Sed quis custodiet ipso custodes? (“But who will guard the guards?”), the Roman poet and satirist Juvenal asked. The **oversight** of intelligence has always been a problem. The ability to control information is an important power in any state, whether democratic or despotic. Information that is unavailable by any other means and whose dissemination is often restricted is the mainstay of intelligence. By controlling information; by having expertise in surveillance, eavesdropping, and other operations; and by operating behind a cloak of secrecy, an intelligence apparatus has the potential to threaten heads of government. Thus, government leaders’ ability to oversee intelligence effectively is vital.

In democracies, oversight tends to be a responsibility shared by the executive and legislative powers. The oversight issues are generic: budget, responsiveness to policy needs, the quality of analysis, control of operations, propriety of activities. The United States is unique in giving extensive oversight responsibilities and powers to the legislative branch. The parliaments of other nations have committees devoted to intelligence oversight, but none has the same broad oversight powers as Congress. (See box, “A Linguistic Aside: The Two Meanings of Oversight.”)
Executive Oversight Issues

The core oversight issue is whether the intelligence community is properly carrying out its functions, that is, whether the community is asking the right questions, responding to policy makers’ needs, being rigorous in its analysis, and having on hand the right operational capabilities (collection and covert action). Policy makers cannot trust the intelligence community alone to answer for itself. At the same time, senior policy officials (the national security adviser, the secretaries of state and defense, the president) cannot maintain a constant vigil over the intelligence community. Outside the intelligence community, the National Security Council (NSC) Office of Intelligence Programs is the highest level organization within the executive branch that provides day-to-day oversight and policy direction of intelligence. Of course, as was discussed in the previous chapter, policy makers may have strong views about the quality of intelligence based on their own policy preferences, so they may not always be objective either.

A Linguistic Aside: The Two Meanings of Oversight

Oversight has two definitions that are distinct, if not opposites.

- Supervision; watchful care (as in “We have oversight of that activity.”)
- Failure to notice or consider (as in “We missed that. It was an oversight.”)

In overseeing intelligence, Congress and the executive branch try to carry out the first definition and to avoid the second.

Although the 2004 intelligence reform law created a Joint Intelligence Community Council (JICC) to improve oversight, Director of National Intelligence (DNI) Mike McConnell found that the JICC did not meet his needs. He created the Executive Committee (EXCOM). The EXCOM is, like the JICC, a mixed policy/intelligence body, comprising both the heads of intelligence components and senior policy officials, usually at the under secretary level. This slightly lower representation by policy departments is probably an advantage, because under secretaries have (slightly) more time to devote to these issues and will undoubtedly have greater working familiarity,
in most cases, with intelligence. A major feature of the EXCOM is the fact that the under secretary of defense for intelligence (USDI) sits on the EXCOM in that capacity and as director of Defense Intelligence, making clear his or her position over the heads of the defense intelligence agencies—Defense Intelligence Agency (DIA), National Geospatial-Intelligence Agency, National Security Agency (NSA), National Reconnaissance Program (NRO)—but acting as part of the office of the DNI. This is a significant step in allowing better coordination between the DNI and the Department of Defense (DOD), which is both the largest aggregation of intelligence agencies and the largest consumer of intelligence. But this added function for the USDI has not been formally institutionalized and thus will depend on the preferences of future DNIs and secretaries of defense.

Since the administration of Dwight D. Eisenhower (1953–1961), with two brief lapses, presidents have relied on what was originally called the President’s Foreign Intelligence Advisory Board (PFIAB) to carry out higher level and more objective oversight than the NSC Office of Intelligence Programs does. With the advent of the more all-encompassing term “national intelligence” in the Intelligence Reform and Terrorism Prevention Act (IRTPA, 2004), as opposed to “foreign intelligence,” the PFIAB became the President’s Intelligence Advisory Board (PIAB). PIAB members are appointed by the president and usually include former senior intelligence and policy officials and individuals with relevant commercial backgrounds. (In the 1990s, some people were appointed to the then-PFIAB largely as political favors.) PIAB can respond to problems (such as the investigation of alleged Chinese spying at Los Alamos National Laboratory) or can initiate activities (such as the Team A–Team B competitive analysis on Soviet strategic capabilities and intentions).

The PIAB’s relationship to policy makers can be subject to the same strains that are seen in the relationship between policy makers and intelligence agencies. From 2001 to 2005, PFIAB was chaired by Brent Scowcroft, who had served as national security adviser under Presidents Gerald R. Ford (1974–1977) and George H. W. Bush (1989–1993). Scowcroft spoke out against the decision to invade Iraq in 2003, which surprised some people given his previous close working relationship with George H. W. Bush. In 2005, President George W. Bush replaced Scowcroft, apparently displeased over his remarks. This was the first time that the chairman of PFIAB was replaced because of a policy disagreement with the White House.

In 2012, the Obama administration asked ten of the fourteen members of the PIAB to step down. Some observers believed this greatly weakened the PIAB. In 2013, when deputy CIA director Michael Morrell announced his retirement, it was also announced that he would join the PIAB. This struck
some observers as inappropriate as he would likely be overseeing many of the operations and analytical efforts that he had just been responsible for at CIA. Morrell was also one of five members named to the President’s Review Group on Intelligence and Communications Technologies, appointed in response to the NSA leaks.

The executive branch has tended to focus its oversight on issues related to espionage and covert action, although analytical issues (Team A–Team B, the September 11, 2001, terrorist attacks) and organizational issues are occasionally investigated. Espionage oversight is inclined to concentrate on lapses, such as the Aldrich Ames spy case or allegations of Chinese espionage. For example, in 1999 PFIAB issued a scathing report on Department of Energy security practices related to Chinese espionage. As with all other activities, executive branch organizations divide responsibility for overseeing covert action. The president is responsible for approving all covert actions, but the day-to-day responsibility for managing them resides with the director of the Central Intelligence Agency (DCIA) and the National Clandestine Service (NCS), formerly the Directorate of Operations (DO). As noted, DNI Admiral Dennis Blair (2009–2010) did win authority to evaluate the effectiveness of specific covert actions when requested by the White House during his struggle with DCIA Leon Panetta (2009–2011). This same authority presumably now resides with DNI retired Lt. General James R. Clapper Jr. (2010–), but it may not be an often-used role and is dependent on executive office officials asking the DNI to undertake an evaluation. The DNI cannot do so on his or her own. The FY2010 Intelligence Authorization Act (Public Law 111–259) gives the DNI authority to conduct an “accountability review” of an intelligence community element. The DNI can also be requested to do so by Congress.

One oversight issue relating to covert action centers on the operating concept of plausible deniability. In the case of large-scale paramilitary operations—such as the Bay of Pigs or the contras in Nicaragua—deniability is somewhat implausible. But many covert actions are much smaller in scale, making it possible to deny plausibly any U.S. role. Some critics of covert action argue that plausible deniability undermines accountability by giving operators an increased sense of license. Because the president will deny any connection to their activities, they operate under less constraint. The critics raise a point worth considering but overlook the professionalism of most officers.

Another oversight issue relating to covert action has to do with broad presidential findings, sometimes called global findings, versus narrow ones. Global findings tend to be drafted to deal with transnational issues, such as terrorism or narcotics. The broader the finding, and thus the less specificity it contains, the greater is the scope for the intelligence community to define the operations involved. Although not suggesting that the president must always
precisely define covert actions, a broad finding does run a greater risk of disconnecting policy preferences from operations.

Policy makers must also be concerned about the objectivity of the intelligence community when it is asked to assess or draw up a covert action. Once again, intelligence officers who feel a need to demonstrate their capabilities may not be able to assess in a cold-eyed manner the feasibility or utility of a proposed action.

Similar concerns may arise when assessing the relative success of an ongoing covert action. Have policy makers and intelligence officials agreed on the signs of success? Are these signs evident? If not, what are the accepted timelines for terminating the action? What are the plans for terminating it?

Finally, can intelligence analysts offer objective assessments of the situation in a country where their colleagues are carrying out a major covert action, particularly a paramilitary one? This issue may be of heightened concern in view of the closer partnership forged between the then-DO and Directorate of Intelligence in the mid-1990s.

The PIAB under the Barack Obama administration has looked into the effectiveness of the DNI, which was undertaken at the request of Congress. This report stressed the importance of the DNI being the acknowledged leader of the intelligence community. Ironically, Obama received the report shortly before he asked DNI Blair to step down. As noted earlier, one of the issues that undercut Blair was his turf fights with the Central Intelligence Agency (CIA), which failed when the NSC supported the CIA over the DNI.

The propriety of intelligence activities is also an aspect of oversight. Are the actions being conducted in accordance with law and executive orders (EOs)? All intelligence agencies have inspectors general and general counsels. In addition, the President's Intelligence Oversight Board (PIOB), a subset of PIAB, can investigate. However, the PIOB is a reactive body, with no power to initiate probes or to subpoena. It is dependent on referrals from executive branch officials. Nonetheless, the PIOB has carried out some useful classified investigations. However, the PIOB fell into disuse during the George W. Bush administration. Members were not appointed until 2003, two years after the administration took office. According to press accounts, the PIOB did not take any actions on various potential violations that were reported to it—mostly in connection with the war on terrorism—until 2006. President Bush curtailed the purview of the PIOB and ordered that it report to the president, not the Justice Department. However, President Obama restored the practice of having the PIOB report potential instances of law breaking to the Justice Department.

A recent addition to executive oversight has been the Privacy and Civil Liberties Oversight Board, which had been recommended by the 9/11 Commission report and was created legislatively in 2004. The board, more
popularly known as the Civil Liberties Protection Board, is chartered to ensure that concerns about privacy and civil liberties are considered when laws, regulations, and policies to combat terrorism are developed. The board has both an advisory and oversight function. The board is part of the executive office of the president, who selects its members. The chairman and vice chairman are subject to Senate approval. The Bush administration’s commitment to the board came into question because members were not selected until March 2006. A change in legislation terminated all board appointees in January 2008. President Bush did not nominate new members; President Obama began nominating members in December 2010, nearly two years into his term. There is also a Civil Liberties Protection Officer in the office of the DNI.

The Privacy and Civil Liberties Oversight Board had its first official meeting in July 2013, when it conducted a series of public hearings on the role of the Foreign Intelligence Surveillance Court (see below) and the NSA programs leaked by Edward Snowden. The board later said it would report on the legality of the NSA programs and investigate if these programs also safeguarded privacy and civil liberties. In his January 2014 directive on signals intelligence collection, President Obama “encouraged” the Privacy and Civil Liberties Oversight Board to report on any of the matters in the directive that fall within the board’s mandate.

In August 2013, DNI Clapper announced the creation of a Review Group on Intelligence and Communications Technologies. This group was formed at President Obama’s direction to assess whether, given the advances in communications technology, U.S. technical collection was conducted so as to protect national security and advance foreign policy while also accounting for the risk of unauthorized disclosure and the need to maintain public trust. The review group made 46 specific recommendations to the president in its December 2013 report, but very few of them were adopted specifically in his January 2014 order.

The controversies that engulfed intelligence after 2001, primarily the September 11 attacks and Iraq’s alleged possession of weapons of mass destruction (WMD), led to an increased use of outside commissions to provide assessments of intelligence. In the United States, great political pressure was brought to bear on President George W. Bush to appoint a commission to investigate intelligence performance before September 11, after Congress’s joint inquiry reported to little satisfaction on anyone’s part. Similarly, after the Iraq controversy, Bush appointed a WMD commission. The prime ministers of Britain and Australia also appointed commissions to look into intelligence on Iraq. Britain’s Butler Report concluded that few reliable sources were available on Iraq WMD programs, especially human resources. Lord Butler
and his colleagues found that the intelligence assessments made good use of the intelligence they did have, although much of it was inferential. As was the case in the United States, analysts did not have complete knowledge of the background of key human resources. The report also found that there was no politicization of intelligence. Australia’s Flood Report made similar findings, noting the paucity of information—much of which came to Australia from the United States or Britain—and the failure to examine the political context in Iraq as well as the technical issue of WMD, a criticism that some have made regarding U.S. intelligence, including DCIA Gen. Michael Hayden during his 2006 confirmation hearings. The Flood Report doubted, however, that better intelligence processes would have led to the correct conclusion about the state of Iraq WMD. The report also noted that there was no evidence of politicized intelligence.

A fitting conclusion to this issue, which will likely haunt the intelligence agencies in all three countries for years to come, is the report of Charles A. Duelfer, who headed the Iraq Survey Group (ISG) for the DCI. The ISG spent two years in Iraq examining the state of Iraq WMD after the occupation of Baghdad. Duelfer had been a senior member of the United Nations Special Commission (UNSCOM), charged with overseeing the disarmament of Iraq after the 1991 Persian Gulf War, until it was ejected by Iraqi leader Saddam Hussein in 1998. Duelfer concluded that Saddam was determined to obtain WMD but would have waited until United Nations sanctions had been lifted. But to achieve that goal, Saddam wanted to preserve the capacity to reconstitute WMD, especially missiles and chemical weapons, as quickly as possible once the sanctions were gone. Finally, Saddam sought to create a state of strategic ambiguity, seeking to convince Iran that Iraq had WMD as a means of deterring Iran while Iraq remained weak. If Duelfer’s assessments are correct, then one could argue that the intelligence agencies were accurate in their assessment of Saddam’s intentions but not the state of his inventory (capabilities) and that they correctly picked up the signs that he was transmitting that he had WMD. They were not able to see through them, however.

The increased use of these commissions raises several issues. First, the commissions are, almost by definition, political in nature. A government is either trying to gain some political advantage or bowing to political pressure in creating a commission. Second, given that commissions are created by a sitting government, the issue of a commission’s objectivity always arises. This is usually addressed by appointing a range of commissioners whose political views or backgrounds are diverse. But this raises a third issue: How much expertise do they bring to the subject? Intelligence, like any other profession, has its own vocabulary and its own practices, some of which are difficult for
an outsider to comprehend or to learn with much facility over the course of an investigation. If too many former intelligence professionals are appointed, the commission will appear to be biased. But if most of the commissioners have little or no intelligence experience, their ability to investigate in a meaningful and perceptive manner may suffer. Finally, the political circumstances that create the commission increase the likelihood that a significant group in the body politic will be dissatisfied with the result, charging either a whitewash or a lynching.

One area of executive branch oversight has become more controversial in recent years. This is the role played by inspectors general (IGs), particularly the CIA IG. Every cabinet department, every major agency, and several small ones have an IG. All IGs essentially have the same function: to ensure that his or her department or agency is operating within legal guidelines, effectively carrying out its mission and not engaging in activities that are unlawful, wasteful, or criminal. The CIA has had an IG since 1952; the position was given a statutory basis in 1989. The CIA IG must be confirmed by the Senate, making this IG one of the few intelligence officials below the level of agency director that requires Senate confirmation. The CIA IG reports to the director of the CIA, but the director has limited authority to constrain or limit the IG. If the director acts to limit the IG’s activities, for reasons of national security, the director must inform the Senate and House Intelligence Committees of his or her reasons. Only the president can remove the CIA IG and, again, the president must also inform the intelligence committees of the reasons for doing so. Thus, to the extent possible, Congress tried to give the CIA IG a fair amount of independence.

An intelligence community IG, part of the Office of the DNI, was created in legislation in 2010. The intelligence community IG is also confirmed by the Senate and is responsible to the DNI and to Congress. Its functions are similar to other IGs. This position also leads and coordinates the activities of other intelligence agency IGs through the intelligence community IG Forum, which was established in the same legislation. The DNI may prevent an IG inspection or audit in order “to protect vital national security interests of the United States.” In such cases, the DNI must inform the intelligence committees of the Congress of the reasons for this action.

All IG investigations come after the fact, which can lead to a certain amount of dissonance for officers who are told by the general counsel that a program is legal and then find themselves being investigated for conducting that program, as former CIA general counsel Jeffrey Smith noted. Smith also noted the difference between operational decisions made under pressure and the hindsight of an IG review. Smith’s comments summarize the problem with IG and other ex post facto reviews, especially on fast-moving or highly important
and sensitive issues. It can also be difficult for IG investigations to capture correctly the analytical process that may have led to an errant conclusion or a larger intelligence failure, unless there are glaring pieces of intelligence that were overlooked or omitted. All of these issues came to a head in 2007, when DCIA Hayden released, under congressional direction, a CIA IG report on the agency’s performance before 9/11; the report found systemic problems and specifically criticized the performance of several senior officials, including then-DCI George Tenet. Hayden ordered a review of the IG, citing concerns about its impartiality and fairness. Eventually, Hayden and the IG agreed to the appointment of an ombudsman, as well as a quality control officer who would ensure that “exculpatory and relevant mitigating information” was also included in IG reports, as well as more rapidly conducted investigations.

The Office of Management and Budget (OMB), although not strictly an oversight entity, should be mentioned because of its central and pervasive role. First, OMB assembles the president’s annual budget. OMB takes the submissions from the various departments and agencies, including the National Intelligence Program (NIP) and Military Intelligence Program (MIP), and makes a final decision as to how much each will be requesting in the president’s budget. Heads of departments and agencies can appeal OMB decisions to the president. Second, OMB keeps track of all agency and department spending rates. OMB’s goal is to ensure that allocated funds are sent at an even pace through the fiscal year, trying to combat the bureaucratic urge to hoard money in the early part of the year and then spend all of it in the latter part of the year, leading to more difficult program management. All of this budget oversight, plus some management oversight, is performed by OMB program managers. In the case of defense and intelligence, the program managers are integrated throughout the budget development cycle because the defense budget, which includes intelligence, is too large to be reviewed at the end of the process each autumn as is the case with most program submissions. Finally, OMB serves as the political guardian of all testimony given by administration officials, including senior intelligence officials. OMB seeks to ensure that all statements adhere to official administration policy and that officials do not recommend programs or initiatives that are not part of the president’s policies.

Congressional Oversight

Congress approaches intelligence oversight—and all oversight issues, whether national security or domestic—from a different but equally legitimate perspective as that of the executive branch.
The concept of congressional oversight is established in the Constitution. Article I, Section 8, paragraph 18, states, “Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” Courts have found that the Necessary and Proper Clause includes the power to require reports from the executive branch on any subject that can be legislated. The essence of congressional oversight is the ability to gain access to information, usually held by the executive branch, which is relevant to the functioning of the government.

Apart from its constitutional mandate, a major factor driving Congress in all matters of oversight is the desire to be treated by the executive as an equal branch of government. This is not always easy to achieve, as the executive branch ultimately speaks with one voice, that of the president, whereas Congress has 535 members. This significant difference leads some people to question whether Congress’s constitutional authority works in reality.

Moreover, in the area of national security, Congress has often given presidents a fair amount of leeway to carry out their responsibilities as commander-in-chief. This is not to suggest that partisan debates do not arise over national security or even intelligence issues, such as the 1960 allegations about a missile gap or the 1970s allegations about a strategic window of vulnerability. (See chap. 2.) To the contrary, debate has become more partisan in the post–cold war period. Effective or forthcoming oversight can also help forge more united policies between the branches, especially during times of crisis. As Senator Arthur Vandenberg, R-MI, chairman of the Senate Foreign Relations Committee (1947–1949) famously told President Harry Truman at the outset of the cold war: “If you want us there for the landings, we have to be there for the take-offs.”

Beyond the constitutional mandate, intelligence oversight is also established in the Intelligence Oversight Act (1980), which requires that the two intelligence committees be kept “fully and currently informed of all intelligence activities carried out by or on behalf of the United States “including any significant anticipated activity.” The act also states that notification is not a necessary precondition for beginning an activity. Finally, the act requires “timely” reports on “any illegal activity or significant intelligence failure.” This is a fairly broad mandate but also a somewhat vague one, hinging on the definition of the word “significant.” In 2011, DNI Clapper issued guidelines (Intelligence Community Directive 112, November 16, 2011) as to what constitutes “significant anticipated intelligence activities,” including those that (1) entail significant risk of exposure, compromise, and loss of human life; (2) will have a major impact of foreign policy or national
security interests; (3) entail deployment of new collection techniques that are a significant departure from previous ones; (4) are related to certain specific budget-related events; and (5) others. “Significant failures” include (1) large-scale and likely systematic loss or disclosure of classified intelligence; (2) major interruptions in or loss of collection capabilities; (3) major analytical errors that can have a significant effect on U.S. policies; and (4) others. Clapper’s directive does add specificity, but there will still be instances where certain events are at issue as to whether or not they should be or should have been reported under the “significant” standard.

Congress has several levers that it can use to carry out its oversight functions.

**Budget.** Control over the budget for the entire federal government is the most fundamental lever of congressional oversight. Article I, Section 9, paragraph 7, of the Constitution states, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”

The congressional budget process is complex and duplicative. It is composed of two major activities: **authorization** and **appropriation.** Authorization consists of approving specific programs and activities. (See chap. 3 for the programs that make up the National Intelligence Program [NIP] and Military Intelligence Program [MIP].) Authorizing committees also suggest dollar amounts for the programs. The House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence are the primary authors of the intelligence budget. The House and Senate Armed Services Committees authorize some defense-related intelligence programs. Appropriation consists of allocating specific dollar amounts to authorized programs. The defense subcommittees of the House and Senate Appropriations Committees perform this function for intelligence.

Technically, Congress may not appropriate money for a program that it has not first authorized. If authorizing legislation does not pass before a congressional session ends, the appropriations bills contain language stating that they also serve as authorizing legislation until such legislation is passed. This can be very important if Congress fails to pass an authorization bill, as was the case for intelligence for fiscal years (FY) 2006 through 2009. (The FY 2010 bill was actually passed in FY 2011.) President George H. W. Bush once vetoed an intelligence authorization bill because Congress had included a requirement that the president give Congress forty-eight hours’ prior notice of covert actions. Congress subsequently passed a refashioned authorization bill omitting that language. The congressional staffer responsible for managing this
piece of legislation was George J. Tenet, who was the staff director of the Senate Intelligence Committee and later would serve as DCI.

Some tension usually can be felt between the authorizers and the appropriators. Authorization and appropriations bills sometimes vary widely. For example, authorizers may approve a program but find that it is not given significant funds—or any funds—by the appropriators. This is called hollow budget authority. Or appropriators may vote money for programs or activities that have not been authorized. These funds are called appropriated but not authorized (or “A not A”). In both cases, the appropriators are calling the tune and taking action that disregards the authorizers. (See box, “Congressional Humor: Authorizers Versus Appropriators.”)

**Congressional Humor: Authorizers Versus Appropriators**

The tension between those who sit on authorizing committees and those who sit on appropriations committees is pithily characterized by a joke often heard on Capitol Hill:

“Authorizers think they are gods; appropriators know they are gods.”

When funds are appropriated but not authorized, the agency receives the money but may not spend it until Congress passes a bill to authorize spending. Sometimes, however, an agency submits a reprogramming request to Congress, asking permission to spend the money, and Congress can informally approve it. If Congress does not pass a new authorization bill or approve a reprogramming request, the money reverts to the Treasury at the end of the fiscal year.

Some congressional staff believe that several factors have begun to give the authorizers more clout. These include the increased difficulty for members of Congress to create earmarks (legislative provisions directing funds to be spent on specific projects); increased member resistance to “appropriated but not authorized” spending; and the general reduction of the budget under sequestration, where the greater programmatic expertise and insight of the authorizers comes more into play.

After the 9/11 Commission (National Commission on Terrorist Attacks upon the United States) issued its report, some discussion emerged about combining intelligence authorization and appropriations into one committee in each chamber. Such a change would end some of the potential budget disconnects. It also would remove intelligence budgets from the defense
appropriations process. However, Congress did not act on the proposal, but in 2007 the House created the Special Intelligence Oversight Panel (SIOP) as an improved link between the authorizers, the House Intelligence Committee, and the appropriators. However, the Republican majority abolished the SIOP in January 2011 at the beginning of the 112th Congress. Instead, the House Intelligence Committee includes three members from Appropriations in some of its hearings and briefings, not as voting members but to give Appropriations insight into the intelligence committee's deliberations and, it is hoped, avoid the legislative disconnects noted earlier.

Congress has debated the issue of making all or part of the intelligence budget public since the 1970s. (See later discussion.) Beginning with FY2007, Congress mandated that the president release the NIP figure for the previous fiscal year. As noted, in October 2010, DNI Clapper released the NIP figure for the previous year—$53.1 billion—and, for the first time, the Defense Department released the MIP figure—$27 billion. The declassification of the aggregate intelligence budget has some implications for Congress. It had been the practice, when the intelligence budget was classified, to “hide” the numbers in the defense authorization and appropriations bills. This is no longer necessary; it is theoretically possible to have a freestanding intelligence budget, the aggregate of which would be public, although the details would remain classified. This would not affect the jurisdictions of the various authorizing committees to work on their respective portions of the intelligence budget, but it does raise the question of which appropriations committee then has jurisdiction, because there is no intelligence appropriations subcommittee. The easiest solution would be to leave the appropriations bills with the defense subcommittees, but there may be some sentiment to create intelligence subcommittees that would be less likely to make trades between defense programs and intelligence programs. Past efforts to create an intelligence appropriations subcommittee have not been successful. DNI Clapper has spoken out in favor of separating the NIP from the defense budget. In 2013, the House again voted against such a provision.

The centrality of the budget to oversight should be obvious. In reviewing the president’s budget submission and crafting alternatives or variations, Congress gets to examine the size and shape of each agency, the details of each program, and the plans for spending money over the next year. No other activity offers the same degree of access or insight. Moreover, given the constitutional requirement for congressional approval of all expenditures, in no other place does Congress have as much leverage as in the budget process.

Critics of the annual budget process argue that it not only gives Congress insights and power but also subjects the executive branch to frequent fluctuations in funding levels, given that they can vary widely from year
to year. Every executive agency dreams of having multiyear appropriations or **no-year appropriations**—that is, money that does not have to be spent by the end of the fiscal year. Although some funds are allocated in these ways, Congress resists doing so on a large scale, because such a move would fundamentally undercut its power of the purse. Appropriated funds that are not spent at the end of a fiscal year are returned to the U.S. Treasury. Each agency keeps careful watch over its spending to ensure that it spends all allocated funds by the end of the fiscal year. The OMB also monitors agencies' spending rates throughout the fiscal year to ensure that they are not spending either too quickly or too slowly.

Congress has, in recent years, used **supplemental appropriations** bills with increasing frequency for intelligence. Basically, supplemental appropriations make available to agencies funds over and above the amount originally planned. In the case of an unforeseen emergency, the requirement for a supplemental bill is easily understood. This is often true for ongoing military or intelligence operations. But when supplements are used on a recurring basis—perhaps annually—they become problematic. Supplemental appropriations are single-year infusions of money. Although no guarantee is made for the size of any appropriation from year to year, supplementals are seen as being riskier in terms of the likelihood that they will be used again. Thus, if a crucial activity is being funded by supplemental appropriations, it may be necessary in the following year either to terminate the activity for lack of funds or to curtail some other activity in the budget (called “taking it out of hide”). Clearly, agencies would prefer to have the supplemental funds included in the base—that is, added to their regular budget, so they can plan more effectively for the ensuing years. Congress has been unwilling to do this, largely as a means of controlling growth, despite the effect that repeatedly passing supplementals has had on programs. The use of supplementals has become so regular that both Congress and executive agencies often plan for them at the beginning of a budget cycle. This became a significant issue for intelligence in 2013 as operational funds tied to the wars in Iraq and Afghanistan—called OCO, or overseas contingency operations—began to be cut back and were not put into the budget base.

The budget gives Congress power over intelligence. In the 1980s, for example, Congress used the intelligence budget to restrict the Ronald Reagan administration (1981–1989) policy in Nicaragua, passing a series of amendments, sponsored by the chairman of the House Permanent Select Committee on Intelligence, Edward P. Boland, D-MA, that denied combat-support funds for the contras. Efforts to circumvent these restrictions led to the Iran-contra scandal. But this budget power only works if the House and Senate are in agreement. For the past several years, the two houses have
been divided over the future of imagery satellites, especially in the aftermath of the Future Imagery Architecture (FIA) debacle. (See chap. 5.) The House supported the DNI/Defense compromise to build new “large” satellites, but the Senate has been adamant about also building some smaller imagery satellites. The result has been deadlock and was one of the reasons why no intelligence authorization bill passed for five years.

As noted above, the 2014 omnibus appropriations bill included language in the classified annex preventing the shift of responsibility for UAV-based attacks from CIA to Defense because of the qualms of some members over how Defense would conduct these operations.

Hearings. Hearings are essential to the oversight process as a means of requesting information from responsible officials and obtaining alternative views from outside experts. Hearings can be open to the public or closed, depending on the subject under discussion. Given the nature of intelligence, a majority of the hearings of the two intelligence committees are closed.

Hearings are not necessarily hostile, but they are adversarial; they are not objective discussions of policy. Each administration uses hearings as a forum for advancing its specific policy choices and as opportunities to sell policy to Congress and to interested segments of the public. Congress understands this and is a skeptical recipient of information from the executive branch, regardless of party affiliation. Intelligence officials are somewhat exempt from selling policy in that they often give Congress the intelligence community’s views on an issue without supporting or attacking a given policy. They gain some protection from congressional recriminations because of the line separating policy and intelligence, unless they are perceived as having crossed that line. Again, this was a concern for some members of Congress in the case of Iraq WMD. (Executive branch policy makers may also perceive the intelligence community’s congressional testimony as unsupportive or as undermining policy, even if that was not the intelligence community’s intent.) However, when intelligence officials testify about intelligence policies—capabilities, budgets, programs, intelligence-related controversies—they are also in a sales mode vis-à-vis Congress.

Hearings are often followed by questions for the record (QFRs or “kew-fers”) submitted to the witnesses and their agencies by members or their staffs to follow up on issues that surfaced during the hearings. Although QFRs give the executive branch an opportunity to make its case again or to add new supportive information, the requests are often viewed as punitive homework assignments. QFRs can also be used by Congress as a tool (or weapon) in a struggle with an agency that seems unwilling to offer information or is stubborn about certain policies.
**Nominations.** The ability to confirm or reject nominations is a profound political power, which resides in the Senate. Nominations for the DCI were not controversial until 1977, when President Jimmy Carter’s nominee, Theodore Sorensen, withdrew his nomination after appearing before the Senate Select Committee on Intelligence and responding to a number of issues that had been discussed publicly about him. The issues included Sorensen’s World War II status as a conscientious objector, which raised questions about his willingness to use covert action; and the possible misuse of classified documents in his memoirs as well as his defense of Daniel Ellsberg, who leaked to the press the classified Pentagon Papers (a DOD study of the Vietnam War), which raised concerns about his ability to protect intelligence sources and methods.

Since 1977, the Senate has held several other controversial DCI nominee hearings. Robert M. Gates withdrew his first nomination in 1987 as the Iran-contra scandal unfolded. His second nomination, in 1991, featured a detailed investigation of charges that Gates had politicized intelligence to please policy makers. In 1997, Anthony Lake withdrew his nomination at the onset of what promised to be a grueling and perhaps unsuccessful series of hearings.

Critics of the nomination process—not just of intelligence positions but across the board—charge that it has become increasingly political and personal, delving into issues that are not germane to a nominee’s fitness for office. Defenders of the process respond that it is a political process, that the Senate is not supposed to be a rubber stamp, and that careful scrutiny of a nominee may preclude embarrassments later on. Regardless of which view is correct, the nomination process has become so formidable that it has convinced some potential nominees to decline office.

One of the tools available to senators that some find objectionable is the ability to put a “hold” on any pending Senate matter, effectively suspending action until the hold is lifted. Since all Senate business requires unanimous consent (or a UCR, a unanimous consent request), a hold undercuts this requirement. One aspect of the senatorial hold that some find objectionable is the fact that a hold can be placed anonymously, although the Senate rules now require that this anonymity be lifted after two days. Holds are usually lifted after the senator’s specific concerns are met. Holds can be placed on nominations. In 2007, Sen. Ron Wyden, D-OR, put an indefinite hold on the nomination of John Rizzo to be CIA general counsel. At issue was the advice that Rizzo, a career-long CIA attorney who had served as acting general counsel for long periods, had given concerning interrogation techniques for terrorist suspects. Facing strong Democratic opposition, Rizzo requested that his nomination be withdrawn.
Treaties. Advising and consenting to an act of treaty ratification is also a power of the Senate. Unlike nominations, which require a majority vote of the senators present, treaties require a two-thirds vote of those present. Intelligence became a significant issue in treaties during the era of U.S.–Soviet arms control in the 1970s. The ability to monitor adherence to treaty provisions was and is an intelligence function. U.S. policy makers also called on the intelligence community to give monitoring judgments on treaty provisions—that is, to adjudicate the likelihood that significant cheating would be detected. The Senate Select Committee on Intelligence, created in 1976, was later given responsibility for evaluating the intelligence community’s ability to monitor arms control treaties. The committee gave the Senate another lever with which to influence intelligence policy. As noted, in 1988 the Senate Select Committee on Intelligence, on evaluating the Intermediate Nuclear Forces (INF) Treaty and concerned about the upcoming Strategic Arms Reduction Treaty (START), demanded the purchase of additional imagery satellites, which the Reagan administration did not want but agreed to nonetheless. Similar issues resurfaced in 2010 when some Republican senators questioned the new START treaty that President Obama had signed with Russia in April 2010. Although the main objections centered on the ability to modernize the U.S. nuclear arsenal, issues concerning the ability to verify were also raised. Treaty proponents, as they have in the past, argued that an arms control treaty offers greater transparency and insight into Russian forces given the treaty’s verification requirements, a position also taken by the Joint Chiefs of Staff.

In 2013, when President Obama expressed willingness to consider Russia’s offer that Syria hand over its entire chemical weapons (CW) arsenal, many experts noted the difficulty of monitoring and verifying such an agreement, assuming it could be negotiated. Such an agreement presumably would not be a treaty, but the same intelligence concerns would arise. It is likely that similar concerns will arise as the United States and other powers enter into a nuclear agreement with Iran.

Reporting Requirements. The separation of powers between the executive branch and the legislative branch puts a premium on information. The executive branch tends to forward information that is supportive of its policies; Congress tends to seek fuller information to make decisions based on more than just the views that the executive branch volunteers. One of the ways Congress has sought to institutionalize its broad access to information is to levy reporting requirements on the executive branch. Congress often mandates that the executive branch report on a regular basis (often annually) on specific issues, such as human rights practices in foreign nations, the arms control
impact of new weapons systems, or, during the cold war, Soviet compliance with arms control and other treaties.

Reporting requirements, which grew dramatically in the aftermath of the Vietnam War, raise several issues. Does Congress require so many reports that it cannot make effective use of them? Do the reports place an unnecessary burden on the executive branch? Would the executive branch forward the same information if there were no reporting requirements? To give some sense of the scope of activity involved, in 2002 the House Intelligence Committee said it had asked for eighty-four reports in the past year, most of which were either late or incomplete. The House Intelligence Committee’s May 2012 report accompanying the FY2013 intelligence authorization bill noted that it had voted to repeal or modify six reporting requirements “so as to alleviate the burden on the IC” (intelligence community). The committee took cognizance of the many reporting requirements but also defended the concept as “a critical part of Congressional oversight.” The DNI had nominated thirty reports for repeal; the House Intelligence Committee had agreed that half of those nominated might be repealed but also took into account the views of other congressional committees.

An important but less visible adjunct to reporting requirements is congressionally directed actions, or CDAs. CDAs are most often studies that the intelligence community (or other executive agencies) is tasked to conduct by Congress, most often via the intelligence authorization act. CDAs are but one more opportunity for Congress to get the information it desires from the executive branch. As a rule, the offices responsible for producing the CDAs find them bothersome and intrusive. CDAs can be a dangerous tool in that they are cost-free for members of Congress and their staff. They have to do no more than levy the requirement. But CDAs do impose time-consuming costs on the executive agencies to which they are sent. In some years, the number of CDAs has been onerous. CDAs, like other reporting requirements, also raise questions about their utility and the degree to which Congress uses them for substantive reasons.

Investigations and Reports. One of Congress’s functions is to investigate, which it may do on virtually any issue. The modern intelligence oversight system evolved from the congressional investigations of intelligence in the 1970s. Investigations tend to result in reports that summarize findings and offer recommendations for change, thus serving as effective tools in exposing shortcomings or abuses and in helping craft new policy directions. The two intelligence committees regularly report publicly on issues that have come before them. These reports may be brief because of security concerns, but they assure the rest of Congress and the public that effective oversight is being carried out, and they create policy documents that the executive branch must consider.
Just as the executive branch has come to rely more on outside commissions for intelligence issues, Congress has increasingly created investigations of its own. After the September 11, 2001, terrorist attacks, Congress conducted a joint inquiry, which consisted of the House and Senate Intelligence Committees. The Senate committee also undertook a long study of intelligence on Iraq WMD. The dynamics of these investigations are different from those created in the executive branch. First, by definition, Congress is a partisan place, made up of a party that supports the president on most issues and one that opposes the president. This can always affect an investigation. Second, Congress has some responsibility for the performance of intelligence by virtue of its control of the budget and its oversight. Thus, Congress’s ability to be objective about its own role comes into question.

Each of these levers—hearings, reports, QFRs, CDAs, investigations—is part of the larger struggle over information that is central both to oversight and to friction between Congress and the executive branch. Essentially, Congress needs and wants information and the executive branch wants to limit the information that it provides, especially information that may not be supportive of preferred executive-branch policies. As with so much else, beyond barebones agreements on information that must be shared (budget justifications, treaty texts, background information on nominees), the remainder falls into a gray zone of debate. Therefore, struggles over information are constant in the oversight relationship. For example, in the 109th and 110th Congresses (2005–2008), issues related to policies to combat terrorism became regular information battlegrounds. Members of Congress sought information (usually internal administration papers) on wiretapping and interrogation techniques. These struggles for information become especially important when the issue at hand is vague or may be breaking new ground, perhaps apart from legislation, as was the case in these two issues. Congress can issue subpoenas, but both branches usually seek to avoid taking the matter to court, in part because this involves yet a third branch of government in the decision. Congress can also deny funding or hold up action on legislation or nominees. Similarly, the degree to which Congress had been apprised of the details and scope of the various NSA programs that had been leaked in 2013 also became oversight issues. (See below for a fuller discussion.)

**Hostages.** If the executive branch disagrees with Congress about some issue, Congress may seek means of forcing it to agree. One way is to take hostages—that is, to withhold action on issues that are important to the executive branch until the desired response by the executive branch is given. This type of behavior is not unique to Congress; intelligence agencies use it as a bargaining tactic in formulating national intelligence estimates (NIEs) and other interagency products.
During the debate on the INF Treaty, the demands of the Senate Select Committee on Intelligence for new imagery satellites was one case of hostage taking. In 1993, Congress threatened to withhold action on the intelligence authorization bill until the CIA provided information on a Bill Clinton administration DOD nominee, Morton H. Halperin. Halperin, who had publicly criticized U.S. covert actions in the 1970s and 1980s, eventually withdrew his nomination for the newly created post of assistant secretary of defense for democracy and peacekeeping. In 2001, the intelligence committees “fenced” (put a hold on) certain funds for intelligence to prod the George W. Bush administration into nominating a new CIA inspector general. Critics argue that hostage taking is a blunt and unwieldy tool; supporters argue that it is used only when other means of reaching agreement with the executive branch have failed.

**Prior Notice of Covert Action.** One of Congress’s main concerns is that it receives prior or timely notice of presidential actions. Most members understand that prior notice is not the same as prior congressional approval, which is required for few executive decisions. Covert action is one of the areas that have been contentious. As a rule, Congress receives advance notice of covert action in a process that has been largely institutionalized, but successive administrations have refused to make prior notice a legal requirement. A congressional demand for at least forty-eight hours’ notice led to the first veto of an intelligence authorization bill, by President George H. W. Bush in 1990. In 2008, the House Intelligence Committee threatened to fence money for all covert actions unless it is briefed on each of them.

The Senate Intelligence Committee’s 2013 summary of its activities in the 112th Congress (2011–2012) states that during each quarter Congress receives a written report on each covert action being carried out under a presidential finding.

As noted in chapter 8, some covert actions are debated openly by officials in the executive branch and by members of Congress. This does not violate any laws but does undercut the plausible deniability of the action. Most recently, this has been the case with the Obama administration’s overt and covert plans to send arms to the Syrian rebels. Members of Congress have voiced concerns over both programs.

**Issues in Congressional Oversight**

Oversight of intelligence raises a number of issues that are part of the “invitation to struggle,” as the separation of powers has often been called.
How Much Oversight Is Enough? From 1947 to 1975—the first twenty-eight years of the modern intelligence community’s existence—the atmosphere of the cold war promoted fairly lax and distant congressional oversight. A remark by Sen. Leverett Saltonstall, R-MA (1945–1967), a member of the Senate Armed Services Committee, characterized that viewpoint: “There are things that my government does that I would rather not know about.” This attitude was partly responsible for some of the intelligence agency abuses that investigations uncovered in the 1970s.

Working out the parameters of the intelligence oversight system has not been easy. Successive administrations, regardless of party affiliation, have tended to resist what they have seen as unwarranted intrusions. There is no objective way to determine the proper level of oversight. Committees review each line item on the budget. They do so to make informed judgments on how to allocate funds, which is Congress’s responsibility. Reviewing specific covert actions may seem intrusive to some, but it represents an important political step. If Congress allows the operation to proceed unquestioned, the executive branch can claim that it had political support should problems arise later. Similarly, serious questions raised by Congress are a signal to rethink the operation, even if the ultimate decision is to go ahead as planned.

Does rigorous oversight require just detailed knowledge of intelligence programs, or does it require something more, such as information on alternative intelligence policies and programs? Congress has, on occasion, taken issue with the direction of intelligence policy and acted either to block the administration, such as with the Boland amendments that prohibited military support to the contras, or to demand changes, such as with the purchase of the arms control–related satellites.

Recently, the buzzword “transparency” has gained currency in congressional discussions of intelligence programs. It may strike some as odd to use the word transparency when talking about activities that are usually secret, but the word is simply another way of Congress asking for more insight into and information about certain activities. The activities that have been most often cited as requiring more transparency have been the use of armed drones and the NSA surveillance programs.

Secrecy and the Oversight Process. The high level of security that intelligence requires imposes costs on congressional oversight. Members of Congress have security clearances (through top secret) by virtue of having been elected to office. Members must have clearances to carry out their duties. Only the executive branch can grant security clearances, but there is no basis for its granting or denying clearances to members of Congress, as this would
violate the separation of powers. At the same time, member clearances do not mean full access to the entire range of intelligence activities. Congressional staff members who require clearances receive them from the executive branch after meeting the usual background checks and demonstrating a need to know. Congressional staffers are not polygraphed as a prerequisite for clearances, as are employees in most (but not all) intelligence agencies and national security–related agencies.

All members are deemed to be cleared, but both the House and Senate limit the dissemination of intelligence among members who are not on the intelligence committees. Although this limitation replicates the acceptance of responsibility that all congressional committees have, in the case of intelligence it entails additional burdens for the panels, as their information cannot be easily shared. Thus, the intelligence committees require special offices for the storage of sensitive material and must hold many of their hearings in closed session. Both houses have also created different levels of notification for members about intelligence activities, depending on the sensitivity of the information. Intelligence officials may brief only the House and Senate leadership (known as the Gang of 4), the leaders and the chairmen and ranking members of the intelligence committees (known as the Gang of 8), some additional committee chairmen as well, or the full intelligence committees. These more limited briefings have no basis in statute, but the practice of the executive branch providing limited briefings predates the intelligence committees.

This issue became extremely controversial in 2009–2010. At issue was whether Congress had been briefed on “enhanced interrogation techniques” being used against terrorists, including waterboarding. House Speaker Nancy Pelosi, D-CA, insisted that she had never been briefed on the use of such techniques, only on the fact that these techniques might be used. DCIA Panetta insisted that members had been briefed correctly. The discussion quickly descended into a shrill and highly partisan debate in both houses and included the issue of CIA’s veracity when briefing Congress, which Pelosi and others questioned, and the issue of who decides which members get briefed, with Pelosi advocating larger groups and less frequent use of the Gang of 8 or Gang of 4. President Obama then threatened to veto the intelligence authorization bill, which included new provisions largely eliminating the Gang of 8 briefings. He also threatened to veto a less onerous Senate version of the bill and a redrafted House version. As often happens in Congress, other issues merged into the briefing issue. Because Pelosi would not allow a bill to reach the House floor that she did not believe was strong enough, senators threatened to stall on the nomination of Clapper to be the DNI, replacing DNI Blair, who had stepped down in May 2010. Some nineteen months after the
controversy began, the House and Senate agreed on a slightly altered briefing procedure. Under the new agreement, Gang of 8 briefings continue; the full committees are to be notified of covert action findings 180 days after a briefing unless the president states in writing that the issue remains sensitive. All intelligence committee members are given a general description of the briefing but no details.

Despite these precautions that limit access and the internal rules intended to punish members or staff who give out information surreptitiously, Congress as an institution has the undeserved reputation of being a fount of leaks. This image is propagated mainly by the executive branch, which believes that it is much more rigorous in handling classified information. In reality, most leaks of intelligence and other national security information come from the executive branch, not from Congress. (In 1999, DCI Tenet admitted before a congressional committee that the number of leaks from executive officials was higher than at any time in his memory.) This is not to suggest that Congress has a perfect record on safeguarding intelligence material, but it is far better than that of the CIA, State Department, DOD, or the staff of the NSC. The reason is not superior behavior on the part of Congress so much as it is relative levers of power. Leaks occur for a variety of reasons: to show off some special knowledge, to settle scores, or to promote or stop a policy. Other than showing off, members of Congress and their staffs have much better means than leaks to settle scores or affect policy. They control spending, which is the easiest and most effective way to create or terminate a policy or program. Even minority members and staff can use the legislative process, hearings, and the press to dissent from policies or attempt to slow them down. Officials in the executive branch do not have the same leverage and therefore resort to leaks more frequently. However, the misperception of Congress as a major leaker persists.

The other issue raised by secrecy is Congress’s effectiveness in acting as a surrogate for the public. The U.S. government ostensibly operates on the principle of openness: Its operations and decisions should be known to the public. (The Constitution does not mention the public’s right to know, however. The Constitution safeguards freedom of speech and of the press, which are not the same as a right to all information relating to government activities.) In the case of intelligence, the principle of openness does not apply. Some people accept the reasons for secrecy and the limitations that it imposes on public accountability. Others have concerns about the role of Congress as the public’s surrogate in executive oversight. Their reasons vary, from doubts about the executive branch’s willingness to be forthcoming with Congress to concerns about Congress’s readiness to air disquieting information.

Another oversight access issue that arose at the same time as the Gang of 8 issue was the desire by some members to give the Government Accountability
Office (GAO) greater access to intelligence programs. The GAO was created in 1921 (as the General Accounting Office) with broad authority to support Congress by investigating how federal money is spent. This usually involves audits or performance reviews of ongoing programs. Although the GAO had some access to intelligence programs, such as some defense special access programs (called SAPs), the GAO was largely excluded from intelligence for many decades, much to its chagrin. Obama threatened to veto the bill over the provision granting the GAO more access. The compromise language added to the legislation left it to the DNI to prepare a directive concerning GAO access to intelligence. DNI Clapper’s directive, issued in 2011, mandated intelligence community cooperation with the GAO with certain limitations on information that would not be passed: intelligence on sources and methods, information related to covert action, and “information that falls within the purview of the congressional intelligence oversight committees.” Supporters of GAO access found this last phrase problematic because it is so broad, but it was generally agreed that the directive improved GAO access overall.

**Congress and the Intelligence Budget.** A recurring issue for Congress has been whether to reveal some aspects of the intelligence budget. Article I, Section 9, paragraph 7, of the Constitution requires that accounts of all public money be published “from time to time.” This phrase is vague, which allowed each successive administration to argue that its refusal to disclose the details of intelligence spending was permissible. Critics contended that this interpretation vitiated the constitutional requirement to publish some account at some point. Most advocates of publication were not asking for a detailed publication of the entire budget but wanted to know at least the total spent on intelligence annually. (See box, “Intelligence Budget Disclosure: Top or Bottom?”)

**Intelligence Budget Disclosure: Top or Bottom?**

One of the curiosities of the debate over intelligence budget disclosure was the term used for the number most at issue. The overall spending total for intelligence was alternatively described as the “top line number” or the “bottom line number.” It sometimes sounded as if people on the same side—those in favor of or opposed to disclosure—were at odds with themselves.

The argument over publishing some part of intelligence spending came to a head in 1997, when DCI Tenet revealed that overall intelligence spending for fiscal year 1998 was $26.6 billion. He provided the number in response...
to a Freedom of Information Act suit, acting to end the suit and to limit the information that the intelligence community revealed. Tenet later refused to divulge the amount requested or appropriated for fiscal year 1999, arguing that to do so would harm national security interests and intelligence sources and methods. Various attempts to make publishing the overall intelligence budget mandatory failed over disagreements between the House and Senate until July 2007, when Congress passed a requirement to do so as part of a bill implementing the recommendations of the 9/11 Commission. The law requires the DNI to disclose the aggregate amount appropriated in the NIP, beginning one month after the end of the previous fiscal year. (In the federal budget process, fiscal years end on September 30 and begin on October 1.) The law requiring the disclosures allows the president to delay or waive release of the NIP figure if the president informs the intelligence committees that disclosure would damage national security. To date, this has not happened and is increasingly unlikely because, since October 2010, the DNI and DOD have released both the NIP and MIP figures for the previous year. Moreover, the amount being requested for the NIP in FY2012 was revealed in early 2011, the first time that a NIP request (as opposed to the previous year’s appropriation) had been declassified. The release of NIP and MIP requests has now become the normal practice.

There is no inclination on the part of DNI or DOD to give more public detail on how intelligence dollars are spent, either by activity or by agency. Does this limited disclosure satisfy the constitutional requirement? The basic lines in the debate remain as they were before. Proponents of disclosure cite, first and foremost, the constitutional requirement for publication. They also argue that disclosure of this one number poses no threat to national security, because it reveals nothing about spending choices within the intelligence community.

Proponents of continued secrecy tend not to cite the “time to time” language of the Constitution, which is a weak argument at best. Instead, they argue that Congress is privy to the information and acts on behalf of the public. They also say that disclosure of the overall amount could be the beginning of demands for more detailed disclosure. Noting how little this one number reveals (and implicitly accepting their opponents’ argument that its disclosure would not jeopardize security), proponents of continued secrecy contend that the initial disclosure would inexorably lead to pressure for more detailed disclosures about specific agency budgets or programs and that these disclosures would have security implications.

Disclosing the overall number entails political risks for U.S. intelligence. Relating spending to outputs is more difficult for intelligence than it is for virtually any other government activity. How much intelligence should $80.1
billion (or any other figure) buy? Should output be assessed by the number of reports produced? The number of covert actions undertaken? The number of spies recruited? Moreover, the overall number—which does not strike many as a small sum—leads some people to question intelligence community performance. Statements along the lines of “How could they miss that coup (or lose that spy) when they have $80.1 billion?” would ensue. Such sentiments would add little to a meaningful debate about intelligence because these types of questions reveal a lack of appreciation for how intelligence functions. The budget is not neatly divided into specific issues (for example, terrorism or China). Rather, it funds activities (collection, analysis, systems administration, and so on), which are then allocated by senior managers into the areas where they are deemed to be most needed. Moreover, the intelligence community does not have the luxury of concentrating on just a few issues and disregarding the others or putting them on hold until resources are available or the issues grow critical. The intelligence agencies devote resources to a very large array of issues at any one time. Therefore, the overall budget figure offers virtually no insight into how well intelligence should be able to perform on any given issue or across the board.

Exactly this type of discussion followed after the release of details of the NIP in 2013 as part of the Snowden leaks. Journalists tended to focus on a few numbers and then made fairly broad and often inaccurate assumptions about what these said about U.S. intelligence priorities or activities. (As noted earlier, these numbers remain classified despite their having been published and therefore cannot be discussed further.)

The general trajectory of the budget also affects how Congress deals with it. As would be expected, it is easier dealing with a growing budget than with a static or declining budget. But even in a growing budget, there will be differences between the branches and among members of Congress as to where the additional dollars should be spent. Also, Congress will always be on the lookout for waste, which tends to happen more in times of plenty than of want. Static or declining budgets are more difficult as choices have to be made between what is maintained and what is cut. One of the agreed “lessons” of the 1990s intelligence budget reductions is that across-the-board cuts are the wrong way to deal with the problem and are more harmful. Indeed, DNI Clapper, when faced with the decline of the intelligence budget, said that he would not repeat that mistake and that he would select “winners and losers.” However, the DNI lost some of that ability once sequestration began, as Congress mandated equal percentage cuts across all intelligence budget program elements. As shown in Table 10.1, the intelligence budget peaked in FY2010 at $80.1 billion ($53.1 billion NIP; $27 billion MIP). The request for FY2014 was $70.8 billion ($54.2 billion NIP; $18.6 billion MIP). The FY2014

Copyright ©2015 by SAGE Publications, Inc. This work may not be reproduced or distributed in any form or by any means without express written permission of the publisher.
request had been $62.8 billion total, but the Obama administration added $4 billion to each program for war-related expenses.

Finally, just as the budget is Congress’s main means of control over the intelligence community, it is also the locus of Congress’s responsibility for how well intelligence performs. Congress ultimately decides which satellites are built, how many are built, and how many analysts and clandestine officers the intelligence community can afford to have on its payroll. Although this was self-evident, it did not become an issue until after the 2001 terrorist attacks. Some people observed that Congress bore some responsibility for intelligence performance because of the steep decline in resources devoted to intelligence after the fall of the Soviet Union in 1991. Budgets were cut and, according to DCI Tenet, the equivalent of 23,000 positions were lost over the decade of the 1990s, affecting performance and capabilities. As one senior official observed, the decision at the time was “to cut people not programs.” This Congressional responsibility apparently became a controversial issue within the joint inquiry, as some members wanted to take note of this responsibility and others refused. Ultimately, the joint inquiry’s report did not address the issue. Given that the Joint Inquiry was actually a combination of the House and Senate Intelligence Committees, some critics felt they had not been forthright in addressing their own responsibilities.

Regulating the Intelligence Community. Since the end of World War II, Congress has passed only two major pieces of structural intelligence legislation: the National Security Act of 1947 and the Intelligence Reform
and Terrorism Prevention Act of 2004. Thus, the structure of the intelligence community was remarkably stable throughout the cold war and the immediate post–cold war period. Only as a result of the terrorist attacks and the issue of WMD in Iraq was there sufficient political impetus to foster major changes. (See chap. 14.) Four presidents have issued extensive EOs on intelligence—Gerald R. Ford in 1976, Jimmy Carter in 1978, Ronald Reagan in 1981, and George W. Bush in 2004 and 2008—the latter of which updated President Reagan’s 1981 executive order, EO 12333, which remains one of the fundamental documents in U.S. intelligence.

President George Washington issued the first executive order under his presumed authority, setting a precedent. Each president since also has done so. No specific constitutional power grants a president this authority. The authority to write EOs stems from the president’s obligation, under Article II, Section 3, to “take Care that the laws be faithfully executed.” EOs are legal documents but may not conflict with a law or a judicial decision. Thus, they sometimes tend to operate in areas where there is neither legislation nor judicial decisions. The major advantage of EOs is that they give presidents the flexibility to make changes in the intelligence community to meet changing needs or to reflect their own preferences about how the intelligence community should be managed or its functions limited. The major disadvantages of EOs are that they are impermanent, subject to change by each president (or even by the same president); they are not statutes and therefore are more difficult to enforce; and they give Congress a limited role. (As a rule, the executive branch has made Congress privy to drafts of executive orders in advance of their promulgation and has given Congress opportunities to comment on them.)

Despite the difficulty that Congress and the executive branch have experienced in making legislative changes, they offer the advantages of being permanent, of being statutes in law and therefore more enforceable, and of allowing Congress a major and proper role. However, legislation is more likely to raise major disputes between Congress and the executive branch and thus is more difficult to enact. Congress is also more likely to harbor several points of view on major intelligence issues than is the executive branch, where the major issues tend to be agency-parochial in nature. This divergence of views within Congress was evident during the debate on the 2004 intelligence reform bill.

The split between the House and Senate Intelligence Committees over attacks on U.S. citizens, an outgrowth of the Anwar al-Awlaki case, is instructive. As of early 2014, the Senate favored an additional review process for such attacks, and the House opposed this. The Senate committee also supported an annual public report on the casualties resulting from drone strikes, which the House committee also opposed.
Similarly, the NSA programs that became controversial after the Snowden leaks also underscored the problem. The two most controversial programs were based on sections of the PATRIOT Act, sections 215 and 702. The legislation provided authorization for certain activities but not specifics about how they would be conducted. Some members expressed the view that the actual conduct of the collection exceeded what they thought they had approved. In his January 2014 speech, President Obama defended the legality and the conduct of the collection.

Given the more permanent nature of legislation, some people question whether certain regulations should not be made statutory largely because the actions they cover are embarrassing or inappropriate. However, if legislation lists proscribed activities, does it implicitly permit those activities that are not listed? No one wants to or is likely able to come up with a comprehensive list of activities that should either be explicitly permitted or banned. Moreover, some activities will likely enter into a gray zone of interpretation. The debate over torture or—more correctly—what constitutes torture, is a good example. Few people would advocate the use of torture. Moreover, torture is specifically banned in the Constitution. The Eighth Amendment bans “cruel and unusual punishment.” But few people would be comfortable going over a list of techniques and then choosing which ones should be specifically permitted in legislation.

The parameters of congressional oversight are usually not dealt with in legislation. All congressional committees are created as part of the rules of the House and Senate. The same is true for jurisdiction and membership. The National Security Act does specify types of intelligence information that have to be shared with Congress, such as that relating to covert action, but the law is written as a requirement levied on the executive branch. During the debate over the 2004 legislation, some suggested combining the two intelligence committees into one joint committee, an old issue, for reasons of security and to reduce the time executive officials have to spend testifying, often on the same subject, before more than one committee. As has been the case in the past, congressional organization was not legislated and was left to the respective chambers.

The Issue of Co-Option. As eager as Congress is to be kept informed about all aspects of policy, a cost is incurred when it accepts information. Unless members raise questions about what they are told, they are, in effect, co-opted. Their silence betokens consent, as the maxim of English law says. They are free to dissent later on, but the administration will be quick to point out that they did not raise any questions at the time they were briefed. Having been informed before the fact tends to undercut Congress’s freedom of action after the fact.
This dynamic is not unique to intelligence, but intelligence makes it somewhat more pointed. The nature of the information, which is both secret and usually limited to certain members, makes co-option more easily accomplished and has more serious consequences. It also puts additional pressure on the members of the intelligence committees, who are privy to the information and are acting on behalf of their entire body.

Congress has no easy way to avoid the inherent exchange of foreknowledge and consent. It is unlikely to revert to the trusting attitude expressed by Senator Saltonstall. Nor can Congress be expected to raise serious questions about every issue just to establish a record that allows it to dissent later on.

This became an issue after the Snowden leaks revealed the NSA collection programs in 2013. The leadership of both intelligence committees defended the programs and noted that they had been briefed on them. According to press reports, briefings to Congress about this type of collection dated to 2001. Most, but not all of the members who raised concerns over the NSA programs, were not on the intelligence committees, creating a divide based in large part on access. Congress is part of a delegated system: Members stand in for their constituents in terms of knowing about certain government activities, and certain committees stand in for the broader membership of both houses. This tends to be generally accepted, except when highly classified and controversial programs are revealed. In July 2013, a coalition of conservative and liberal members in the House attempted to curtail the NSA program via an amendment to the Defense appropriations bill. The debate pitted the House leadership and the intelligence committee against the amendment’s supporters. The amendment was defeated in a close vote, 217–205.

The Snowden leaks also raised once again the issue of how forthcoming executive branch witnesses should be when testifying on intelligence matters, especially in unclassified sessions. In a case that was very reminiscent of the Richard Helms testimony controversy in 1973 (see chap. 13), Sen. Ron Wyden, D-OR, a longtime critic of many collection programs, asked DNI Clapper in an unclassified hearing for a “yes or no” response as to whether NSA collects “any type of data at all on millions or hundreds of millions of Americans?” Clapper answered that NSA did not, at least “not wittingly.” When confronted with this answer after the Snowden leaks, Clapper said he was trying to give the “least untruthful” answer possible, a response that raised obvious criticism. Clapper sent a letter to Senate Intelligence Chairman Sen. Dianne Feinstein, D-CA, explaining why he had given the answer he did, stating that he had misunderstood Wyden’s question, which had begun with the use of the phrase “dossiers,” which was what Clapper said he had focused on. Clapper also said that he had clarified the matter with Wyden as soon as he realized his error.
What Price Oversight Failures? Even when the intelligence oversight system is working well, most members and congressional staff have difficulty running the system so as to avoid all lapses. Most members and staff involved in the process understand the difference between small lapses and large ones. Some of the larger lapses for which Congress has taken the intelligence community to task are these:

- Failure to inform the Senate Intelligence Committee that CIA operatives were directly involved in mining Corinto, a Nicaraguan port, in 1984, during the contra war. The CIA let it appear that the contras had carried this out on their own. When the truth became known, not only did Vice Chairman Daniel Patrick Moynihan, D-NY, resign—although he later changed his mind—but Chairman Barry Goldwater, R-AZ, also reprimanded DCI William J. Casey (1981–1987) in harsh and public terms.

- Failure to inform Congress on a timely basis when agents in Moscow began to disappear, which was later presumed to be the result of the espionage of CIA officer Aldrich Ames. (The assessment as to who caused the losses may have changed as a result of the damage assessment from the Robert Hanssen spy case.) The House Intelligence Committee issued a public report critical of the CIA in 1995, with which the CIA agreed.

- The revelation in 2007 of the existence and subsequent destruction, in 2005, of tapes made in 2002 during the interrogation of two senior al Qaeda members. The CIA insisted that some members had been briefed about the existence of the tapes but none knew about their destruction, which was ordered by the then-head of the NCS, Jose Rodriguez. Rodriguez was subpoenaed to testify before Congress but excused on the request of his attorney, Robert S. Bennett, who had requested immunity for Rodriguez given the possibility of criminal charges. In November 2010, the Justice Department dropped criminal charges related to the tapes’ destruction, citing a lack of evidence.

Congress does have at hand some levers to enforce its oversight. It can reduce the intelligence budget, delay nominations, or, in the case of a serious lapse, demand the resignation of the official involved, although that decision is ultimately up to the official and the president. If the lapse is serious enough and can be traced back to the president, impeachment might be an option. In the cases cited above, Congress did not impose any of these penalties.
But even without inflicting concrete penalties, Congress can enforce its oversight. The loss of officials’ credibility before their major committees is serious in and of itself. As hackneyed as it sounds, much of Washington runs on the basis of trust and the value of one’s word. Once credibility and trust are lost, as happened to Casey in the Corinto affair, they are difficult to regain.

Internal Dynamics of Congressional Oversight

Even though oversight is inherent in the entire congressional process, the way Congress organizes itself to handle intelligence oversight is somewhat peculiar.

Why Serve on an Intelligence Oversight Committee? Members of Congress take office with specific areas of interest, derived from either the nature of their district or state or their personal interests. Most members, at least early in their legislative careers, tend to focus on issues that are most likely to enhance their careers. For most members, intelligence is unlikely to fit any of these criteria. Therefore, why would members spend a portion of their limited time on intelligence?

At first blush, the disadvantages are more apparent than the advantages. Intelligence is, for most members, a distraction from their other duties and from those issues likely to be of greatest interest to their constituents. Few districts have a direct interest in intelligence. The main ones are those in the immediate Washington, D.C., area, where the major agencies are located, and those districts where major collection systems are manufactured. But these are a small fraction of the 435 House districts in the fifty states.

Once involved in intelligence issues, members cannot discuss much of what they are doing or what they have accomplished. Co-option is also a danger. Should something go wrong in intelligence, committee members will be asked why they did not know about it in advance. If they did know in advance, they will be asked why they did not do something about it. If they did not know, they will be asked why not. These are all difficult questions to answer.

Finally, the intelligence budget is remarkably free of pork, that is, projects to benefit a member’s district or state that are earmarked for funding. Therefore, members on the committees have few opportunities to help their constituents.

With all of those disadvantages, why serve? Because some advantages accrue from membership. First, service on the intelligence committees allows members to perform public service within Congress, to serve on a committee where they have few, if any, direct interests. Second, their service gives
members a rare opportunity to have access to a closed and often interesting body of information. Third, it gives members a role in shaping intelligence policy and, because of the relatively small size of the two committees (in the 113th Congress—2013–2014—twenty-one members on the House Intelligence Committee and fifteen on the Senate Intelligence Committee), perhaps a greater role than they would have on many of the other, larger oversight committees. (The House Armed Services Committee, for example, has sixty-two members.) Fourth, membership on the intelligence committee may offer opportunities for national press coverage on high-profile issues about which few people are conversant. Fifth, because members of the two intelligence committees are selected by the majority and minority leadership of the House and Senate, being chosen is a sign of favor that can be important to a member’s career. (Select committees usually have limited life spans, especially in the House. The House Intelligence Committee is called “permanent select” to denote its continued existence, even though it remains “select.”)

There are also some different sensitivities involved in selecting members for the intelligence committees because of the issues they oversee. The party leadership in both houses wants to be sure that members are selected who will not only take their oversight role seriously and will be careful not to disclose classified information but who also reflect that Congress is a serious steward when it handles intelligence. This sensitivity became apparent in late 2006, as then-Representative Pelosi, who would be the Speaker of the House in the 110th Congress in January 2007, considered whom to select as chairman of the House Intelligence Committee. The ranking Democrat on the committee was Rep. Jane Harman, D-CA, with whom Pelosi had a strained relationship. If Pelosi by-passed Harman, next in line was Rep. Alcee Hastings, D-FL. Pelosi found herself caught between the fact that Hastings is an African American, an important constituency in the Democratic caucus and party, and also the fact that Hastings had been impeached by the House in 1988 (when it was controlled by Democrats) and removed from office by the Democratically controlled Senate the following year because of alleged bribery when he served as a federal district court judge. (Pelosi had been among the 413 representatives who voted to impeach Hastings. Hastings was removed from office but acquitted in a federal criminal trial because his alleged co-conspirator refused to testify.) Pelosi eventually decided to by-pass Hastings as chairman as well, finally selecting Rep. Silvestre Reyes, D-TX, instead. Hastings was designated as vice chairman.

The Issue of Term Limits. Service on the House and Senate Intelligence Committees, unlike other committees, was initially limited. Congress adopted term limits for committee membership based on the view that the pre-1975
The oversight system had failed, in part, because the few members involved became too cozy with the agencies they were overseeing.

The major advantage of term limits is the distance that they promote between the overseers and the overseen. Limited terms also make it possible for more members of the House and Senate to serve on the intelligence committees, thus adding to the knowledgeable body necessary for informed debate.

Term limits also carry disadvantages. Few members come to Congress with much knowledge of, and virtually no experience with, intelligence. Because it can be arcane and complex, requiring some time to master, members are likely to spend some portion of their tenure on the committee simply learning about intelligence. Once they have become knowledgeable and effective, they are nearing the end of their term. Term limits also make service on the intelligence committees less attractive, because they reduce the likelihood that a member can become chairman through seniority.

In 1996 Larry Combest, R-TX, who was then chairman of the House Intelligence Committee, testified that he thought it was time to consider longer tenure on the committee, which would be to Congress’s advantage. Members on the House committee, however, are still limited to eight years’ service; the chairman and ranking minority member can serve for up to ten years. In 2004, the leaders of the Senate Intelligence Committee, Pat Roberts, R-KS, and John D. Rockefeller IV, D-WV, also spoke out in favor of revising the limits, which had been dropped for the Senate panel.

**Bipartisan or Partisan Committees?** The Senate and House Intelligence Committees are distinctly different in composition. Typically, the ratio of seats between the parties on committees in both chambers roughly reflects the ratio of seats in each chamber as a whole. The Senate Intelligence Committee has always been exempt from this practice, with the majority party having just one more seat than the minority. Moreover, the ranking minority member is always the vice chairman of the Senate committee. The Senate leadership took these steps in 1976 to minimize the role of partisanship in intelligence. When the House Intelligence Committee was formed in 1977, the House Democratic leadership rejected the Senate model, insisting that membership on the committee be determined by the parties’ ratio in the House, which reflected the will of the people as expressed in the last election.

A bipartisan committee offers opportunities for a more coherent policy, because the committee is removed—as far as is possible—from partisanship. A committee united on policy and not divided by party may also have more influence with the executive branch. In the case of the Corinto mining, Chairman Goldwater and Vice Chairman Moynihan agreed that the intelligence community was guilty of a significant and unacceptable breach. Thus, DCI
Casey had no political refuge for not keeping the committee informed. Despite the continuation of this bipartisan structure on the Senate committee, the Democratic minority showed signs of restiveness in the 108th Congress (2003–2005) and the 109th Congress (2005–2007). A formal division of the committee’s budget was made in 2004 (60 percent for the Republican majority; 40 percent for the Democratic minority). In early 2005, Democratic members sought ways to limit the powers of the committee’s staff director in the areas of hiring and staff assignments. Although their goal was greater bipartisan control, the issue was discussed and decided on partisan terms.

Partisanship runs counter to the preferred myth that U.S. national security policy is bipartisan or nonpartisan. A partisan committee has the potential to be more dynamic than a bipartisan committee, where political compromise is more at a premium. In many ways, the compromise that a bipartisan committee engenders is equivalent to the lowest common denominator dynamic that one sees in intelligence community estimates.

In its own accidental way, Congress may have achieved the right balance, with a bipartisan intelligence committee in one chamber and a partisan committee in the other.

**Committee Turf.** All congressional committees guard their areas of jurisdiction jealously. For example, in 1976, when the Senate was considering the creation of an intelligence committee, the Senate Armed Services Committee resisted, seeking to preserve its jurisdiction over the DCI and the CIA. Dividing issues or agencies cleanly and clearly between or among committees is not always possible, in which cases the jurisdiction is shared and certain bills get referred to more than one committee. But jurisdiction equates to power.

There is also a more subtle aspect to congressional jurisdiction. Committees tend to become protectors of the agencies they oversee, at least when the jurisdiction or authority of these agencies is under question or attack. There is no inconsistency or hypocrisy involved in the committees serving as agencies’ “best friends and severest critics.” Committee members believe that they have a better and more complete understanding of the agencies they oversee. Also, if the agencies they oversee lose power, then the committees also lose power.

This dynamic, which is inherent in the committee system that dominates Congress, was in evidence during the drafting of, and debate over, the 2004 intelligence legislation. The Senate was initially more responsive to calls to accept the recommendations of the 9/11 Commission, but jurisdiction over the legislation went to the Senate Governmental Affairs Committee (SGAC), not the Senate Intelligence Committee. This could be rationalized in terms of jurisdiction, as the SGAC oversees government organization. However, in the past, bills of this sort had gone to the intelligence committee. Thus,
the Senate leadership did not display much confidence in the intelligence committee for reasons that are not entirely clear. (Some believe the Senate leadership and perhaps the George W. Bush administration were concerned about the possible outcome as the Senate Intelligence chairman, Pat Roberts, R-KS, had independently issued his own plan for intelligence reorganization that was widely seen as too radical.) In the House, the intelligence committee was given jurisdiction. But friction arose with the House Armed Services Committee when Chairman Duncan Hunter, R-CA, raised questions about the military’s access to intelligence and the chain of command. There was a certain disingenuous aspect to this debate. Hunter made public a letter from Gen. Richard Meyers, chairman of the Joint Chiefs of Staff, stating concerns of the type that Hunter voiced, but Secretary of Defense Donald H. Rumsfeld said he had no advance knowledge of the general’s action. Sen. John W. Warner, R-VA, chairman of the Senate Armed Services Committee, was supportive of Hunter but let him do most of the arguing. In the end, a DNI was created, but the secretary of defense lost little if any authority over the intelligence budget or over defense intelligence agencies. As a result, the two armed services committees had not lost any jurisdiction, either.

The jurisdiction of the two intelligence committees are not the same. The Senate Intelligence Committee has exclusive jurisdiction over the DNI and the CIA but shares all other jurisdiction, primarily with the Senate Armed Services Committee, which guards its oversight of NGA, NSA, NRO, and DIA very jealously. The House Intelligence Committee has jurisdiction over all NIP agencies and shares jurisdiction with the House Armed Services Committee over MIP agencies.

*How Does Congress Judge Intelligence?* An important but little discussed issue is how Congress views and judges intelligence, as opposed to the criteria used by the executive branch. No matter how much access Congress has to intelligence, it is not a client of the intelligence community in the same way that the executive branch is, even as congressional requests for specific analytical products have increased. Congress never achieves the same level of intimacy in this area and does not have the same requirements or demands for intelligence.

The budget is one major divide. No pattern has been set as to which branch wants to spend more or less. The Reagan administration favored spending more on intelligence than Congress did and was allowed to, up to a point, after which Congress began to resist. However, the Reagan administration did not want to buy the additional imagery satellites demanded by the Senate Intelligence Committee. During the Clinton administration, it was Congress, after the Republican takeover in 1995, that was willing to spend more than
was requested. Congress takes the firm view that all budget requests from the executive branch are just that—requests. They are nonbinding suggestions for how much money should be spent. To put it succinctly, the executive branch has programs; Congress has money.

The second major divide is the intimacy of the relationship that each branch has with intelligence. Executive officials may have unrealistic expectations of intelligence, but over time they have far greater familiarity with it than do the majority of members of Congress. Thus, the possibility of even larger false expectations looms in Congress. Moreover, having provided the money, members may have higher expectations of intelligence performance. At the same time, members of Congress may be more suspicious of intelligence analysis, fearing that it has been written largely to support administration policies. Members and staff have rarely heard of intelligence that questions administration policies, even when such intelligence exists. Thus, the Congress–intelligence relationship is fertile ground for doubts, whether justified or not.

The relationship between Congress and the intelligence community has undergone a change in recent years. Both before and after the modern oversight system was created, the main requests Congress made of the intelligence community, other than testimony at hearings, were for briefings. Congress has had access to some intelligence products on a regular basis, but they were written for the executive branch. In the mid-1990s, Congress began to take a greater interest in the substance of intelligence analysis. Dissatisfaction among some members with a 1995 NIE about missile threats to the United States led Congress to create a commission headed by Rumsfeld, which came to different conclusions about the nature of the threat.

More significant, in the period prior to the onset of the war in Iraq (2003–2011), members of the Senate Intelligence Committee requested that an updated national intelligence estimate on Iraq’s WMD programs be written so that senators could have the benefit of reading it before they considered voting on a resolution authorizing the president to use force against Iraq. This took the intelligence relationship with Congress into a new and difficult area. Although the National Security Act states that the National Intelligence Council “shall prepare national intelligence estimates for the Government,” it is also understood that the intelligence community is part of, and works for, the executive branch. Meanwhile, the intelligence community finds it difficult to refuse such a request for both professional and political reasons. The resulting NIE became controversial after the war started, when surveys of Iraq did not discover the programs that were said to exist. Many senators questioned the quality of the analysis and the underlying reasons for the apparently incorrect conclusions. A criticism lodged against the intelligence community was that it
had rushed the NIE, although the Senate had imposed a three-week deadline. (This particular criticism was somewhat ironic, as NIEs are usually criticized for how long they take, from several months to a year in some cases.) Although the conclusions of the NIE were not borne out, the estimate probably had little effect on the Senate as, according to press accounts, only six senators read the NIE before voting. (This was known because Senators had to sign for the NIE given its high classification. The Senate voted 77–23 to “[a]uthorize the President to use the U.S. armed forces to . . . defend U.S. national security against the continuing threat posed by Iraq.”) The Senate Select Committee on Intelligence investigated the intelligence community’s performance on Iraq WMD. Among its major findings were that many of the NIE’s key judgments were overstated or not supported by the underlying intelligence; that the uncertainties for some judgments were not explained; that some of these judgments were then used as the basis for further judgments; that an excessive reliance was placed on foreign liaison reporting; and, most significant, that a groupthink dynamic had led to a presumption that Iraq had an ongoing WMD program. Congress continued to make further requests for intelligence analysis crafted for its needs, which entailed the same risks evidenced in the Iraq NIE experience. The intelligence community is part of the executive branch and works for the president or the president’s senior cabinet officers. Intelligence managers will be hard put, however, to make choices between serving their usual policy makers and Congress. Although there may be grounds to respond to Congress only as time allows or after executive branch demands have been met, the consequences of such a course may be harsh. Congress’s most obvious retaliation would be the budget. There is also the question of priorities. In 2007, the House Intelligence Committee strongly requested that an NIE on global warming be written. DNI McConnell resisted initially and then agreed, even as he noted that this NIE would not take resources away from terrorism. McConnell was saying, in effect, that the intelligence community would respond to the committee’s request but that it was clearly not at the same level of priority as other issues.

Another major divide is partisanship. Whether it is the majority or the minority, a substantial group in Congress always opposes the administration on the basis of party affiliation as well as policy. Partisanship inevitably spills over into intelligence, often in the form of concerns that the executive branch has cooked intelligence to support policy. Dissent about intelligence policy could arise within the executive branch, but it would not be based on partisanship.

**External Factors.** The intelligence oversight system does not take place in a vacuum. Among the many factors that come into play to affect oversight, the press is a major one. The lingering effects of Watergate, including the search
for scoops and major scandals, have influenced reporting on intelligence. The press, as an institution, gets more mileage out of reporting things that have gone wrong than it does from bestowing kudos for those that are going right. The fact that intelligence correctly analyzes some major event is hardly news; after all, that is its job. Moreover, in the aftermath of the 1975–1976 investigations, the intelligence community found it impossible to return to its previous state of being largely ignored by the press. The greater coverage given to intelligence and the press's emphasis on flaws and failures influence how some in Congress approach oversight. (The issue of the press's responsibilities when it gets access to classified information is touched on in chapter 13.)

Finally, even intelligence has partisans who appear in the guise of lobbyists. Some groups are made up of former intelligence community employees, and some advocate strong stances and spending on national security. Groups have been formed that oppose certain aspects of intelligence, usually covert action, as well as some aspects of espionage; that are concerned about U.S. policy in every region of the world; and that would prefer to see some portion of the funds devoted to intelligence spent elsewhere. In the aftermath of 9/11, a faction of families who lost relatives in that attack became a powerful lobby in favor of the legislation creating a DNI, an issue in which their inputs were understandably more emotional than analytical and substantive. Finally, there is a group made up of firms that derive large portions of their income from the work they do for the intelligence community. All of these groups are legitimate within the U.S. political system and must be taken into account when considering how Congress oversees intelligence.

**Competition Within the Congressional Agenda.** A series of debates influencing intelligence oversight recur in every Congress, with varying degrees of strength. One is the debate between domestic and national security concerns, which is especially important when dealing with the budget. During the cold war, national security rarely suffered. In the post–cold war period, with national security concerns more difficult to define, the intelligence community had difficulty—until the terrorist attacks in 2001—maintaining level spending, let alone winning increases.

Another debate is that between civil liberties and national security. The debate is almost as old as the republic, dating back to the Alien and Sedition Acts of 1798. Other instances of civil liberties clashing with national security concerns predate the advent of the intelligence community: President Abraham Lincoln's suspension of *habeas corpus* during the Civil War, the arrest of antiwar dissidents during World War I, the mass arrests and detention of Japanese Americans during World War II, and acts aimed at rooting out communist subversion during the cold war. In each case, political leaders cited
national emergencies to place temporary limitations on civil liberties. This debate resumed in 2001 in the aftermath of the terrorist attacks, as the George W. Bush administration sought increased powers for surveillance, nonjudicial trials (the proposed use of military tribunals), and other types of authority. President Obama also focused on the balance between civil liberty and security in his January 2014 speech about the NSA collection programs.

The precedents notwithstanding, the intelligence investigations of the mid-1970s revealed several instances in which intelligence agencies violated constitutional guarantees, laws, and their own charters. The violations included surveillance of dissident groups, illegal mail openings, illegal wiretaps of U.S. citizens, and improper use of the Internal Revenue Service. Some of these actions were known by the president at the time; some were not. The revelation of these activities underscored concerns about the ability of secret agencies to act without safeguards and the need for strong executive and congressional oversight. As noted, this is the area in which the Civil Liberties Protection board is supposed to be active.

A third perennial congressional debate focuses on the level and range of U.S. activism abroad. From World War I through the first twenty years of the cold war, the Democrats were largely the interventionist party; and the Republicans, the noninterventionist party. During World War II and the cold war, an interventionist consensus formed, although a Republican faction remained noninterventionist. The damage that the Vietnam War inflicted on the cold war consensus fostered a shift in the positions of the two parties. The Democrats largely became the noninterventionist party and the Republicans became the interventionist party. In the post–cold war period, a renascent noninterventionist faction grew within the Republican Party. After September 2001, wide support emerged for both military and intelligence operations abroad, although this unraveled, largely as a result of Iraq and Afghanistan. Iraq and Afghanistan, like Vietnam, will likely engender a set of “lessons” that will be applied—rightly or wrongly—to the next foreign policy debate. The preliminary but abbreviated debate in the House and Senate in September 2013 over President Obama’s request for backing to bomb Syria after Assad’s use of chemical weapons appears to indicate a more fractured pattern. Liberal Democrats and conservative Republicans—as they had in the House debate to end the NSA programs—appeared to coalesce against the President’s request. This would suggest that future support for intelligence or for military action will have to be forged by a bipartisan coalition, some of whose members will be concerned about their respective flanks, especially during the next primary season.

Finally, the immigrant basis of the U.S. population is reflected in foreign policy debates. Every region of the world and virtually every nation are represented within the U.S. population. U.S. policies or actions around the
world—real, planned, or rumored—are likely to stir reactions from some segment of the population and perhaps even different reactions. Members of Congress having ethnic ties to a region or representing constituents who do are also likely to voice opinions.

The Courts

As noted earlier, the courts have had a role in intelligence oversight—beyond their normal judicial function—since the passage of the Foreign Intelligence Surveillance Act (FISA) in 1978, which mandated court orders for surveillance and established the Foreign Intelligence Surveillance Court (FISC) for this purpose. The Chief Justice of the United States selects FISC members from among sitting federal judges. The eleven FISC judges must be drawn from at least seven judicial circuits, and at least three must reside within twenty miles of the District of Columbia. One judge must be a member of the U.S. District Court for the District of Columbia to deal with time-urgent warrants. The FISC judges serve overlapping terms of no more than seven years. There is also a Foreign Intelligence Surveillance Court of Review, made up of three district or appeals court judges also appointed by the Chief Justice. The Review Court hears government appeals of a FISC decision. According to the official website of the federal judiciary, it was not necessary for the Review Court to meet until 2002, given the “almost perfect record” of requests for warrants.

There had been some criticism of the FISC over the years, particularly about the secrecy with which it operates and the fact that only one party, the U.S. government, is represented at FISC proceedings. Two former FISC judges have recommended creating a security-cleared public advocate to argue against government applications. In August 2013, President Obama said he would support such a change. However, in January 2014, U.S. District Judge John D. Bates, a former Chief Judge of the FISC, sent a letter to the Senate Intelligence Committee on behalf of past and current FISC members. Bates said the judges opposed a permanent public advocate, arguing that it would be too disruptive and that it might be of questionable value given that the advocate could not consult with the intended target, given the secrecy, and would not be able to conduct his or her own investigation of the case at hand. Bates did endorse the use of an advocate appointed at the discretion of the FISC. Bates’ letter also opposed court approval for each national security letter, given that some 20,000 are issued annually. In its December 2013 report, the President’s Review Group on Intelligence and Communications Technologies favored a FISC public advocate. However, in his January 2014 speech on the NSA...
programs, President Obama endorsed a panel of advocates in cases involving novel and important privacy issues and without the authority to review FISC cases and decide when its presence would be warranted.

Also, the FISC has no investigative powers and is dependent on intelligence agencies to report noncompliance with its orders.

Former FISC judge James Robertson is among those who believe the FISC’s role has changed and that, under the terms of the FISA Amendments Act (2008), the FISC now makes rules for the conduct of surveillance programs, making it “an administrative agency,” rather than a law court, in Robertson’s critique. Critics also note the extremely high percentage of warrants that are approved each year—well over 99 percent—although observers note that government attorneys rarely bring a request that they think will not pass judicial muster. In August 2013, the U.S. government said it would release annual totals for the different types of surveillance orders, including the number of people targeted. In October 2013, FISC member Judge Reggie Walton noted that although the court approves almost every request it receives, the court also demands substantial changes to nearly one-quarter of the applications before approving them.

There has also been criticism about how the members of the FISC are chosen, with critics contending that more conservative judges and those with former prosecutorial experience are being chosen more frequently, especially by U.S. Chief Justice John Roberts (2005–), thus making it more likely that they will approve warrant applications. Several suggestions have surfaced to alternative ways to select the FISC members, including having each appeals court select a judge, having the Review Court’s decisions reviewed by six other Supreme Court judges, or having the president nominate the FISC members, subject to Senate confirmation.

The NSA leaks by Edward Snowden in 2013 focused new attention on the FISC, and many of the reform proposals noted above came after the Snowden leaks. The FISC had approved the Internet metadata collection in 2004 and the telephone metadata collection in 2006. Even though these programs did not collect the actual communications, they were widely seen as being much larger than any past court-approved surveillance programs. This created renewed pressure to declassify some of the FISC’s rulings. As noted, some believed this was important as the FISC had, in effect, developed a body of law based on its administrative decisions, as Judge Robertson noted. In June 2013, Robert Litt, the general counsel for the DNI, spoke in favor of releasing as many of the rulings as could be done while safeguarding national security, and the government began doing so in September 2013.

According to press reports and documents released by DNI Clapper, the NSA programs exceeded their bounds on several occasions and were
reprimanded by the FISC for doing so. These disclosures have been interpreted in two different ways: Critics of the NSA program argue that the programs lack sufficient oversight, even by the FISC, and violate their own boundaries. Supporters of the programs, including the leadership of the House Intelligence Committee, argue that NSA has been forthcoming to the FISC about problems encountered in managing the programs, indicating both good governance and good oversight. The opinion issued by FISC Judge Claire Eagan in September 2013 took note of past violations but stated that these issues had been resolved through the FISC’s oversight. Judge Eagan also made the point that the court’s job is to rule and oversee the legality of the program but that any decision about the future of the program is a political one.

One legal result of the NSA leaks was a July 2013 Justice Department ruling that defendants in criminal cases need to be told when some of the evidence against them comes from broad surveillance programs.

As noted in chapter 8, the increased use of unmanned aerial vehicles (UAVs) and, in at least one case—that of Anwar al-Awlaki—the specific targeting of a U.S. citizen, led some to suggest creating a court similar to the FISC for drone attacks. During his Senate confirmation hearings to be DCIA, John Brennan said that the Obama administration had discussed the concept. In theory, this court would hear the intelligence presented to justify a given target and grant approval—or not—to the strike. Although the idea of the “drone court,” as it became known, is still inchoate, critics have raised a number of issues. Some are similar to that raised with the FISC: the secrecy of proceedings; the absence of one party in the court, that is, the intended target; and the means by which judges would be selected. Another key issue is the role of the president as commander-in-chief and the possible intercession of nonelected officials—judges—in the chain of civilian command. If a president disagreed with a court decision, could he or she still order a UAV strike? Other issues include how judges would assess such issues as potential collateral damage and casualties, and the issue of timeliness if a legitimate terrorist target was suddenly discovered but the government first had to go to court. Again, the “drone court” is still a largely unformed notion, but it does reflect interest in an increased role for the courts in intelligence oversight.

Conclusion

The nature of congressional oversight of intelligence changed dramatically in 1975–1976. Although Congress may go through periods of greater or lesser activism, it is unlikely to return to the laissez-faire style of intelligence oversight. Congress has become a consistent player in shaping intelligence policy.
This seems novel in the case of intelligence only because it is relatively recent. Congress has played the same activist role in all other areas of policy since adoption of the Constitution, and its role is inherent in the checks and balances system that the framers set up. The willful division of power creates a system that is a constant “invitation to struggle.”

The oversight system is, of necessity, adversarial but does not have to be hostile. Any system that divides power is bound to have debates and friction. But they do not have to be played out in an antagonistic manner. When antagonism arises, it is more often the effect of personalities, issues, and partisanship than the oversight system per se.

### Key Terms

- appropriated but not authorized
- appropriation
- authorization
- earmarks
- executive orders
- Gang of 4
- Gang of 8
- global findings
- hollow budget authority
- no-year appropriations
- oversight
- President’s Foreign Intelligence Advisory Board (PFIAB)
- President’s Intelligence Advisory Board (PIAB)
- special access programs (SAPs)
- supplemental appropriations

### Further Readings

The expansion of the role of Congress as an overseer has been matched by an increasing number of books and articles on the topic. Much less has been written about executive branch oversight issues.

**Congressional Oversight**

Barrett, David M. *The CIA and Congress: The Untold Story From Truman to Kennedy.* Lawrence: University of Kansas Press, 2005.


U.S. Senate Select Committee on Intelligence. Legislative Oversight of Intelligence Activities: The U.S. Experience. 103d Cong., 2d sess., 1994.
Executive Oversight


