

POLICY ESSAY

REVITALIZING INTELLIGENCE: THE HISTORY AND FUTURE OF HPSCI, THE IAA, AND CONGRESSIONAL OVERSIGHT

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I. INTRODUCTION

Effective congressional oversight makes for better intelligence, which in turn makes for stronger national security. That is one of many reasons why, perhaps now more than ever, the American people should care about the institutional performance of the House Permanent Select Committee on Intelligence (“HPSCI” or the “Committee”)—on which I have had the honor of serving since 2015. After the 2016 presidential election and the Committee’s investigation of Russian interference, partisan tumult has shaken HPSCI to its foundations and generated much-deserved public criticism. The 116th Congress, however, offers an opportunity for renewal and recommitment to its founding mission. Under new leadership, the Committee should: (1) restore its reputation for bipartisan cooperation; (2) reverse harms wrought by the Committee’s recent dysfunction; and, most importantly, (3) take steps to better fulfill its responsibility of overseeing elements of the Intelligence Community (“IC”).¹

For the Committee to operate effectively, two related questions must be addressed: first, whether the Committee itself should be altered, and if so, how; and second, how the Committee could pursue reform through an im-

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¹ The Intelligence Community is made up of seventeen separate government agencies and departments (or “elements,” in IC parlance) that pursue a coordinated, national intelligence strategy under a common mission. The Office of the Director of National Intelligence is responsible for coordination and organizational efforts for the remaining sixteen IC agencies. The remaining agencies are: the Central Intelligence Agency, Defense Intelligence Agency, Federal Bureau of Investigation, National Security Agency, National Geospatial-Intelligence Agency, and National Reconnaissance Office, as well as the intelligence components of the Department of Energy, Department of Homeland Security, Department of State, Department of Treasury, Drug Enforcement Administration, U.S. Army, U.S. Navy, U.S. Marine Corps, U.S. Air Force, and U.S. Coast Guard. *See* OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, MEMBERS OF THE IC, <https://www.dni.gov/index.php/what-we-do/members-of-the-ic> [<https://perma.cc/GWH6-XDST>] (last visited Mar. 11, 2019).

proved Intelligence Authorization Act (“IAA”). In the following pages, I will present, in sketch form, some views on both.

Regarding the structure and efficacy of HPSCI, in recent years some reform advocates have argued for a total overhaul of the Committee.² A frequently cited reason for this position is that, according to proponents, Committee members and staff cannot access the critical information necessary to conduct meaningful oversight of the IC.³ Additionally, some advocates of a complete reformation believe that Committee members have an overly deferential attitude towards the IC and its activities, and therefore may even be disinclined to seek such information in the first place.⁴ Based on my experience on the Committee, I disagree with both claims. Though doing so is sometimes challenging, HPSCI can and routinely does obtain from the IC extensive information—some of it of the utmost sensitivity—needed to conduct effective oversight. And though HPSCI may support some IC activities wholeheartedly, behind closed doors the Committee can and routinely does act as a check on other activities with which members disagree. For those reasons, I do not believe a fundamental reworking of the congressional oversight structure is warranted. This essay argues instead, in Part III, for more modest improvements. These can be implemented more quickly and enable the Committee to respond more nimbly to oversight challenges.

Regarding the second issue, the key driver for reform is the IAA, which Congress has passed, with some exceptions, on a steady basis since 1991.⁵ As explained below, the IAA is among the most important—though by no means the only—tool the Committee and Congress can use to balance competing values implicated by the IC’s most vital activities. Considering the polarized political landscape, it is significant that the IAA has continued to draw broad bipartisan support over many congresses.⁶ Though the IAA has shown itself to be highly effective, it too could be improved in specific ways, which I describe below in Part IV.

² See generally Daniel Schuman et al., *Strengthening Congressional Oversight of the Intelligence Community*, R. STREET (Sept. 13, 2016), https://s3.amazonaws.com/demandprogress/reports/Strengthening_Congressional_Oversight_of_the_IC_White_Paper_Sept_2016.pdf [<https://perma.cc/FQQ7-FWUK>].

³ See Daniel Schuman, *No More Snowdens? Start by Reforming the House Intelligence Committee*, JUST SECURITY (Sept. 21, 2016), <https://www.justsecurity.org/33090/snowdens-start-reforming-house-intelligence-committee/> [<https://perma.cc/J5JU-AMVH>].

⁴ See *27 Organizations Call on the House to Reform HPSCI, Strengthen Intel Oversight, as Part of its Rules Package*, DEMAND PROGRESS (Nov. 16, 2018), <https://demandprogress.org/27-organizations-call-house-reform-hpsci-strengthen-intel-oversight-part-rules-package/> [<https://perma.cc/6W4L-EWF2>].

⁵ See Intelligence Authorization Act for Fiscal Year 1991, Pub. L. No. 102-88, 105 Stat. 429.

⁶ See, e.g., 163 CONG. REC. H6547 (daily ed. July 28, 2017), <https://www.congress.gov/congressional-record/2017/07/28/house-section/article/H6547-1> [<https://perma.cc/TB98-8XYA>] (reflecting that the Intelligence Authorization Act for Fiscal Year 2018 passed the House 380-35).

II. A SHORT HISTORY OF THE HOUSE AND SENATE INTELLIGENCE COMMITTEES

The congressional relationship with the IC can be traced from the period immediately following World War II, when then-President Harry S. Truman created the Central Intelligence Group (“CIG”) to continue the valuable work of information gathering and processing that had begun during the War.⁷ The “group,” as it came to be known, allowed for the formation of the Central Intelligence Agency (“CIA”), and by 1947, the CIG was disbanded.⁸ In its place, Congress established the CIA through the National Security Act of 1947.⁹ Importantly, by creating the CIA through federal statute, Congress asserted its authority over intelligence matters more clearly, thus laying the groundwork for development of an oversight framework over time.

The CIA would operate with little oversight in the decades following its establishment. Throughout the 1950s and 60s, it engaged in numerous covert activities meant to destabilize governments around the world, specifically in places like the Middle East, South Asia, and Latin America.¹⁰ Some of those operations, like the Bay of Pigs Invasion in Cuba, were not successful. However, it was not until 1975—when illegal surveillance of American citizens, warrantless searches, and involvement in foreign assassinations became prevalent—that the White House and Congress began to assert more authority over the CIA. That year, President Gerald R. Ford launched a blue-ribbon panel to investigate the actions of the CIA, primarily during the Nixon administration.¹¹ In parallel, the Senate formed a committee chaired by Senator Frank Church (D-Idaho) (the “Church Committee”)¹² and the House eventually formed a corresponding investigatory body helmed by Representative Otis Pike (D-N.Y.) (the “Pike Committee”).¹³

The Church Committee conducted a thorough investigation into the allegations against the CIA and other members of the IC.¹⁴ The Church Committee was largely functional, bipartisan, and efficient, and it issued a report

⁷ See Michael Warner, *The Creation of the Central Intelligence Group*, CIA LIBRARY (May 8, 2007), <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol39/no5/html/v39i5a13p.htm> [https://perma.cc/A8YL-KZPE].

⁸ See *id.*

⁹ See Pub. L. No. 80-253, § 102, 61 Stat. 495, 497-99 (1947).

¹⁰ See TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* 92-119, 164-78, 248-55 (2008).

¹¹ See Gerald K. Haines, *The Pike Committee Investigations and the CIA: Looking for a Rogue Elephant*, 42 *STUD. IN INTELLIGENCE* 81 (1999), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art07.html [https://perma.cc/BRB2-8UQH].

¹² See *A Look Back . . . The Church Committee Meets*, CENTRAL INTELLIGENCE AGENCY (Mar. 27, 2008), <https://www.cia.gov/news-information/featured-story-archive/2008-featured-story-archive/a-look-back-the-church-committee-meets.html> [https://perma.cc/4K4A-BGA3].

¹³ See Haines, *supra* note 11.

¹⁴ See Thomas Young, *40 Years Ago, Church Committee Investigated Americans Spying on Americans*, BROOKINGS INST. (May 6, 2015), <https://www.brookings.edu/blog/brookings->

in April of 1976 that detailed a wide range of ethical and legal breaches by the CIA.¹⁵ However, the Church Committee was also careful to note the ways that the IC was instrumental in ensuring American safety and security.¹⁶

Within a month after the report's public release, the Senate established the Senate Select Committee on Intelligence ("SSCI") to maintain permanent oversight of the IC.¹⁷ The resolution establishing the SSCI mandated that no more than eight members of the fifteen-person body come from the same political party, regardless of the composition of the Senate.¹⁸ As a select committee, membership on the SSCI is determined by Senate leadership and not through caucus steering procedures applicable to the naming of members of other committees. Under the rules, the SSCI always includes at least one member from each party from the Senate Appropriations, Armed Services, Foreign Relations, and Judiciary Committees to ensure diverse and important perspectives.¹⁹ Moreover, unlike a typical congressional committee with a Chair from the majority party and a Ranking Member from the minority, the SSCI has both a Chair and a Vice Chair.²⁰ This distinction is important because it empowers the minority and promotes committee comity. By serving in a more peer-level role, senators have seemingly reduced partisan tensions that can arise in a more hierarchical structure. The Vice Chair serves as SSCI chair, rather than another member of the majority party, if the primary chair is unable to preside over committee actions.²¹

In contrast to its Senate counterpart, the Pike Committee in the House conducted a wide-ranging and raucous investigation.²² The Pike Committee frequently butted heads with the Ford administration and IC leaders during the investigation over access to important documents and the scope of the inquiry.²³ Then, more than a year after the Church Committee finished its work, Republicans and Democrats in the Pike Committee voted together to

now/2015/05/06/40-years-ago-church-committee-investigated-americans-spying-on-americans/ [https://perma.cc/FZ4Q-5M4Z].

¹⁵ See generally S. REP. NO. 94-755 (1976).

¹⁶ See *A Look Back . . . The Church Committee Meets*, supra note 12.

¹⁷ See *The CIA and Congress: Creation of the SSCI*, CENTRAL INTELLIGENCE AGENCY (Dec. 8, 2011), <https://www.cia.gov/news-information/featured-story-archive/2011-featured-story-archive/the-cia-and-congress-creation-of-the-ssci.html> [https://perma.cc/WVD7-BC8N].

¹⁸ See FREDERICK M. KAISER, CONG. RESEARCH SERV., 20540, LEGISLATIVE HISTORY OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE 38, 41-42 (1978), <https://fas.org/sgp/crs/intel/leghist.pdf> [https://perma.cc/VK7V-RMA6].

¹⁹ See A Resolution to Establish a Standing Committee of the Senate on Intelligence Activities, S. RES. 400, 94th Cong. (1976).

²⁰ See *About the Committee*, U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE, <https://www.intelligence.senate.gov/about> [https://perma.cc/52GX-AXUC] (last visited May 9, 2019).

²¹ See L. BRITT SNIDER, *THE AGENCY AND THE HILL: CIA'S RELATIONSHIP WITH CONGRESS, 1946-2004* 52 (2008).

²² See *id.* at 53-54.

²³ See *id.*

prevent the public release of the final Pike report.²⁴ The report was eventually, and infamously, leaked in 1976 to *The Village Voice*, which subsequently published it.²⁵

Nevertheless, the House followed the Senate's lead and formed HPSCI on July 14, 1977.²⁶ Unlike SSCI, HPSCI has no Vice Chair and the Committee's party makeup is designed to mirror that of the House as a whole.²⁷ After the 2010 elections, the majority party placed twelve members on the twenty-person body and the minority party placed eight.²⁸ Like SSCI, however, HPSCI's membership is chosen by House leadership, and the Committee must also contain at least one member of the House Committees on Appropriations, Armed Services, Judiciary, and Foreign Affairs.²⁹

Today, HPSCI has jurisdiction over elements of the IC, as well as over intelligence and intelligence-related activities of all other departments of government, including those of the Department of Defense.³⁰ During the 116th Congress, HPSCI will exercise this jurisdiction through subcommittees—on strategic technologies and advanced research, on counterterrorism, counterintelligence and counterproliferation, on intelligence modernization and readiness, and on defense intelligence and warfighter support. The Committee hosts between two and three member-level events during each week that the House is in session: a closed “hot spots” briefing on current foreign policy or intelligence matters; a full Committee hearing or briefing, in either closed or open session; and, frequently, a subcommittee-led event on specific matters within the subcommittee's purview. All legislation touching intelligence matters, to include foreign intelligence surveillance and certain aspects of cybersecurity, are referred to HPSCI for consideration.

III. IMPROVING THE HOUSE INTELLIGENCE COMMITTEE

From my experience, HPSCI plays a unique, dual role in its oversight of the IC: It simultaneously scrutinizes and enables the IC's activities, with the overall goal of enhancing the IC's capacity to collect and analyze information needed to make key decisions related to national security. To better

²⁴ See David E. Rosenbaum, *House Prevents Releasing Report on Intelligence*, N.Y. TIMES, Jan. 30, 1976, at A1.

²⁵ See JPat Brown, *Thanks to the CIA, You Can Read the Report the CIA Doesn't Want You to Read*, MUCKROCK (Aug. 23, 2017), <https://www.muckrock.com/news/archives/2017/aug/23/vv-pike-report/> [<https://perma.cc/6Q3G-JNQK>].

²⁶ See H.R. Res. 658, 95th Cong. (1977).

²⁷ See SNIDER, *supra* note 21, at 53.

²⁸ See *The CIA and Congress: Creation of HPSCI*, Central Intelligence Agency (Aug. 4, 2011), <https://www.cia.gov/news-information/featured-story-archive/2011-featured-story-archive/cia-and-congress-hpsci.html> [<https://perma.cc/TMZ3-K4VX>].

²⁹ See House R. X, Cl. 11(a)(1).

³⁰ See House R. X, Cl. 11(b)(1)(D)(ii). In this respect, HPSCI's jurisdiction overlaps in part with that of the Congressional armed services committees. Importantly, HPSCI is empowered to study “on an exclusive basis” the sources and methods used by the IC. See House R. X, Cl. 3(m).

perform this mission, HPSCI should make changes in three major areas: coordination with the Appropriations Committee, transparency, and staffing.

The annual appropriations process has long been discussed as an area for improvement for both intelligence committees.³¹ Like other authorizing committees, neither HPSCI nor SSCI have appropriation authority.³² Both instead can pass authorizing legislation, which sets funding levels and furnishes policy guidance to the IC.³³ But, as with all other arms of the federal government, the funding itself must be provided by the full Appropriations Committee, on which I have also served since 2013.

Following the terrorist attacks of September 11, 2001, the Congressional Joint Inquiry and the 9/11 Commission both conducted broad evaluations of the intelligence and other failures that preceded the worst attack on U.S. soil since Pearl Harbor. The 9/11 Commission made alternative recommendations regarding changes to the oversight structure: either replacing the existing intelligence committees with a joint committee comprised of members in both the House of Representatives and the Senate, or consolidating intelligence appropriation and authorization functions into one committee in each chamber of Congress.³⁴

An important effort was made regarding the latter recommendation, but it did not last. A Select Intelligence Oversight Panel, including members of the Appropriations and Intelligence Committees, was established in 2007, in part to give effect to the 9/11 Commission's recommendation that Congress merge the appropriation and authorization functions for the IC.³⁵ But the panel was disbanded in 2011 and replaced by an arrangement that still exists today, whereby HPSCI and the House Appropriations Committee on Defense ("HAC-D") may freely share classified information, and three members of HAC-D may be admitted, on an *ad hoc* basis, by the HPSCI Chairman to HPSCI's classified hearings.³⁶ The HAC-D also has appropriations authority over agencies covered within HPSCI's areas of jurisdiction.³⁷ I continue to believe that the 9/11 Commission's recommendation, regarding consolidation of authorization and appropriation disciplines, is sound. Nevertheless, I recognize that right now there is little political will to alter existing structures fundamentally. That being the case, less sweeping but still

³¹ See 9/11 COMMISSION, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 416 (2002).

³² See House R. X, Cl. 11(i).

³³ See MICHAEL E. DEVINE, CONG. RESEARCH SERV., R45421, CONGRESSIONAL OVERSIGHT OF INTELLIGENCE: BACKGROUND AND SELECTED OPTIONS FOR FURTHER REFORM 11 (2018), <https://fas.org/sgp/crs/intel/R45421.pdf> [<https://perma.cc/2FK2-MRBL>].

³⁴ See 9/11 COMMISSION, *supra* note 31, at 420–21.

³⁵ Cf. H.R. Res. 35, 110th Cong. (2007).

³⁶ See STAFF OF H. PERMANENT SELECT COMM. ON INTELLIGENCE, 116th CONG., RULES OF PROCEDURE 13 (Feb. 6, 2019).

³⁷ See *Defense*, HOUSE COMM. ON APPROPRIATIONS, <https://appropriations.house.gov/subcommittees/defense-116th-congress> [<https://perma.cc/7DYM-VUGY>] (last visited Mar. 14, 2019).

important changes to the HPSCI–HAC-D relationship may be more viable in the short term.

Based on my experience, HPSCI and HAC-D currently seek to coordinate their activities and jointly consider budget justifications from IC elements. While it may not be possible to create a new intelligence appropriations subcommittee, by restructuring and increasing staff, both committees could better leverage resources and optimize oversight of the IC. For example, by ensuring maximum committee reciprocity—in the sharing of classified information between committee members and their staffs, and in mutual admission into each other’s sessions—HPSCI and HAC-D could create better opportunities to coordinate House-driven priorities and reduce unnecessary inter-committee tensions.³⁸

Staff resources should also be increased, particularly on the appropriations side. During the previous Congress, I observed that one clerk and one professional Appropriations Committee staff member were tasked with overseeing the funding of the entire Defense Department, large portions of the State Department, and intelligence agencies, which is an extraordinary workload. Under the new Democratic majority in the 116th Congress, the Appropriations Committee has increased that number to five: one clerk and four dedicated, professional staffers. This is an improvement already being implemented and will allow for a better allocation of resources. Future reforms might include resources for expert intelligence staffers (divided equally among the majority and the minority) who would be paid through the Appropriations Committee and act as a formal liaison to HPSCI, responsible exclusively for the IC portions of the funding process.

Second, I have always believed that the American people deserve a government that is transparent and accountable. These principles must extend into the intelligence space, while recognizing the natural limits based on national security concerns. As such, HPSCI must aim to be as transparent as possible. As the founder and Chair of the Congressional Transparency Caucus, I acknowledge the public’s right and desire to push for more transparency from both the IC and HPSCI. There are several nuanced policy solutions that can improve transparency.

First, HPSCI must accommodate a more robust public hearing schedule. The Committee does make efforts to host somewhat regular public hearings, but there is certainly a greater need to further educate and update the public. The Committee should maintain the practice of “world-wide threats” open hearings and expand upon the practice of more targeted, regional, and

³⁸ Language newly added to HPSCI’s Rules of Procedure for the 116th Congress acknowledges the importance of reciprocal sharing, and admission to oversight hearings, as a value in the HPSCI–HAC-D relationship. *See* STAFF OF H. PERMANENT SELECT COMM. ON INTELLIGENCE, 116th CONG., RULES OF PROCEDURE 10, 13 (Feb. 6, 2019) (noting that Chairman’s exercise of authority to share classified information with HAC-D, and to admit certain HAC-D members to HPSCI sessions, may be conditioned on reciprocal sharing and admission on HAC-D’s part).

issue-specific hearings. Giving the public and the media more regular access to the Committee and representatives from the IC will help sustain the trust of the American people and provide a deeper understanding of the day-to-day work done by HPSCI members.

Finally, in order to function, government requires resources. Certainly, fiscal responsibility should be a central consideration when crafting any policy, but the political imagery of taxpayer-funded bureaucrats sitting high on the hog is largely mythical. The political culture of austerity that has governed recent congresses has left HPSCI under-resourced. In my view, this was recently illustrated throughout the first half of the Russia investigation, during which professional Committee staff were expected to undertake a full-scale congressional investigation. This was in addition to their more routine work focusing on hot spots around the globe. The problem could be remedied by providing an infusion of resources needed to increase the Committee staff, on a bipartisan basis, to levels commensurate with the myriad intelligence challenges of the day, and with the extraordinary scope of HPSCI's oversight jurisdiction.

By way of comparison, the House Armed Services Committee currently has sixty-two staff to HPSCI's twenty-two; the Committee on Oversight and Government Reform, forty-two.³⁹ An alternative would be for the House to aim to more closely align with the Senate by adopting, consistent with resource and security needs, the SSCI practice of providing each committee member with a professional staff designee who works for the committee but reports to the member. This would allow staff to better serve members and would allow HPSCI and the member offices to leverage existing staff resources. Ultimately, this would be cost effective, improve cohesion, and reduce duplicative congressional staff roles.

IV. IMPROVING THE IAA

As noted above, the IAA has proven to be an effective oversight instrument for HPSCI. It could, however, be made more effective through targeted reforms.

By way of background, the bill's architecture is straightforward and essentially uniform from one IAA to the next. It comprises publicly available legislative text, as well as a Committee report that explains legislative provisions and provides unclassified direction to IC elements—requests for briefings and reports on specific programs, for example.⁴⁰ Also incorporated by reference in the legislative text is a classified schedule of authorizations,

³⁹ See JOINT COMMITTEE ON PRINTING, GOVERNMENT PUBLISHING OFFICE, S. PUB. 115-7, OFFICIAL CONGRESSIONAL DIRECTORY, 115TH CONG. 408, 435–36, 454 (2018).

⁴⁰ See, e.g., Intelligence Authorization Act for Fiscal Year 2016, Pub. L. No. 114-113, 129 Stat. 2908 (2015); H.R. REP. NO. 114-144, at 2–3 (2015) (explaining provisions and directions to IC elements).

which describes funding levels for IC programs.⁴¹ The incorporation by reference gives the schedule the same legal status as a statute.⁴² Lastly, a classified annex to the bill sets forth the Committee's comments with respect to classified matters—and may include more specific direction granting or denying requested resources or conditioning their availability on fulfillment of particular requirements of importance to the Committee.⁴³

To be sure, the IAA is but one of many tools with which HPSCI oversees the IC. Like any other committee, HPSCI may, for example, hold hearings with IC personnel or seek witnesses or documents, informally or through formal mechanisms like a subpoena.⁴⁴ HPSCI also may register its disapproval of an IC proposal to “reprogram” funds, i.e., to devote the funds to a different use than that for which they were approved initially.⁴⁵

Still, authorizing legislation affords advantages, which are especially important when some of the nation's most sensitive-intelligence activities are implicated. If an IAA has been enacted into law, then the IC has no choice but to respect funding levels set by the intelligence committees. Without one, however, IC elements often may spend appropriated funds without restriction—perhaps in a fashion contrary to HPSCI members' expectations or desires. Enactment of an authorizing bill thus protects intelligence committee equities, particularly when there are disagreements with the appropriations committees.⁴⁶

The IC has taken the position that unclassified direction contained in a Committee report to an IAA, and classified direction in the IAA's annex, are not expressed in a statute passed by both chambers of Congress and signed by the President.⁴⁷ For that reason, according to the IC, the direction is not

⁴¹ See, e.g., Intelligence Authorization Act for Fiscal Year 2016, 129 Stat. 2908.

⁴² See, e.g., Intelligence Authorization Act for Fiscal Year 2015, Pub. L. No. 113-293 § 102, 128 Stat. 3990, 3992 (2014) (stating that amounts authorized to be appropriated for intelligence activities of IC elements are “those specified in the classified Schedule of Authorizations prepared to accompany the bill”).

⁴³ See, e.g., H.R. REP. NO. 114-144, at 13 (describing the classified annex as “integral,” and further noting HPSCI's expectation that “all intelligence programs discussed in the classified annexes to this report will follow the guidance and limitations set forth as associated language therein”).

⁴⁴ See STAFF OF H. PERMANENT SELECT COMM. ON INTELLIGENCE, 116TH CONG., RULES OF PROCEDURE 8 (Feb. 6, 2019) (authorizing the issuance of subpoenas “by the Chair of the full Committee, upon consultation with the Ranking Minority Member, or by vote of the full Committee”).

⁴⁵ U.S. law requires the Director of National Intelligence to inform the intelligence committees in advance of proposed reprogramming actions, thus affording the committees an opportunity to evaluate and object to the proposals. See generally 50 U.S.C. §§ 3024(d)(7), 3094(a)(3) (2012).

⁴⁶ To be sure, authorizing the expenditure of appropriated funds necessarily requires the appropriation of funds. The term “hollow budget authority” refers to a scenario in which the intelligence committees authorize spending to a certain level, but the appropriations committees provide no actual funds.

⁴⁷ In 2015, the General Counsel to the Office of the Director of National Intelligence publicly explained the IC's view that the directive portion of the classified annex to the IAA comprises “report language explaining the positions of the committee on a variety of issues, and has no more force than any other committee report. That is to say, it expresses the views of

binding in character and, as a strict legal matter, might even be ignored. Even so, based on my experience, the IC is aware that a failure to fully satisfy unclassified report or classified annex guidance could risk irritating the Committee—and provoking a stern response. For these reasons, the IAA has been a cornerstone of our Committee’s work.

To strengthen the IAA as an oversight tool, I first suggest that Congress make the IAA a “must-pass” bill, akin to the annual National Defense Authorization Act (“NDAA”) and encourage passage and enactment as early as possible.

As things stand now, the NDAA is the only *authorizing* legislation regarding national security which the House and Senate both pass each year without fail, on a roughly established timetable. The appropriations committees handle separately legislation *appropriating* defense and intelligence funds.

Structurally, the IAA is the IC analogue to the NDAA—with equivalent importance for the nation’s intelligence policy. In my view, the recent trend towards introduction of an IAA for most fiscal years reflects growing recognition of the IAA’s stature in that regard.⁴⁸ But there is not quite parity between the defense and intelligence bills yet. Unlike with the NDAA, Congress sometimes does not ultimately pass a final IAA. Final intelligence authorization legislation also may not be passed and signed by the President until well into, or even after the close of, the relevant fiscal year.⁴⁹ For obvious reasons, that uncertainty is bad for the nation, for the IC, and for the intelligence committees—and ought to be changed.

Congressional leaders and the White House therefore should agree to treat the IAA with the same urgency as its defense counterpart. Further, they should ensure that an IAA for the coming fiscal year is marked up, passed by both chambers, and enacted into law as early as possible annually. In my view, this could be accomplished by informal agreement between House and Senate leaders, through chamber or committee rules, or in other ways.

the Congress, and it therefore would ordinarily be followed as a matter of comity, but does not have the force of law. . . .” Steven Aftergood, *ODNI: Annexes to Intelligence Bills are not ‘Secret Law,’* SECRECY NEWS (May 18, 2015), <https://fas.org/blogs/secrecy/2015/05/not-secret-law/> [https://perma.cc/HP6L-J9QQ].

⁴⁸ See, e.g., S. 1761, Intelligence Authorization Act for Fiscal Year 2018, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/1761/text> [https://perma.cc/TLR2-ZQM9] (indicating that the bill was introduced on August 18, 2017); H.R. 6237, Intelligence Authorization Act for Fiscal Year 2019, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/6237/text> [https://perma.cc/U8B3-HB3B] (indicating that the bill was introduced on June 27, 2018).

⁴⁹ As of this writing, for example, despite the bill’s smooth passage and strong bipartisan support in the House, inaction in the Senate has stalled enactment of an IAA for fiscal year 2019—which commenced on October 1, 2018. For similar reasons, and in an exception to the trend in recent years, House passage and widespread congressional backing likewise did not result in Senate passage and enactment of an IAA for fiscal year 2018 at all. See *supra* note 48.

Secondly, Congress should require the intelligence committees for each year to assess congressional notification practices and consider IAA language to codify or improve them. The statutory obligation imposed on the IC, to keep the intelligence committees “fully and currently informed” of intelligence activities and related matters, is widely known—and the subject of a long-running dialogue between the committees and the Executive Branch.⁵⁰ Perhaps somewhat less known is how that obligation is given effect, and how the practice of congressional notification interacts with the IAA.

In part to implement its statutory obligations, the IC has issued publicly available guidance on congressional notification.⁵¹ But from time to time—often in response to consequential foreign policy or national security events—the intelligence committees may disagree with the IC’s view of what must be notified to Congress or find fault with how the IC’s guidance on notification has been implemented regarding a particular matter. Members may claim that certain activities were not notified in a more timely manner or specific information was withheld, or wish to take steps to ensure that specific information is made available. For example, Congress drafted language in the fiscal year 2010 IAA to require submission to the intelligence committees, upon the latter’s request, of information on the legal basis under which covert activities are conducted.⁵²

Of course, it is common for the intelligence committees to consider IAA legislative language codifying or changing notification practices. But such consideration is not required with any regularity. Instead, and as noted above, notification issues sometimes are taken up by the intelligence committees in an *ad hoc* fashion, in response to specific events or concerns.⁵³

A more optimal approach would be to require HPSCI to take up notification matters in the context of drafting and/or marking up an IAA. That would ensure that the choice to legislate—or not—in the field of congressional notification will be taken in a consistent, comprehensive fashion.

Finally, and for similar reasons, the IAA should consistently include language regarding, and authorize funds for, consensus-based transparency

⁵⁰ See generally 50 U.S.C. § 3092(a) (2012) (imposing, consistent with the protection of intelligence sources and methods and with other limitations, a requirement to keep the intelligence committees fully and currently informed of intelligence activities other than covert actions); 50 U.S.C. § 3093(b)(1) (imposing a comparable requirement to keep the intelligence committees fully and currently informed as to covert action). The congressional notification requirement antedates the committees’ establishment. Enactment in 1974 of the so-called Hughes-Ryan Amendment to the Foreign Assistance Act of 1961, for example, denied funding for certain intelligence activities abroad, unless and until the President provided, “in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress.” Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (1974).

⁵¹ See generally OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE 112, CONGRESSIONAL NOTIFICATION (2017).

⁵² See Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-25, § 331, 124 Stat. 2654.

⁵³ See *id.*

measures. The point is at once unsurprising and yet also somewhat counter-intuitive: There are several reform proposals regarding the IC, about which members of both parties long have agreed, at least in general terms, but which have seen only intermittent legislative action.⁵⁴ These subjects are not at all technical or insignificant; some, in fact, touch on policy concerns of the greatest importance. Perhaps the most well-known area is transparency.

From my experience, it is a commonplace belief that the IC's classification system is broken and too often can result in too much information being kept from public view. This could be for any number of reasons: because information that should not be classified is initially deemed to be, by mistake; because information that was once properly classified is nevertheless not eventually declassified, despite meeting the requirements for declassification; or because insufficient resources are devoted to Executive Branch reviews of Freedom of Information Act ("FOIA"), declassification, prepublication review, or similar requests. Every member to serve on the intelligence committees comes to understand this to be a serious problem, and yet it remains unaddressed.

Of course, that is not to say that the situation cannot be improved or has not been improved in recent years. The IC itself has taken steps to inform the public about more of its activities, both on its own initiative and at the direction of the President and Congress, and in a fashion respectful of intelligence equities.⁵⁵ The universe of material subject to disclosure, moreover, includes items that, as recently as a decade ago, simply would not have ever been considered candidates for public release—such as redacted opinions of the Foreign Intelligence Surveillance Court regarding the section 702 surveillance program.⁵⁶ For its part, Congress also has taken steps to impose greater transparency, or to chip away at the scourge of over-classification.

For example, the 2017 IAA required that the IC not charge more for photocopying and other reproduction services in connection with requested declassification, than may be charged in the context of a request under FOIA.⁵⁷ The committee report to that bill likewise directed the ODNI to develop and promulgate an IC-wide policy, governing the rules for so-called "pre-publication review" of books and articles authored by current and former IC personnel. More recently, if enacted into law, the fiscal year 2019

⁵⁴ See *infra* notes 57–60.

⁵⁵ See generally OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, STATISTICAL TRANSPARENCY REPORT REGARDING USE OF NATIONAL SECURITY AUTHORITIES (2018) (publicly setting forth how often the IC invoked various authorities, including those conferred by the foreign intelligence surveillance and USA FREEDOM Acts, during the calendar year 2017).

⁵⁶ See Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 702, 122 Stat. 2436, 2437; see also United States Foreign Intelligence Surveillance Court, Memorandum Opinion and Order (Apr. 26, 2017) (Hogan, J.), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf [<https://perma.cc/M8X6-UJ7S>]. The IC routinely publishes recently declassified materials, transparency reporting, and similar items online. See IC ON THE RECORD, <https://iconthercord.tumblr.com> [<https://perma.cc/J68V-AF4A>] (last visited Mar. 14, 2019).

⁵⁷ See H.R. 6393, 114th Cong. § 312 (2016).

IAA would reauthorize for ten years the Public Interest Declassification Board.⁵⁸ This advisory body's mission is to promote "the fullest possible public access to a thorough, accurate, and reliable documentary record of significant U.S. national security decisions"⁵⁹ and activities, part of which involves making recommendations on how to get historically classified information out to the public.⁶⁰

The trouble is that initiatives like these do not always make it into the IAA, or any other legislation—even though members, the IC, and the public would likely support them. That can and should be easily changed. The intelligence committees should impose a standing requirement, akin to that described above, to consider including in each IAA new transparency initiatives—or, short of that, an infusion of funds to carry out historical initiatives that have often lacked necessary resources or personnel.

V. CONCLUSION

Congress can and should take seriously its vital role in providing adequate oversight over the IC. The tools are there, and the recommendations above will go far in improving and strengthening our ability to hold the IC accountable, while preserving the important work they do to keep us safe. These modest reforms do not require a groundbreaking change to our current oversight system. Instead, they require the will of members to do what is necessary to elevate the importance and respect for oversight, as is warranted, and for HPSCI to return to the bipartisan tradition that made the Committee so effective over its relatively short existence. The safety and security of the American people is too valuable for us not to do so.

⁵⁸ See Intelligence Authorization Act for Fiscal Year 2019, H.R. 6237, 115th Cong. § 2501 (2018).

⁵⁹ Public Interest Declassification Act of 2000, Pub. L. No. 106-567 § 703(b), 114 Stat. 2831, 2857.

⁶⁰ See *id.*

