peter Hoekstra, *supra* note 22.

²⁵ Telephone Interview with Bob Graham, *supra* note 16.

²⁶ *Id.*

²⁷ *Chairman Roberts Trades Pugnacity for Pragmatism in Intelligence Probe*, CQ WEEKLY, July 19, 2003, at 1808.

²⁸ Priest, *supra* note 21, at A4.

²⁹ Michael Isikoff & Mark Hosenball, *Did the CIA Shut Out Congress on WMD?*, NEWSWEEK, June 23, 2003, at 8.

gence context, however, this ability is circumscribed by the high level of classification surrounding the hearings.³⁰

B. *Letters and Direct Requests*

Another tool at Congress's disposal is the use of public and private correspondence to secure executive branch compliance with congressional directives. For example, in May 2006, Chairman Hoekstra wrote to President Bush chastising the President for his lack of disclosure of Administration programs to Congress.³¹ The Administration responded and arranged a meeting with the CIA Director.³²

Because minority party members lack unilateral subpoena power, executive branch officials often do not comply with probing and uncomfortable requests. Unlike other congressional subject areas, the secrecy surrounding intelligence oversight limits the ability of the minority party to stir up public pressure to force an executive response. Often, the only chance that minority members have to force cooperation is to convince the majority to support their position.³³

C. *Public, Interest Group, and Media Scrutiny*

When it comes to intelligence oversight, public hearings are rare, material is often classified, and even unclassified information cannot be discussed publicly without committee approval.³⁴ These constraints make public, interest group, and media scrutiny of the intelligence community and the quality of oversight difficult, if not impossible. As Senator Graham stated:

Intelligence is a black box . . . you don't have the journalists, you don't have the interest groups, you don't have the academics who are watching virtually every activity of the federal government. If something is going wrong, like at Walter Reed hospital recently, it wasn't the Department of Veterans Affairs that came to Congress with this problem, or not the Pentagon; rather it was the very ag-

³⁰ Telephone Interview with Peter Hoekstra, *supra* note 22.

³¹ *Id.*; see also Eric Lichtblau & Scott Shane, *Ally Told Bush Project Secrecy Might be Illegal*, N.Y. TIMES, July 9, 2006, at A1 (quoting Rep. Peter Hoekstra as saying, "If these allegations are true, they may represent a breach of responsibility by the administration, a violation of the law, and, just as importantly, a direct affront to me and the members of this committee.").

³² Telephone Interview with Peter Hoekstra, *supra* note 22.

³³ For example, then Ranking Member of the House Oversight and Government Affairs Committee Henry Waxman was only able to gain a response to his inquiry into the Bush Administration's handling of the African Yellowcake incident when the Republican majority sent a letter to the Administration requesting more information. See Letter from Henry Waxman, Rep., to Condoleezza Rice, Assistant to the President for Nat'l Security Affairs, (July 29, 2003), <http://oversight.house.gov/documents/20040628075717-52199.pdf>; Douglas Jehl, *Senate Panel Sends New Letter to Rice Demanding Papers on Iraq Arms Today*, N.Y. TIMES, Oct. 31, 2003, at A8.

³⁴ Priest, *supra* note 21, at A4.

gressive journalists from *The Washington Post* who rang the alarm.³⁵

The task of public and media watchdogs is significantly more difficult in the intelligence oversight context compared with other areas of the federal government.³⁶ Because of the clandestine nature of the intelligence activities, the media and the public are extraordinarily unlikely to be aware of what is going on behind the veil of secrecy.

Leaks to the media provide one of the most important forms of fire-alarm oversight. For example, the *New York Times* revealed the National Security Agency's controversial program that permitted the monitoring of international phone calls and emails without warrants.³⁷ Following the publication of the exposé, the controversial wiretapping program was brought under the bright lights of public and congressional scrutiny.³⁸ The lesson from the NSA wiretapping incident is sobering. Congress, constrained by its own classification rules, was unable to use traditional tools to develop popular outrage over the Administration's conduct, and therefore was reliant on agency whistleblowers to drive media scrutiny.

D. Whistleblowers

Without scrutiny from the outside, lawmakers often rely on tips from within the intelligence community itself to let them know when agencies exceed their authority. The structure is informal and is driven by a belief that intelligence committee members will protect their sources.³⁹ Relationships like these, based on trust, can take a long time to develop—a challenge in light of the term limits on intelligence committees that still exist in the House.⁴⁰

Despite congressional reliance on tipsters, “whistle-blowing is not a respected tradition in the intelligence community,” notes Representative Rush Holt.⁴¹ In a business where a premium is placed on confidentiality, the intelligence community takes any breach very seriously.

Public whistle-blowing is an even more serious matter. From a national security perspective, neither Congress nor the Executive Branch supports the distribution of classified information without explicit government approval. The response to media leaks by agency officials has been swift and severe—

³⁵ Telephone Interview with Bob Graham, *supra* note 16.

³⁶ *Id.*; Telephone Interview with Peter Hoekstra, *supra* note 22.

³⁷ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

³⁸ Steven Aftergood, *Conflicting Bills on Warrantless Surveillance Advance in Senate*, SECURITY NEWS, Sept. 14, 2006, available at http://www.fas.org/blog/secretcy/2006/09/conflicting_bills_on_warrantle.html.

³⁹ Telephone Interview with Peter Hoekstra, *supra* note 22.

⁴⁰ *Id.*

⁴¹ Whitelaw & Kaplan, *supra* note 19, at 37.

ranging from investigations into the source of the leaks to attacks on the character of the leakers.⁴²

E. Appropriations and Authorizations

Funding is Congress' strongest "leverage point" in overseeing the intelligence community.⁴³ Unlike other oversight tools, the withholding or redirection of money, the lifeblood of every government agency, instantly gets the attention of the executive branch. The structure of congressional committees, however, pits authorizers against appropriators and undermines the ability of the committees to hold the agencies that they oversee accountable.⁴⁴ Intelligence officials vastly prefer to deal with appropriators, as opposed to oversight committees, because they are not privy to all the classified information to which authorizing committees have access.⁴⁵

This division between intelligence authorization and appropriations has created friction within Congress.⁴⁶ To address the problems of turf battles between different committees, the *9/11 Commission Report* called for closer involvement of the intelligence authorization committees in crafting the budget, and even giving funding power to appropriation subcommittees within the intelligence committees.⁴⁷ Despite efforts in the Senate, this reform has stalled.⁴⁸ Without this change, intelligence authorizing committees remain unable to use the strongest tool that they have at their disposal—the ability to grant and withhold funds—while the appropriations committees that write the agencies' budgets are most often not privy to the classified information on which the authorizing committees base their oversight.⁴⁹

PART IV: RECOMMENDATIONS FOR REFORMING CONGRESSIONAL INTELLIGENCE OVERSIGHT

In reviewing Congress's attempts at intelligence oversight reform, the 9/11 Commission gave Congress a "D."⁵⁰ With the notable exception of eliminating term limits for the Senate Intelligence Committee, little has changed. Given the failure to implement the 9/11 Commission's recommendations, we

⁴² See Joseph C. Wilson IV, *What I Didn't Find in Africa*, N.Y. TIMES, June 6, 2003, at WK9.

⁴³ Telephone Interview with Peter Hoekstra, *supra* note 22.

⁴⁴ Whitelaw & Kaplan, *supra* note 19, at 38.

⁴⁵ *Id.*

⁴⁶ For example, Intelligence Chairman Hoekstra voted against the 2005 intelligence appropriations bill when it was presented to the House because the appropriators would not permit him to see the appropriations for the intelligence community. Telephone Interview with Peter Hoekstra, *supra* note 22.

⁴⁷ Jonathan Weisman, *Democrats Reject Key 9/11 Panel Suggestion*, WASH. POST, Nov. 30, 2006, at A7.

⁴⁸ *Id.*; Telephone Interview with Bob Graham, *supra* note 16.

⁴⁹ Telephone Interview with Bob Graham, *supra* note 16.

⁵⁰ 9/11 PUBLIC DISCOURSE PROJECT, FINAL REPORT ON 9/11 COMMISSION RECOMMENDATIONS, Dec. 5, 2005 available at http://www.9-11pdp.org/press/2005-12-05_summary.pdf.

propose four additional reforms that will be both practical and politically palatable. These reforms will not, and cannot, address all the problems identified in Part II. Rather, these recommendations are made with those difficulties in mind and with an eye toward overcoming the turf-guarding tendencies of congressional leaders.

A. *Enhance Member Selection Criteria*

Volunteering to serve on the intelligence committees is a difficult choice for members of Congress. They must balance the advantage of access to secrets against the challenges of service on committees that provide few opportunities to grandstand for constituents or bring home pork.

The success of congressional leadership's selection of intelligence committee members is mixed. In the 1990s there was a broad sense that the leadership used the selection process to choose ideologues who would protect the Administration from serious oversight.⁵¹ But appointments to the intelligence committees must be approached more carefully than "ordinary" committees. In addition to considering the age, maturity, and history of good judgment of potential members, the committee should also consider the members' prior intelligence experience, their commitment to a bipartisan approach to intelligence oversight, their willingness to make a long-term commitment to the committee, and their other committee assignments.

The leadership selection committees should ensure that intelligence committee members' service overlaps with their service on other relevant committees such as Appropriations and Armed Services. This membership overlap helps to minimize friction between the committees, permits Congress to speak with one voice when addressing intelligence agencies, and increases the ability of the intelligence committee to use all the tools at Congress's disposal, such as hearings and restrictions on agency funding.

B. *Augment Training for Committee and Non-Committee Members*

The relative inexperience of members assigned to oversee the various intelligence committees is a critical challenge faced by Congress in conducting effective intelligence oversight. For example, none of the fifteen members of the Senate Select Intelligence Committee had intelligence agency experience prior to their selection to serve on the Committee.⁵² Even if our first recommendation were to be adopted, it is likely that some members of the committees would not have adequate intelligence expertise at the commencement of their service.

This problem is unique to intelligence oversight. As active citizens, recently-elected Congressmen tend to have broad experience in dealing with

⁵¹ *Id.*

⁵² U.S. Senate Select Committee on Intelligence, 110th Congress (2007–2008), <http://intelligence.senate.gov/memberscurrent.html> (last visited Mar. 20, 2008).

domestic issues. They are therefore able to hit the ground running following their appointment to different congressional committees. As Senator Graham noted, however, prior to entering Congress, “most [Congressmen] know very little about [intelligence] precisely because of its clandestine nature.”⁵³

One solution that deserves strong support is mandatory training for new members and discretionary training for non-committee members. The John F. Kennedy School of Government at Harvard University is developing a series of training modules for novice intelligence committee members. The objective of the training is to specifically address this critical problem by “accelerat[ing] the learning process so that [new members] will more rapidly be in a position that they can make good judgments on intelligence-related issues.”⁵⁴ During the required training the novice members should have the opportunity to engage with members of the intelligence community, current committee members, and former members to gain a deeper understanding of the issues that they will face when they return to the committee room.

In addition to providing training for new committee members, Congress should support continuing education for existing members. The training seminars directed towards current members could be designed to ensure that the members remained up-to-date on new developments in the intelligence arena.

Congress should also consider developing a series of seminars for current non-committee members who want to become more engaged in understanding the intelligence community. This would help to address the institutional lack of understanding of the intelligence community. By creating an accessible program for members of Congress to inform themselves of the challenges and complexities of intelligence gathering and analysis, Congress can increase the ability of members to effectively and responsibly oversee the intelligence community.

C. *Increase Term Lengths*

The 9/11 Commission argued that it was imperative that Congress eliminate term limits on service on the intelligence committees.⁵⁵ Despite this recommendation, while the Senate eliminated term limits in December 2004,⁵⁶ the House still has not.⁵⁷ The failure of the House to eliminate term limits inhibits the ability of Congress to provide effective oversight. In fact, often the only place to develop these oversight skills is in committee

⁵³ Telephone Interview with Bob Graham, *supra* note 16.

⁵⁴ *Id.*

⁵⁵ 9/11 COMMISSION REPORT, *supra* note 11, at 421.

⁵⁶ Walter Pincus, *Senate Realigns Intelligence Procedures*, WASH. POST, Dec. 23, 2004, at A21.

⁵⁷ Telephone Interview with Peter Hoekstra, *supra* note 22.

rooms.⁵⁸ Intelligence committee members do most of their learning on the job and might spend two to four years of an eight-year term “getting to the point of competence to be able to make good judgments.”⁵⁹

The two most salient arguments against indefinite terms are committee capture and the lack of broad knowledge of intelligence issues throughout Congress. The committee capture theory suggests that “regulated entities ‘capture’ the governmental bodies that regulate them.”⁶⁰ This capture is a particular risk of eliminating term limits because the longer legislators serve, the more likely they are to develop close, and even supportive, relationships with the agencies and individuals that they oversee.⁶¹

The other problem with the elimination of term limits is that it deprives Congress of broad knowledge of intelligence issues. Term limits are beneficial in the sense that they ensure a steady stream of members circulating through the committees and returning to the general membership with the added knowledge of how the intelligence community works.⁶² This knowledge is incredibly useful when they are asked to vote on defense and intelligence budgets or when Congress as a whole addresses major intelligence issues.

Despite these concerns, we support efforts to eliminate, or at the very least extend, the intelligence committees’ term limits in order to ensure that members develop the skills and experience necessary to ask the right questions of the intelligence agencies.⁶³

D. Enhance Police-Patrol Oversight by Strengthening Staff Capabilities

Given the structural barriers to effective fire-alarm oversight in the context of clandestine national intelligence, Congress must conduct more and higher quality police-patrol oversight if it is to serve as an effective check on the intelligence agencies.⁶⁴ Attention to the daily activities of the intelligence community must be, at least in part, prospective. The resources currently available to the committees are insufficient to fulfill this function.

⁵⁸ *Id.*

⁵⁹ Telephone Interview with Bob Graham, *supra* note 16.

⁶⁰ Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1273 (1988).

⁶¹ *See* STAFF OF PERMANENT SELECT COMM. ON INTELLIGENCE, H.R., IC21: THE INTELLIGENCE COMMUNITY IN THE 21ST CENTURY (1996) available at <http://www.access.gpo.gov/congress/house/intel/ic21/ic21015.html>.

⁶² *Id.* (“Inasmuch as information available to HPSCI [House Permanent Select Committee on Intelligence] cannot be made available to all Members, rotating service will permit a larger percentage of Members to have some understanding of intelligence issues. For example, there are currently some 20 Members of the House who have previously served on the HPSCI, including three former chairmen. Such experience contributes to better informed decisions on intelligence budgets as well as on national security questions that require an appreciation for the limits of available intelligence information.”).

⁶³ *See id.*

⁶⁴ Telephone Interview with Bob Graham, *supra* note 16.

Our research and interviews suggest that the reliance of committee members on staff is comparatively greater in the intelligence context than in others, because of the discreet and clandestine nature of the material.⁶⁵ For this reason, intelligence committee staffing “needs to be beefed up both quantitatively and qualitatively” to effectively respond to the modern challenge of intelligence oversight.⁶⁶

The committees’ staffs should be made up of individuals whose experience comes from time spent within the intelligence agencies, so as to give an “insider’s” insight into their inner workings, as well as those whose expertise is from sources external to the intelligence community itself, who may be more objective critics of the agencies.⁶⁷

More staff is also needed to keep up with the growing complexities of national intelligence. A mere increase in the number and quality of staff, however, is insufficient. The 9/11 Commission sought to increase the robustness of congressional oversight by recommending the creation of a joint committee, based on the model of the Joint Committee on Atomic Energy (JCAE), which has exclusive jurisdiction over “all bills, resolutions, and other matters” relating to both military and civilian implementation of nuclear power.⁶⁸ While the JCAE is considered one of the most powerful and most effective committees in congressional history,⁶⁹ Congress appears unwilling to consider a joint committee model for intelligence. Both Senator Graham⁷⁰ and Representative Hoekstra⁷¹ noted that the different cultures in the Senate and the House are prohibitive to effectuating this reform. Congressman Hoekstra further suggested that redundancy of oversight between the committees of the two houses would improve its quality.⁷²

The 9/11 Commission noted that the fact that leaders of the Department of Homeland Security appear before eighty-eight committees and subcommittees of Congress is “perhaps the single largest obstacle impeding the Department’s successful development.”⁷³ However, given the infeasibility of a joint committee, we propose a different approach. We recommend that the committees create a unified staff, reporting to both committees, that would serve as a warehouse of expertise on intelligence at the service of Congress that would vastly improve its oversight function.⁷⁴

⁶⁵ Whitelaw & Kaplan, *supra* note 19, at 36.

⁶⁶ *Id.*; Telephone Interview with Bob Graham, *supra* note 16; *see also* Telephone Interview with Peter Hoekstra, *supra* note 22.

⁶⁷ Telephone Interview with Bob Graham, *supra* note 16.

⁶⁸ CHRISTOPHER M. DAVIS, U.S. CONG. RESEARCH SERV., 9/11 COMMISSION RECOMMENDATIONS: JOINT COMMITTEE ON ATOMIC ENERGY—A MODEL FOR CONGRESSIONAL OVERSIGHT? CRS-2 (2004).

⁶⁹ *Id.*

⁷⁰ Telephone Interview with Bob Graham, *supra* note 16.

⁷¹ Telephone Interview with Peter Hoekstra, *supra* note 22.

⁷² *Id.*

⁷³ 9/11 COMMISSION REPORT, *supra* note 11, at 421.

⁷⁴ Paul R. Pillar approved of such a concept in a 2006 article in *Foreign Affairs*. Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, FOREIGN AFF., Mar.–Apr. 2006, at 15.

This new organization, attached and accountable to Congress, would be responsive to requests from the intelligence committees primarily, as well as those from members of Congress not sitting on the committees. The staff would look into intelligence community activities and provide ongoing analysis of intelligence reports to Congress.

Despite the many disagreements about the path to better intelligence oversight, it is clear that more staff capacity is needed; a joint committee is a political impossibility; there is too little police-patrol, forward-looking oversight; and too much responsibility for intelligence oversight is spread too thinly over too many committees with jurisdiction. A separate staff body to aid the committees, combined with limiting jurisdiction for intelligence to just the committees, would do much to remedy these problems. Moreover, these steps are more politically palatable than the 9/11 Commission's recommendation to create a joint committee.

CONCLUSION

Despite broad support for its recommendations, the momentum for reform following the issuance of the 9/11 Commission Report has slowed. Without public pressure, there is little impetus for reform. The executive branch and intelligence community want less scrutiny from Congress, and Congress itself is unlikely to shake up the status quo. Since neither the executive branch nor Congress is willing to reform, advocates for change must look to external public pressure to force improvements. Sadly, as recent notable incidents of intelligence failures fade into distant memory, public pressure has diminished almost entirely. If we are to avoid another intelligence catastrophe, citizens, public advocates, and the media must refocus their attention on implementing these critical and achievable reforms to ensure more effective congressional oversight of intelligence.

