

**Spies, Secrecy, and Democracy:  
The Congressional Connection  
An Introductory Essay  
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*There is nothing more necessary than good intelligence to frustrate a designing enemy, & nothing requires greater pains to obtain.*

– Former British Lt. Colonel George Washington (1766)

*The necessity of procuring good intelligence is apparent & need not be further urged. All that remains for me to add, is that you keep the whole matter as secret as possible. For upon Secrecy, Success depends in most Enterprises of the kind, and for want of it, they are generally defeated, however well planned & promising a favourable issue.*

– American General George Washington (1777)

*The intelligence community exists to steal secrets. The way by which we get those secrets and the secrets themselves have to be protected.*

–John Gannon, former CIA official (2003)

### **Introduction**

If, as someone has observed, spying is the second oldest profession, then it should come as no surprise that it was well underway on the North American continent long before the colonies had won their independence from Great Britain. Before George Washington became America's victorious revolutionary war general and its first president, he was a spy for the British colonial government. In 1753, Washington was sent by the British into the Ohio Territory to gather information about French military capabilities. During his mission, we are told, he proved to be a skillful elicitor of information by injecting himself into the social environment of drinking sessions and meals with French officers.

In 1755, Washington learned a hard lesson about the need for intelligence when General Braddock committed his troops to the battle of Fort Duquesne during the French and Indian War without first bothering to collect intelligence on the enemy. Consequently, they rode into a French ambush and barely managed to extricate themselves after a three-hour battle, suffering a major military defeat. It was probably that experience that later prompted Washington to convey to a friend the observation contained in the first epigraph to this essay.<sup>1</sup>

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By the time Washington had been commissioned as Commander in Chief of the Continental Army to fight against the British, the necessity of good intelligence to battlefield victories was well ingrained in his military mind. Moreover, he also understood how critical secrecy was to the successful use of information obtained from intelligence sources. This is evidenced in the second epigraph above, taken from a letter he wrote to one of his colonels. Washington can be credited not only for being the Commander in Chief of the Continental Army and Father of his country, but also for being the nation's "first great spymaster."<sup>2</sup>

The purpose of this essay is not to give a detailed history of the evolution of U.S. intelligence gathering, but rather to highlight the intersection between American intelligence activities and the role of Congress in shaping the policies governing them and overseeing their implementation. In so doing, the essay raises the question of how well Congress can be expected to oversee something which most Members of Congress can't see (and probably don't want to see), and yet for which they know they bear considerable responsibility and accountability. Moreover, the essay poses (but does not answer) the question of how Congress can maintain the balance between the secrecy and transparency that a free and open society demands in order to preserve both the liberty and security of its people.

### **Intelligence During the Revolutionary War**

Unlike today's tripartite national government, the first governing body of the colonies was a single unit. The Continental Congress combined the legislative and executive powers in a single body of representatives from the 13 "United Colonies." As such, the Continental Congress (1774-1781), and its successor Congress of the Confederation (1781-1789) were responsible not just for framing legislative policies, but for executing them as well.

It should not come as a surprise to learn that during the Revolutionary War the Continental Congress operated in strict secrecy. Enemy troops, spies, and loyalists were everywhere. Congress was forced to relocate on several occasions to stay one step ahead of the red coats. Not only did the Congress meet in secret, but it formed secret committees to carry out the most sensitive war-related missions. Covert intelligence operations were devised, approved, and run by its Secret Committee; and its Committee of Secret Correspondence dealt with secret agents.

The Secret Committee, created by resolution on September 18, 1775, was given broad powers and considerable sums of money to obtain military provisions surreptitiously, and with distributing the supplies and selling gunpowder to privateers chartered by the Congress. The Committee kept its transactions secret and destroyed many of its records to ensure confidentiality. The Committee employed agents overseas, gathered intelligence about Tory secret ammunition stores with a view

to seizing them, and sent missions under foreign flags to plunder British supplies in the Southern colonies.<sup>3</sup>

The Committee on Secret Correspondence, created by resolution on November 29, 1775, collaborated with the Secret Committee in employing foreign agents. The committee members were in effect the country's first foreign intelligence directorate, and included Benjamin Franklin of Pennsylvania (also a member of the Secret Committee), Benjamin Harrison of Virginia, and Thomas Johnson of Maryland. A subsequent committee appointee, James Lovell became the Congress' expert on codes and ciphers and has been called the father of American cryptanalysis.<sup>4</sup>

On April 17, 1777, the committee was renamed the Committee on Foreign Affairs, though it retained its intelligence function. Matters of actual diplomacy were conducted by other committees or by the Congress as a whole. With the creation of the Department of Foreign Affairs on January 10, 1781, the forerunner of the State Department, the correspondence function shifted to the new body whose secretary was authorized to correspond "with all other persons from whom he may expect to receive useful information."<sup>5</sup>

Another intelligence-related committee, the Committee on Spies, was created on June 5, 1776, for the purpose of considering "what is proper to be done with persons giving intelligence to the enemy or supplying them with provisions." Its membership included John Adams, Thomas Jefferson, Edward Rutledge, James Wilson and Robert Livingston. The Continental Congress considered its report on August 21, 1776, and enacted the nation's first espionage law which provided the punishment of death to those who give intelligence to the enemy, supply them with provisions, or "who shall be found lurking as spies in or about the fortification or encampments of armies of the United States," or such other punishment as a court martial may direct.<sup>6</sup>

Another important entity created by the Continental Congress was the Committee (later to be called the Commission) for Detecting and Defeating Conspiracies. It was made up of groups established in New York between June 1776 and January 1778 to collect intelligence, apprehend British spies and couriers, and examine suspected British sympathizers. In effect the organization was a "secret service" for New York that had the power to arrest, convict, grant bail or parole, and jail or deport. The Committee had a militia under its command to help it implement its broad charter. It heard over 500 cases of disloyalty and subversion. John Jay, who directed the work of the committee, has often been called the first chief of American counterintelligence.<sup>7</sup>

The relationships between these various committees and the Continental Congress that created them, is instructive in pointing the way to future such relationships after the intelligence gathering role shifted to the executive branch under the Constitution of 1787. The Committee on

Secret Correspondence, for instance, insisted that matters pertaining to funding and instruction of agents be held within the committee. When the Congress called for the committee members to lay their proceedings before the Congress, they did so by resolution that permitted “withholding the names of the persons they have employed, or with whom they have corresponded.” Even with the names deleted, Congress imposed “an injunction of secrecy” on its members when the proceedings were read to it. Moreover, in November 1775 the Continental Congress adopted its own oath of secrecy which was more stringent than the oaths required of others in sensitive employment. In June 1776, the Congress adopted the first secrecy agreement for employees of the new government. In addition, the Congress kept separate “secret journals” apart from its public journals, to record its decisions on intelligence matters.<sup>8</sup>

Even commander-in-chief of the revolutionary forces, George Washington, had a run-in with the Continental Congress over the wisdom of disclosing certain information. Washington wanted to publicize an encouraging development that he judged would give “a certain spring to our affairs” and bolster public morale. John Jay, the president of the Continental Congress and close friend of Washington’s, disagreed on grounds that disclosure could compromise sources and methods and therefore must be kept secret. Jay prevailed.

Washington was a skilled intelligence manager in addition to being a good military general. As one account puts it:

He utilized agents behind enemy lines, recruited both Tory and Patriot sources, interrogated travelers for intelligence information, and launched scores of agents on both intelligence and counterintelligence missions. He was adept at deception operations and tradecraft and was a skilled propagandist. He also practiced sound operational secrecy.<sup>9</sup>

Washington obtained a “secret service fund” from the Continental Congress, expressing a preference for specie, preferably gold. In accounting for the funds in his journals he did not identify the recipients. “The names of persons who are employed within the Enemy’s lines or who may fall within their power cannot be inserted.”<sup>10</sup>

In addition to managing numerous spies around the locations of British forces, he ran several spy networks inside British-controlled New York City and Philadelphia. For instance, the Culper spy ring in New York was managed by Major Benjamin Tallmadge from an outpost on the Hudson River above the city. It was the most professional of Washington’s networks, using code names, secret writing, enciphered communications, couriers, dead drops, signal sites and specific collection requirements.<sup>11</sup>

It is not the purpose of this essay to recount the many intelligence successes of the Patriot

forces under Washington during the Revolutionary War. Instead, it should suffice to sum them up by quoting Washington's British intelligence counterpart in the colonies: "Washington did not really outfight the British," he said after the war. "He simply out-spied us."<sup>12</sup>

### **Executive Branch Prerogatives**

There is no historical evidence that the framers of the Constitution thought for a second about retaining the intelligence gathering function in the Congress once it had created the Executive Branch and office of the presidency. The president, after all, would be the nation's leader spokesman in foreign affairs as well as commander-in-chief of the military forces. The main purposes of intelligence gathering activities, after all, were to facilitate the informed conduct of both responsibilities.<sup>13</sup>

In his first annual message to Congress on January 8, 1790, President George Washington asserted his leading role in matters of foreign policy as follows:

The interests of the United States require that our intercourse with other nations should be facilitated by such provisions as will enable me to fulfill my duty, in that respect, in the manner which circumstances may render most conducive to the publick good: And to this end, that the compensations by made to persons who may be employed, should, according to the nature of the appointments, be defined by law; *and a competent fund designated for defraying the expenses incident to the conduct of our foreign affairs.*<sup>14</sup> (emphasis added)

While the details of the use of the fund were not spelled out in the message, the "Foreign Intercourse Fund" (also known as the Secret Service Fund), which Congress subsequently approved in July, allowed for a portion of the monies to be used for secret activities. The president was required to certify the amounts spent, but was not required to conceal the purposes and recipients.<sup>15</sup>

The Congress later codified this fund in 1810. It wasn't until the presidency of James Polk in 1847 that Congress even tried to find out how funds appropriated under this secret account were being used. Polk responded by letter, refusing to provide Congress with the information—in effect claiming the modern day equivalent of executive privilege for national security reasons. Congress did not pursue the matter further.<sup>16</sup>

Prior to World War II, intelligence was primarily a wartime issue only, and most intelligence activities were run through the military services. And then, as now, intelligence failures became more well known than successes since the latter usually required continued secrecy to protect sources and methods for future operations. In the war of 1812, for instance, military intelligence failed to detect the British advance on Washington until it was just 16 miles from the Capital. The Secretary of War had refused to believe that the British would invade the Capital, and military intelligence

reported from his perspective.<sup>17</sup>

In 1941, President Franklin D. Roosevelt appointed his fiend, William Donovan, as Coordinator for Information to organize a non-military intelligence organization to “collect and analyze all information and data which may bear upon the national security.” While the coordinator could request information from other departments and agencies, he was specifically prohibited from interfering with the duties and responsibilities of the President’s military and naval advisers.<sup>18</sup>

The attack on Pearl Harbor on December 7, 1941, pointed to a massive intelligence failure, as subsequent investigations revealed, due to the casual and uncoordinated way in which intelligence had been handled, primarily by the Army and Navy. This in turn pointed to the need for a centralized intelligence structure. During World War II, this function was performed by the Office of Strategic Services (OSS), established in June 1942 under the Joint Chiefs of Staff to replace the office of information coordinator, with Donovan remaining in charge of the new entity. The OSS was chartered to carry out clandestine operations against the axis powers worldwide.

### **Congress, the Cold War, and Intelligence**

The placement of OSS under the Joint Chiefs was not a good fit, and as early as 1944 Donovan began campaigning for a peacetime successor that would be a civilian organization, directly responsible to the President. In 1947, at President Truman’s request, Congress obliged, passing the National Security Act that created the Central Intelligence Agency, the National Security Council in the White House, and unified the military services.

Despite the new centralization of intelligence coordination and evaluation in the CIA, intelligence agencies continued to proliferate after 1947. In 1952, the National Security Agency (NSA) was established by presidential directive under the Secretary of Defense, charged with cryptography and code-breaking duties. The Defense Intelligence Agency (DIA) was created in 1961 by Defense Department directive to coordinate intelligence for the Pentagon. Other important elements of the intelligence community can be found in the FBI, the Departments of State and Energy, the Treasury Department, Drug Enforcement Administration, Army Intelligence, Navy Intelligence, marine Corps Intelligence, and Air Force Intelligence.

The enactment of the 1947 National Security Act formally brought Congress into the intelligence loop, with funding and oversight responsibilities. But, for the most part, Congress was still content to defer to the executive branch leadership, and only a few senior members of the Armed Services and Appropriations committees in each house paid any attention to the intelligence community. Both sets of committees did establish special intelligence subcommittees. What oversight was conducted by the subcommittees, however, was done behind closed committee doors

for reasons of national security.

While the necessity for secrecy is understandable, the fact remained that closed hearings and meetings could not benefit from the input of the public, press, or clientele groups. The committees only met with the director of central intelligence and other high-ranking officials. Even then, it is questionable how useful or probative the oversight efforts were. As one former CIA legislative counsel observed: “We briefed in whatever detail they wanted. But one of the problems was you couldn’t get Congress to get interested.” President Truman’s aide, Clark Clifford, echoed that observation: “Congress chose not to be involved and preferred to be uninformed.”<sup>19</sup>

Nevertheless, the Pearl Harbor disaster had awakened the Congress to the need for better intelligence capabilities and coordination, and the advent of the Cold War after World War II made Congress and the public all the more sensitive about potential threats and vulnerabilities. Regardless of the interest level of individual members of Congress in the details of intelligence activities, the National Security Act wedded the two branches in mutual accountability for their success or failure, as much as many members may have preferred “out of sight, out of mind,” to oversight and “mind the store (or ‘The Company,’ as the case may be).”

Part of the explanation for this lax attitude was the mind-set and culture of Congress at the time. The bipartisan spirit by which Congress supported the Marshall Plan to rebuild Europe, create the United Nations, unify the military services, and create other new national security apparatuses (like the CIA), was highly deferential to the president as commander-in-chief and foreign policy leader in the face of Cold War threats.

The first notable exception to this deference to the executive on intelligence matters was Democratic Senator Mike Mansfield of Montana. Beginning in 1953, he pushed for the creation of a joint House-Senate CIA committee to oversee the intelligence community. His proposal was finally reported to the Senate floor in 1956 where it faced stiff opposition from Senator Richard Russell (D-Ga.) who was not only known as “Mr. Senate,” but chaired both the Armed Services and Appropriations CIA subcommittees. Russell questioned whether a joint committee would result in substantially more savings or increased availability of intelligence information. As he wrote to Senate Rules Committee Chairman Theodore Francis Green on January 16, 1956, “If there is one agency of government in which we must take some matters on faith, without a constant examination of its methods and sources, I believe this agency is the CIA.” The Mansfield resolution was subsequently rejected on a 27 to 59 vote.<sup>20</sup>

Another lone voice in the Senate was Senator J.W. Fulbright (D-Ark.) who challenged Russell a decade later in 1966. Fulbright, then chairman of the Senate Foreign Relations Committee,

had introduced a resolution to create a Senate Committee on Intelligence Operations to be comprised of members of the Armed Services, Appropriations, and Foreign Relations committees. This time the vote was 28 to 61. Following the vote, Russell invited Fulbright, Mansfield and others to sit in on his subcommittee hearings. Fulbright and some of his colleagues took Russell up on the offer, but as Fulbright later recounted:

They would never reveal anything of significance. They would never tell us how much money was being spent or where it was in the budget, or what they were doing with it. There was no stenographic record kept and the oversight was neither thorough-going nor effective. All this was basically a device to silence the critics in the Senate.<sup>21</sup>

As Frank Smist, Jr., observes, Russell “was a successful practitioner of what I define as ‘institutional oversight.’” As a strong believer in intelligence and executive leadership in foreign affairs, Smist says, Russell used his position in the Senate to protect those he was overseeing. This was the way oversight was implemented in the U.S. Senate during the Russell era. And the same was the case in the House from the late 1940s to mid-1970s under Armed Services Committee chairmen Carl Vinson (D-Ga.), Mendel Rivers (D-S.C.), and F. Edward Hebert (D-La.). As Smist puts it of the Armed Services Committee under Vinson, this was more a “stay in touch” committee than a “vigorous oversight” operation. The members were concerned about needless congressional “meddling with intelligence.” Smist concludes of this era, “All four committees, the House and Senate committees on Appropriations and Armed Services—were practitioners of institutional oversight. All were strong supporters and advocates of the very intelligence community they were overseeing.”<sup>22</sup>

### **The Watershed on the Hill**

The era of institutional oversight came to an abrupt halt in Congress in the wake of Vietnam and Watergate with the disclosure in 1974 by *New York Times* reporter Seymour Hersh of alleged CIA violations of its charter—namely that it had engaged in a “massive, illegal domestic intelligence operation during the Nixon Administration against the anti-war movement.” Although President Gerald R. Ford moved promptly to appoint a commission headed by Vice President Nelson Rockefeller to investigate the charges, Congress did not defer or delay its own responsibilities to look into the matter. On January 27, 1975, the Senate appointed a select investigative committee chaired by Senator Frank Church (D-Idaho). And, on February 19, 1975, the House followed suit by creating a House Select Intelligence Committee to be chaired by Representative Lucien Nedzi (D-Mich.). The diverging courses of those two efforts is instructive about the differing cultures and attitudes of the two bodies towards intelligence and foreign policy matters.



The Church committee, formally known as the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities set right to work on a 15 month investigation that included 21 days of public hearings and produced seven volumes of hearings, six final reports, and 183 recommendations to improve foreign and military intelligence and how to protect the rights of American citizens.<sup>23</sup>

The first House select committee, on the other hand, never got off the ground, first deadlocking over the appointment of a staff director, and then imploding when Democrats learned that designated chairman Nedzi had done nothing when he had learned about the intelligence abuses while serving as the principal intelligence overseer for the House Armed Services Committee.

In July the House created a second select intelligence committee, this time to be chaired by Representative Otis Pike (D-N.Y.). The Pike committee conducted 28 days of public hearings, but, like its predecessor, was wracked by internal dissension and confrontations with the Executive Branch. In January 1976, the House repudiated the committee by voting 246 to 124 against releasing the committee's final report. When the report was nevertheless leaked to the press and published, the House voted in February to conduct an official investigation into the leaking. The investigators became the subject of an investigation, with all 13 members and 32 staff being forced to testify under oath on the leaking of the report.

Notwithstanding the different results of the two inquiries, the House and Senate did agree on one thing, and that was the need to create permanent select intelligence committees. The Senate voted 72 to 22 in May 1976 to create such a committee, while the House did not act until July 1977 to do so. Why were permanent select committees established instead of permanent standing committees? The main reason is that select committee members are appointed directly by the party leaders (the Speaker and Senate majority leader), while standing committees are nominated by the House and Senate caucuses and then voted by the full chambers. Evidently, the leadership wanted to guard against loose cannons (and loose lips) ending up on such sensitive committees.

### **Back to the Future?**

The September 2001 terrorist attacks on New York and Washington sent another shock wave through Congress and the intelligence community over possible intelligence failures and what could be done to avert such attacks and failures in the future. The House and Senate intelligence committees joined forces in a joint investigation into the intelligence community's role (reminiscent of the Mansfield joint committee proposal); and the Congress and Administration subsequently agreed to an independent commission investigation into the same matters (similar to the post-Pearl

Harbor and the Rockefeller commissions). The joint intelligence committee venture was even marred by the leak of protected information, resulting in a self-requested investigation by the F.B.I. (harkening back to the Pike report's leak and subsequent investigation).

The coincidences of past and current events are not raised here merely for their curiosity value, but more importantly to underscore the recurring patterns of intelligence problems and Congress's alternating inattention and attention to them— all with mixed results. As more than one member of the congressional intelligence oversight committees has noted, the fact that a conspiracy of such massive proportions as 9/11 within the borders of the U.S. went undetected is not just a reflection on the intelligence community's performance, but also on the ability of Congress to adequately oversee and deal with perceived weaknesses and failings of that community.

The existence of two full-time committees in Congress, established specifically to oversee intelligence policies and operations, makes Congress as accountable as never before for the strengths and weaknesses of the system. Surely any recommendations flowing from the multiple investigations underway should speak as much to how Congress can better handle its responsibilities as to what needs to be changed in the executive agencies.

It may seem unfair that Congress should be held to such high standards of accountability when only a handful of members are actually privy to or have any influence over the conduct of American intelligence structures and operations. Delegating this responsibility to a handful of members on two very secretive committees may be a necessity, but in a democracy it remains a paradox in a black box (replete with black budgets, black bags, and black ops) that no one seems to have the key to open, let alone unravel and solve. Or, as Winston Churchill once put it in another context, "It is a riddle wrapped in a mystery inside an enigma."<sup>24</sup>

In the new and dangerous world disorder that has emerged since the fall of communism, good intelligence is more important than ever to preserve and protect democratic states from those who would undermine and destroy the freedoms they embody. That spying and secrecy may seem inimical to the ideals and values of a free society should not be allowed to obscure the reality that such practices are integral to producing information on which the safety and security of such societies depend.

The check of a representative legislature on the potential abuse of such practices is the one safeguard the people should be able to look to as assurance their rights and the freedom of their society are being protected. This may require that Congress find new ways to better fulfill its intelligence oversight responsibilities to cement public confidence in its accountability for this anomaly of democracy.

## Notes

1. George Washington to Robert Hunter Morris, 5 January 1766, from *The Writings of George Washington* (GPO: 1931-1944, Vol. I, p. 268), quoted in P.K. Rose, "The Founding Fathers of American Intelligence," Center for the Study of Intelligence, Central Intelligence Agency, 1999, 2.
2. Frank J. Smist, Jr., *Congress Oversees the United States Intelligence Community, 1947-1989* (Knoxville: The University of Tennessee Press, 1990), 1, 2. The quote is taken from a letter from General Washington was writing to Colonel Elias Dayton dated July 26, 1777.
3. "Intelligence in the War of Independence," a publication of the Central Intelligence Agency, 1,2, accessed at <http://www.odci.gov/csi/books/warindep/intro.html>, on January 9, 2003.
4. Ibid, 1.
5. Ibid.
6. Ibid, 2.
7. Ibid, 6, 7.
8. Ibid, 10.
9. Ibid, 15.
10. Ibid.
11. Rose, 2.
12. Dan Gilgoff, "Washington's Web: The General was One Accomplished Spymaster," *U.S. New and World Report*, February 3, 2003, 52.
13. John Jay confirms this assumption about the Constitution's implicit lodging of intelligence responsibilities in the executive when he writes in Federalist No. 64: "It seldom happens in the negotiation of treaties, of whatever nature, but that perfect secrecy and immediate despatch are sometimes requisite. These are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. . . .There are doubtless many who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular Assembly. The [constitutional] convention have done well, therefore, in disposing of the power of making treaties, that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such a manner as prudence may suggest."
14. President George Washington, "The First State of the Union Address," January 8, 1790, accessed at the University of Oklahoma Law Center web site <http://www.law.ou.edu/hist/washu.html> on April 4, 2003.
15. "The Evolution of the U.S. Intelligence Community—An Historical Overview," Appendix A to the report of the Brown-Rudman Commission, "Preparing for the 21<sup>st</sup> Century, An Appraisal of U.S. Intelligence," March 1, 1996, A-1, accessed at

<[http://www.access.gpo.gov/su\\_docs/dpos/epubs/int/pdg/report.html](http://www.access.gpo.gov/su_docs/dpos/epubs/int/pdg/report.html)> on April 4, 2003.

16. Smist, 2.

17. Brown-Rudman Report, A-2.

18. Ibid, A-4.

19. Smist, 5.

20. Ibid, 6.

21. Ibid, 6,7.

22. Ibid, 7-9.

23. Ibid, 10.

24. Churchill used this phrase in explaining why he could not forecast the actions of the Russians in 1939. Coincidentally (or ironically), it was also 1939 when the British secret service set up the Ultra project to intercept the Enigma signals of the Germans. Enigma was the name of the device by which the German military encoded its strategic messages. The code was first broken by the Poles in the early 1930s, and later turned over to the Allies during the war, enabling them to accurately forecast the actions and movements of the German military.