

LEGAL ECHOES: THE NATIONAL SECURITY ACT OF 1947 AND THE INTELLIGENCE REFORM AND TERRORISM PREVENTION ACT OF 2004

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Legend has it that Mark Twain was once asked if history repeats itself. No, he was said to answer, it does not repeat itself, but sometimes it rhymes. In 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act—the most sweeping reform of the U.S. Intelligence Community in almost sixty years. The debates surrounding passage of this bill offered uncanny echoes of the arguments over the law it amended: the original National Security Act of 1947. It is instructive to survey the rhyming passages between the two debates, as well as some important dissonances.

The American government usually changes by increments, rather than by leaps. Its Constitution ingeniously divides and re-divides power to ensure that no President or Congress can long exercise unchallenged power or make sweeping and precipitous changes to the nation's institutions. That does not mean that transformative shifts are impossible but rather that, when they come, they typically do so only after some national trauma. Even after such a trauma, the proverbial stars have to align for a major statutory and institutional change to occur swiftly rather than incrementally. In the intelligence field, such a major re-writing of statutes has happened only twice: once in 1947 and once in 2004.

We need to understand the parallels, and differences, between these events. For reasons listed below, the music of the stars that gives us sweeping intelligence reform is not likely to hit another such refrain in the foreseeable future. Still, it is helpful to grasp the various political, military, institutional, technological, and even personal factors that come into play during the passage of a major piece of legislation in the United States. Anyone who wishes to

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understand how to interpret a new law, and particularly the Intelligence Reform Act of 2004, should learn how it was written and deliberated, and one way of doing so is to understand how that process echoed and diverged from precedents.

What follows is a list of the parallel conditions that influenced the drafting, deliberations, and passage of the National Security Act of 1947 and the sweeping amendments to it passed in 2004. Each piece of legislation is briefly explained to show how it was affected by events in each era. This survey makes no attempt to be a close legal or policy analysis of either statute, but is rather an attempt to provide context for textual interpretation and policy prescription. As important as both of those techniques are, what is also needed is insight into how laws are negotiated, passed, and interpreted. Every nation has its own methods of composing legislation, and the uniquely American minuet between the President, the houses of Congress, and Cabinet departments has rhythms that transcend the players involved in any particular decade. Here is a brief list of the parallel influences on each Act.

A recent national crisis or trauma. World War II had ended less than two years before passage of the National Security Act. From the perspective of six decades later, the Allied victory in that conflict looked assured, but it did not look so inevitable during the great national crisis of June 1940, when Hitler had conquered France in a mere six weeks and seemed poised to snuff out Britain's independence as well. Pearl Harbor was an even greater shock to the average American the following year, convincing the populace that war would eventually come to North America whether or not the United States tried to remain neutral. In the course of the war more than thirteen million Americans—roughly ten percent of the population—served in the Armed Services. The U.S. Government itself was transformed by the crisis of 1940-1941, perhaps more so than by the New Deal a decade earlier, or the Great Society in the 1960s.

The War on Terror has not had such a wrenching effect on the United States, but the horror of September 11, 2001, will nonetheless be recalled in terms much like the remembrance of Pearl Harbor. It is easily the biggest national event in living memory for millions of younger Americans. It has led to several major pieces of legislation, as well as significant renovations of portions of the U.S. Government (e.g. the establishment of a Department of Homeland Security, a Director of National Intelligence (DNI), and a National Security Branch in the Federal Bureau of Investigation, to name a few), and it marked a shift in attitudes toward issues of national security.

An uncertain, unstable, and potentially dangerous global environment. After World War II, Communism seemed to be on the march, and for a year or so fascism was seen as something that could revive. Our very survival, as well as colder calculations of geopolitics, dictated that we resist Nazi Germany when it threatened to dominate the Eurasian landmass in 1940-41. An even greater power loomed after 1945—this time one with a superficially appealing

and vaguely scientific ideology of revolution. For a time, that ideology even seemed to persuade a significant number of Americans that the wave of the future was Communism, not liberal democracy.

A new ideology of Islamic radicalism loomed in the 1990s, and in September 2001 it proved able to cause mass destruction in our cities. Over the last decade this ideology has wreaked havoc from New York to Madrid to London, with countless other incidents in the Near East (especially in its Sunni Arab districts). Not every suicide bomber had sworn fealty to Osama bin Laden, and not every one had even heard of al Qaeda, but it is clear that a significant number of Salafist extremists have been willing to die for the sake of their cause. At the same time, other global and regional trends are adding to the general sense of instability. Uncertainty remains about the prospects for liberalization in many former and nominally Communist countries, and unease has arisen in certain quarters about Washington's geopolitical intentions.

Major technological change that undermined traditional notions of security. In the 1940s, long-range bombers, ballistic missiles, and most of all—the atomic bomb—convinced U.S. policymakers that America's ocean moats could no longer protect us. By late 1945, it did not take much imagination to foresee a day when the bombers would be jet-powered and A-bombs could be made small enough to fit on missiles that could reach across oceans.¹ No one doubted that the Russians would eventually deploy all of these weapons systems, and that other nations might acquire them as well.

At the turn of the Twenty-first Century, disputes over globalization and the simultaneous “democratization” of weapons of mass destruction (both trends based in part on the internet and global travel) convinced many observers that strategies for an earlier age were rapidly reaching the end of their useful life. A series of frightening but isolated terrorist assaults in the mid-1990s showed that small bands of desperate plotters could injure thousands. By the late 1990s the Clinton administration had begun warning about the dangers of powerful new weapons in the hands of terrorists, and to some members of the administration, Osama bin Laden looked like the terrorist leader most likely to seek and use such weapons against the United States.² These concerns have hardly diminished in recent years.

A shift in national strategy to meet the latter two conditions. President Franklin D. Roosevelt abandoned America's traditional isolation and neutrality

1. See Memorandum from the Joint Chiefs of Staff to Secretary of War Henry Stimson and Secretary of the Navy James Forrestal, Establishment of a Central Intelligence Agency Upon Liquidation of [the Office of Strategic Services (OSS)] (Sept. 19, 1945), *reprinted in* DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES, 1945-1950: EMERGENCE OF THE INTELLIGENCE ESTABLISHMENT 41 (Glenn W. LaFantasie et al. eds., Gov't Printing Office 1996) [hereinafter FRUS].

2. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 100-02, 118-19 (Gov't Printing Office 2004) [hereinafter *9/11 Commission Report*].

over a year before Pearl Harbor, arguing that the English Channel had become the nation's first line of defense against Hitler. From FDR's new emphasis emerged a new grand strategy for the United States. Roosevelt did not live to see its completion, but his successor Harry Truman brilliantly accomplished it with the establishment of the United Nations, the World Bank, the Marshall Plan, the Truman Doctrine, and the NATO alliance. These moves pushed America forward into the Old World, first into Europe in 1947, and then into East Asia in 1950. What was loosely called "containment" worked for the Cold War, defending the Western world while Soviet Communism eventually rotted from within.

The 9/11 attacks demonstrated weaknesses in the strategy of containing enemies far from America's shores. A handful of terrorists showed that weapons of mass destruction could be launched against U.S. cities from within the American homeland. In response, President George W. Bush adjusted FDR's construct in his own *National Security Strategy* in September 2002. This document is not a repudiation of the Rooseveltian grand strategy, much of which it retains. Military might and regional balances of power to restrain potential hegemony in Europe and vital sectors of Asia remain key elements of the new strategy, but in the face of radicals who cannot be deterred from using weapons of mass destruction, the Bush Administration has vowed to pre-empt gathering threats and to promote the building of "the infrastructure of democracy" abroad.³

A serious intelligence failure, a subsequent Congressional investigation, and then more mistakes. Almost as soon as the shooting stopped in 1945, Congress turned to its long-awaited investigation of the Pearl Harbor disaster. The probe was undertaken on a joint basis in a blaze of publicity, and it quickly divulged (with tacit assent from the White House) the secret that we had been reading high-level Japanese codes even before the war began.⁴ This revelation, combined with the chronic rivalry among the branches of the armed services that the investigation also highlighted, convinced many lawmakers that the nation's defense and intelligence structures needed to be overhauled. The inmost councils of the Truman Administration also knew something else: that American intelligence agencies during the war had often failed to coordinate their work overseas, thus endangering operations and squandering opportunities.⁵ Both considerations figured prominently in the Administration's

3. GEORGE W. BUSH, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 2002 15, 21 (2002), available at <http://www.whitehouse.gov/nsc/nss.html>. Because the White House publicly released its revisions to the Strategy in March 2006, see <http://www.whitehouse.gov/nsc/nss/2006/> for an updated version. For an insight into the recent course of American grand strategy, see John Lewis Gaddis, *A Grand Strategy of Transformation*, FOREIGN POL'Y, Nov.-Dec. 2002, at 51-52.

4. GORDON PRANGE, AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR 679, 688 (1981).

5. Minutes of Meeting of the Secretaries of State, War, and Navy (Nov. 14, 1945),

call for new intelligence legislation, in Congress's consideration of competing proposals, and in the White House's ultimate acceptance of what emerged from Congressional deliberations in 1947.

Congress investigated both 9/11 and the Iraq intelligence failure, and passed legislation creating an independent commission to conduct a more detailed probe of the September 11 attacks. The findings of these several inquiries created great unease in Congress about the capabilities of the Intelligence Community. If the disaster of 9/11 is analogous to Pearl Harbor, then the failure to understand Saddam's weapons programs (or lack thereof) is analogous to the operational failures of World War II. Many Members of Congress from both parties were frustrated by the Intelligence Community's bad call on Iraq. In some quarters the distrust of the Central Intelligence Agency—the flagship of the Intelligence Community before and during the Iraq War—ran strong. More than a few Members felt that the powers of the Director of Central Intelligence (DCI) had to be divided among two positions. Every DCI had an inherent conflict of interest arising from his ties to the CIA, it was believed, and thus no DCI could be an impartial leader of the Community while simultaneously acting as chief of an important Community component.⁶

A Congress willing to fix intelligence. Reform of intelligence is rarely a topic that arouses the interest of Members of Congress. There are relatively few intelligence “constituents,” even for Members representing districts around Washington, DC. The amounts of money to be saved (or spent) are small by federal standards. The subject itself is complicated, arcane, and fenced by formidable security and classification barriers, and thus the risk of making a well-intentioned mistake with significant long-run repercussions is considerable. Nevertheless, there are times when enough Members are willing to take on the job to form a coalition for change, and their less-interested colleagues are willing at least to vote on a reform bill. Political considerations can usually be spotted behind some Members' uncommon willingness to take on the issue.

The White House was the driving force behind intelligence reform in 1947, but many Congressmen felt part of a consensus that something needed to be done to modernize the nation's intelligence structure. The Pearl Harbor investigation report that had been issued in mid-1946 was a bipartisan enterprise, and its conclusions helped give Congressmen a clear set of talking points for reform. Intelligence had to be more unified and effective, the report concluded, and Congressmen echoed that axiom throughout the debates over the National Security Act.⁷ A few months earlier, in March 1947, Congress had

reprinted in FRUS, at 110.

6. See *Hearing of the Senate Select Committee on Intelligence*, FEDERAL NEWS SERVICE, July 20, 2004 (noting remarks of Sen. Dianne Feinstein (D-CA)).

7. DAVID F. RUDGERS, CREATING THE SECRET STATE: THE ORIGINS OF THE CENTRAL

changed hands, as the Republicans regained control of both chambers for the first time in sixteen years. The incoming GOP Members had something to prove: they wanted to show voters that their party, long banished to the political wilderness by Franklin D. Roosevelt, could once again be trusted with matters of state. Constructively engaging President Truman on the reform of the national security structure was a means to that end.

In 2004, Congress drove the reform impulse. Members from both parties and both houses offered bills in the year before the passage of the Intelligence Reform Act; several of those bills contained provisions that would have reshaped the Community more radically than the final Act accomplished.⁸ This time there were two mantras: centralized leadership for the Intelligence Community that would break down the bureaucratic “stovepipes” that had been built around the various intelligence collection specialties and sharing of information across the agencies to “connect the dots” with regard to the terror threat. Again, these ideas and others like them gave many Congressmen a clear set of talking points that justified an interest in intelligence reform and proposed a general direction for reform to take.

Politics naturally played a role as well. In this case, the political impetus came from a group of survivors of persons killed in 9/11, attacks, as well as from the 9/11 Commission, which continued its work with funding from several prominent foundations after issuing its report in July 2004. Both groups remained strictly non-partisan in their public utterances, and thus provided an implicit sanction: they could criticize either party or any official who actively *opposed* intelligence reform. No elected official in Washington or candidate on the hustings was anxious to weather such criticism in an election season. As the completed legislation was finally being prepared for a vote on the Senate floor on December 8, 2004, several Senators paid tribute to the persuasiveness of the 9/11 family members and the 9/11 Commission. Senator John McCain (R-AZ) declared their support “crucial”; Senator Joseph I. Lieberman (D-CT) called them “our inspiration”; Majority Leader Bill Frist (R-TN) said they provided “the momentum” that led to the Act’s passage.⁹ That was high praise indeed.

A president who wanted institutional reform—but held reservations about entrusting the job of fixing intelligence to Congress. No president likes Congress to micromanage the executive branch, and every president has been cool to the idea of Congressmen writing detailed legislation to govern intelligence. This rule holds for Democratic and Republican administrations, and under both Democratic and Republican-controlled Congresses. Certainly

INTELLIGENCE AGENCY, 1943-1947 138-39 (2000); *see also* JOINT COMMITTEE ON THE INVESTIGATION OF THE PEARL HARBOR ATTACK, INVESTIGATION OF THE PEARL HARBOR ATTACK 252-53 (1946).

8. *See, e.g.*, Intelligence Transformation Act of 2004, H.R. 4104, 108th Cong. (2004).

9. 150 CONG. REC. S12007, S12009 (daily ed. Dec. 8, 2004) (statements of John McCain, Joseph Lieberman, and Bill Frist).

Harry Truman felt that way, and there is evidence that George W. Bush has as well. The impracticality of several reform ideas proposed on Capitol Hill in both 1947 and 2004 gave executive officials ample grounds for such concern.

Early in his tenure, President Truman made it a goal to reform what he called the nation's "antiquated defense setup."¹⁰ He drove the drafting and passage of the National Security Act, although he had strong support from many Members of Congress, members of his administration, and parts of the military high command. Despite his enthusiasm, however, Truman was indeed reluctant to let Congress hash out the specifics of intelligence reform. He avoided proposing intelligence legislation in 1945, preferring to eliminate the wartime Office of Strategic Services rather than asking Congress to make it permanent. Instead, Truman asked lawmakers to treat the intelligence issue along with overall military reorganization.¹¹ As we shall see, the intelligence sections of the bill that became the National Security Act of 1947 were left short and vague in hope of avoiding scrutiny on the Hill.¹²

President Bush did not take office in 2001 with reform of the national security establishment high on his agenda. Nevertheless, his record as a reformer could well end up being as lengthy as Truman's. On his watch, "transformation" has become the Pentagon's unofficial motto, a raft of agencies have been reshuffled into the new Department of Homeland Security, and, of course, intelligence has seen its most significant reorganization in almost six decades. President Bush has repeatedly evinced reluctance to endorse Congressional initiatives that would tinker with institutions while they are fighting a war, but as reform efforts gathered momentum with Congress and the public, he has sought to ensure that new laws and new institutions are fashioned to accomplish the White House's ends. The trajectory of the Intelligence Reform Act followed this path. The Administration officially remained silent on the several intelligence reform bills that were offered in 2003 and 2004 until after the release of the 9/11 Commission report and Democratic presidential nominee John F. Kerry's swift embrace of its recommendations. A month later, the White House issued four executive orders on intelligence and terrorism and made it known that it wanted Congress to pass legislation that would go even further.¹³ When the intelligence reform bill

10. HARRY S. TRUMAN, *MEMOIRS: YEARS OF TRIAL AND HOPE* 46 (1956).

11. *Text of the President's Message to Congress Asking Unification of the Army and Navy*, N.Y. TIMES, Dec. 20, 1945, at 14.

12. THOMAS F. TROY, *DONOVAN AND THE CIA: A HISTORY OF THE ESTABLISHMENT OF THE CENTRAL INTELLIGENCE AGENCY* 374 (1981).

13. Exec. Order No. 13353, 69 Fed. Reg. 53,585 (Aug. 27, 2004); Exec. Order No. 13354, 69 Fed. Reg. 53,589 (Aug. 27, 2004); Exec. Order No. 13355, 69 Fed. Reg. 53,593 (Aug. 27, 2004); Exec. Order No. 13356, 69 Fed. Reg. 53,599 (Aug. 27, 2004); *see also White House Conference Call Background [on] President's Executive Orders*, FEDERAL NEWS SERVICE, Aug. 27, 2004 (noting the comments of the "senior administration official" who briefed reporters on background on the day the executive orders were signed).

subsequently stalled in a House-Senate conference committee, President Bush's public urging of Members "to pass an effective intelligence reform bill that I can sign" just two days after his re-election helped revive its prospects.¹⁴ It is true that President Bush himself was not the engine of intelligence reform, but it is also likely that without his efforts on its behalf, the Intelligence Reform Act would never have reached a vote in Congress.¹⁵

Rivalry over who would control intelligence. The infighting in the government over intelligence reform after World War II is proverbial among students of the field. The Department of State, the Joint Chiefs of Staff, the Office of Strategic Services, the Federal Bureau of Investigation, and the White House's Bureau of the Budget all offered ideas for running intelligence. The military and FBI did not want the Department of State to hold preeminence, as it had before 1941; the White House rejected a "Gestapo" with the FBI's J. Edgar Hoover controlling intelligence; the armed services insisted to President Truman that they be allowed to provide for their own needs and not be compelled to go as supplicants to a civilian intelligence czar.¹⁶ These rivalries can be exaggerated, as there is much evidence of cooperation on smaller matters in the years after the war, but it is clear that the principals fixed their mutually exclusive positions early in the bidding over postwar intelligence and articulated them with conviction throughout.

The media depicted the struggle over intelligence reform in 2004 in terms much like those that scholars have long used to describe the debates over the original National Security Act. According to the newspapers, the Secretary of Defense was locked in a grim struggle over intelligence centralization with proponents of the 9/11 Commission's recommendations for a "National Intelligence Director." Representative Duncan Hunter (R-CA), the influential chair of the House Armed Services Committee, labored to defend the prerogatives of military commanders to control their access to the intelligence they need on the battlefield, and he was widely seen as representing the Pentagon's side of the argument. Senators Susan M. Collins (R-ME) and Joseph Lieberman (D-CT)—the Senate's main shepherds for the bill—were taken to be the champions of strong central direction free of supervision by the Secretary of Defense, who controls agencies that collectively spend four-fifths of every intelligence dollar. As with many misconceptions, these contained

14. White House, Office of the Press Secretary, President Holds Press Conference, Nov. 4, 2004, <http://www.whitehouse.gov/news/releases/2004/11>.

15. 150 CONG. REC. S11940, S11944, S12009 (daily ed. Dec. 8, 2004). Senate Majority Leader Bill Frist noted that President Bush had directly participated in the process that led to the passage of the Act, while Sen. Susan Collins praised both the President and Vice President: "[t]heir intervention at critical points throughout the debate was absolutely essential in helping us to forge the compromises that were necessary to move this bill along." Her colleague Senator Joseph Lieberman echoed this assessment. *Id.*

16. For President Truman's perspective on the rivalry, see TRUMAN, *supra* note 10, at 57.

elements of truth.¹⁷

The availability of reform proposals that could be fitted into legislation. In the Truman Administration's internal debates over intelligence, the key innovation was a "director of intelligence" who held limited powers and reported to the White House and a committee of department heads—and could not be monopolized by any one agency.¹⁸ The idea of such an official had emerged in a series of plans drafted for the Joint Chiefs of Staff beginning in 1944 and had developed a life of its own when aides presented it to President Truman in January 1946. He praised its simplicity and pronounced it the most workable arrangement for the new intelligence structure—and so it came to pass.¹⁹ The Administration found the scheme viable in practice over the course of the next year and included it in the drafting of the National Security Act.

The appeal of a central intelligence director endures to this day. Indeed, it was the inspiration for the reforms contained in the 2004 Act, which was touted by its proponents as completing—not supplanting—President Truman's vision. The new Director of National Intelligence would finally have significant administrative powers that had been withheld from DCIs since 1947 and would be truly independent from policymaking and operational distractions by virtue of his separation from the chore of managing the CIA. He would also control intelligence "mission centers," a term of art for proposed organizations that would co-locate analysts and collectors in the hope of increasing the synergy between them. This was an idea, not further defined, that the drafters of the bill borrowed from the 9/11 Commission Report and applied liberally in the 2004 Act to give the DNI greater responsibilities over terrorism and the proliferation of weapons of mass destruction—and almost any other topic that the White House and the DNI deemed appropriate.²⁰

A vacuum at the top ranks of the nation's intelligence establishment. The Constitution's division of the executive branch into roughly co-equal departments, and the resulting durability of the departments' respective intelligence offices, create a situation in which fundamental reform of intelligence is usually achieved only through legislation. It is true that certain directors of Central Intelligence, Walter B. Smith at their head, conceived and implemented reforms that altered the workings of the intelligence establishment without Congressional help. Exceptions like these prove the larger rule. Typically, DCIs have quietly opposed legislative intervention

17. RICHARD A. BEST, JR., CONGRESSIONAL RESEARCH SERVICE, INTELLIGENCE COMMUNITY REORGANIZATION: POTENTIAL EFFECTS ON DOD INTELLIGENCE AGENCIES 14-17 (2004).

18. See H.F. Matthews, Minutes of Meeting [of the Secretaries of State, War, and Navy], Oct. 16, 1945, reprinted in FRUS, at 64.

19. See TRUMAN, *supra* note 10, at 56-57.

20. THE 9/11 COMMISSION REPORT, *supra* note 2, at 411-14.

unless it has been carefully crafted and specifically tailored to achieve predetermined and limited results. Presidents and their Cabinets have tended to share this view, forming common fronts against most bills. Without DCI support, it was difficult to build bipartisan coalitions for change on Capitol Hill.

The two sweeping legislative reforms of intelligence in 1947 and 2004 occurred while the DCI's post was vacant or barely filled. The Truman Administration's basic approach to reform, of course, had been set in late 1945, when no official of the U.S. Government served to coordinate the efforts of the intelligence agencies. The National Security Act was debated in the spring of 1947 as one DCI (Hoyt Vandenberg, an U.S. Army Air Forces three-star general) left office and his lower-ranking successor (Roscoe Hillenkoetter, a Navy two-star general) was coming in. In 2004, DCI George Tenet, who was widely respected on Capitol Hill, departed a few weeks before the 9/11 Commission issued its report, and the White House did not nominate his successor (Representative Porter Goss, R-FL) for several weeks after the report's publication and the beginning of sustained work in the Senate to draft reform legislation. In both 1947 and 2004, the temporary absence of a strong and visible leader of the intelligence establishment removed a potential rallying point for opposition to legislative intervention.

Legislative language that is minimally acceptable to the key players in the White House, Congress, and the departments, in part because it is vague. The Truman Administration held the intelligence provisions of the 1947 Act to fewer than three pages, promising Congressional leaders and CIA officials that a more detailed bill to define the administrative authorities of the DCI to run his new agency would be proposed at a later date. The White House had two reasons for taking this approach. First, everyone close to the President knew that his main legislative goal was the passage of an act to "unify" the armed forces and that nothing would be inserted in the larger national security bill to distract the Congressmen from that objective.²¹ Second, the heavy lifting on the intelligence section had already been done by 1947; it was accomplished in the executive branch over a year earlier in the course of debating outlines of the new central intelligence unit.

Two compromises had allowed the important players in the intelligence debates in late 1945 to come to a working arrangement. The first was the trick of subordinating the proposed DCI to a committee of Cabinet secretaries—the "National Intelligence Authority." That allowed the armed services and the Department of State to claim that no one agency or viewpoint would dominate the new intelligence arm. The Secretaries of State, War, and Navy, joined by one of the President's aides, would constitute the Authority and jointly

21. See LYLE MILLER, OFFICE OF LEGISLATIVE COUNCIL, CENTRAL INTELLIGENCE AGENCY, LEGISLATIVE HISTORY OF THE CENTRAL INTELLIGENCE AGENCY—NATIONAL SECURITY ACT OF 1947 72 (1947).

supervise the Central Intelligence Group (CIG). In addition, the verbs used to describe the CIG's duties (words like "evaluate," "coordinate," and "survey") were suitably ambiguous, so as not to make any existing department jealous of its authorities. Perhaps the key ambiguity was the phrase "services of common concern," representing something the new CIG would do that did not seem patently objectionable. Just what those services were remained to be defined.

Having reached this state of balanced ambiguity, the White House felt confident that Congress would approve its proposal, and so the President's January 1946 directive establishing the CIG was used as the basis of the text of the intelligence provisions in the new national security bill in early 1947. The Administration's tactic of keeping the intelligence section short and vague almost backfired, however, and the Congressmen ended up pondering almost every clause. Few Members knew much, if anything, about intelligence at that time, but they knew plenty about artful ambiguity, and various provisions, like the "services of common concern" phrasing, eventually prompted unhelpful speculation in the newspapers. The Administration scrambled to answer such questions as the bill neared a vote. In a Top Secret memorandum dated June 26, 1947, the National Intelligence Authority admitted to a powerful House committee chairman that "services of common concern" was indeed a euphemism for clandestine operations—in short, espionage. Painful experience in wartime, the Secretaries noted, had convinced the Administration that clandestine activities must be coordinated (if not always directed) from a central point in Washington. With "a multitude of espionage agencies," the Secretaries explained, the agents in the field "tend to uncover each other." The feelings of the Members of Congress about this logic are lost to history, but whatever they were they did not derail the National Security Act, which Congress passed on July 26, 1945.²²

The 2004 Act was far more detailed, but the details in it generally covered only the changes to existing law that were relatively uncontroversial. For instance, large shares of the intelligence portion of the Act were devoted to secondary issues such as a White House Privacy and Civil Liberties Oversight Board (five pages), an Intelligence Community Scholarship Program (three pages), and the many technicalities governing how the Office of the DNI was to be assembled from staffs transplanted from the CIA and the DCI's suite.

The key increments of authority for the DNI over personnel, budgets, and operations, however, were phrased very carefully—and most succinctly—and had to be hammered out with great difficulty in the House-Senate conference committee to reconcile the two chambers' widely divergent bills.²³ On the day

22. Memorandum from the National Intelligence Authority to Rep. Clare Hoffman, June 26, 1947, *reprinted in* FRUS, at 311. Representative Hoffman (R-MI) chaired the House Committee on Expenditures in the Executive Departments.

23. Two of the trickiest phrasings covered the DNI's authorities to "reprogram" funds among intelligence agencies (Intelligence Reform and Terrorism Prevention Act of 2004,

the House voted to approve the conference report, the chairman of the House Permanent Select Committee on Intelligence Peter Hoekstra (R-MI) looked back in wonder: "This conference report is the product of what may go down in the annals of this institution as one of the most difficult and certainly one of the most involved conferences everThe negotiations have been tough, long and sometimes extremely contentious."²⁴ The trick to building bipartisan votes for the DNI provisions (and muting the opposition) was striking a balance between increasing and limiting the DNI's powers. Each increment had to be worded with enough ambiguity both to give it real bite and to allow what appeared to be vital exceptions for the Cabinet departments charged with fighting the nation's wars and enforcing its laws. Two examples stand out.

One of the key differences between the new DNI and the DCI he replaced is the increase in authority over the main budget for intelligence, the "National Intelligence Program." Section 102A(c)(1)(B) of the 2004 Act gives the DNI the power to "develop and determine" the budgets of all the Intelligence Community agencies, as well as "exclusive direction" over how and when the money is dispersed by the White House's Office of Management and Budget to the Cabinet departments for their agencies. This is a strengthening of the National Security Act's previous grant of authority for the Director of Central Intelligence to "facilitate the development" of the intelligence budget.²⁵ But the money will still be appropriated to those departments, not to the DNI, and it is still spent by their people, not his. On the day the Senate voted on the conference report, Senator Collins assured her colleagues that "the word 'determine' in the legislation means that the DNI is the decisionmaker regarding the budget and does not share this authority with any department head." The legislation would "ensure that the Secretary of Defense does not interact with the Intelligence Community in a way that is inconsistent with the DNI's authorities."²⁶ "We do not want to create a figurehead," she said a little later; the DNI "will have significant budgetary and other authorities, and that makes sense."²⁷

But it was almost not to be. Reaching this nuanced balance of power between the DNI and the Cabinet secretaries required sharp debate in the conference committee. The previous day, Rep. Duncan Hunter (R-CA) on the floor of the House had sounded relieved at how the conference had turned out: "We had to walk back this idea that somehow we were going to send the money for the combat support agencies around the Department of Defense, not allow the Department of Defense to have a normal working relationship with

Pub. L. No. 108-487, § 1011 (2004)) and the "preservation of authorities"—i.e., the chain of command—in the Executive Branch (Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-487, § 1018 (2004)).

24. 150 CONG. REC. H11003 (daily ed. Dec. 7, 2004) (statement of Rep. Hoekstra).

25. 50 U.S.C. § 403-3(c) (2004).

26. 150 CONG. REC. S11970 (daily ed. Dec. 8, 2004) (statement of Sen. Collins).

27. *Id.* at S12007.

its own combat support agencies.” The House conferees had had to stop “this wild attempt to remove the Department of Defense from its own budget flow to its combat support agencies.”²⁸

What did all this mean? Three Senators offered varying assessments while the Senate was preparing to vote on the conference report on December 8, 2004. Sen. John D. Rockefeller IV (D-WV), ranking member of the Senate Select Committee on Intelligence, expressed disappointment: “[T]he intransigence of the House conferees forced the Senate conferees to give up more than I would have hoped.” Specifically, “[t]he comptroller established to execute the National Intelligence Program funding has been dropped, requiring intelligence spending to still be channeled through the Pentagon comptroller.”²⁹ Senator Lieberman was more optimistic: “[t]he DNI will have unprecedented authority in the implementation and execution of all funding under our national intelligence program.”³⁰ Unprecedented, perhaps, but just how much authority will the DNI actually have over intelligence budgets? Sen. Pat Roberts (R-KS), chairman of the Senate Select Committee on Intelligence, may have put it best in saying that the Act gave the DNI “marginally improved budget authorities over our intelligence community agencies.”³¹

Section 1018 of the Intelligence Reform Act also insists that the DNI must use his new authorities “in a manner that respects and does not abrogate” the statutory responsibilities of the heads of the departments. The words “not abrogate” surely constituted the most delicate phrasing in the entire legislation, being as they were the fragile resolution to the dispute over the DNI’s ability (or lack thereof) to interpose himself between a Cabinet secretary and the agencies of his department. House and Senate conferees exchanged more than a dozen offers and counteroffers seeking words that would give the DNI authority without letting him infringe the ability of Cabinet secretaries to manage their departments.³² Finally, on December 6, 2004, the conferees settled on the “not abrogate” formulation. Members who had been involved in the conference insisted the “not abrogate” formulation would work. The House passed the bill the next day, and the Senate followed suit on December 8. According to Representative Hunter, the House had turned back an “attempt to keep the chain of command in a position where it was questionable.”³³ Senator Roberts argued that the bill “does very little to modify the chains of command” and that no President or Congress “would ever permit the crucial intelligence

28. 150 CONG. REC. H11005 (daily ed. Dec. 7, 2004) (statement of Rep. Hunter).

29. 150 CONG. REC. S11958 (daily ed. Dec. 8, 2004) (statement of Sen. Rockefeller).

30. *Id.* at S11942 (statement of Sen. Lieberman).

31. *Id.* at S11953 (statement of Sen. Roberts).

32. *Id.* at S12004-06 (charting the evolution of the passage that led to “not abrogate”). The conferees took two weeks searching for the right phrase, as a chronology assembled by Sen. John W. Warner (R-VA).

33. 150 CONG. REC. H11005 (daily ed. Dec. 7, 2004) (statement of Rep. Hunter).

needs of our military to be ignored by the Director of National Intelligence.”³⁴ Senator Collins insisted on this latter point: “Some observers have raised concerns that this legislation will impede the flow of intelligence to the warfighter. I believe that nothing is further from the truth.”³⁵

All sides in the passage of the Intelligence Reform Act seemed a little dazed by the time the conference report finally came to a vote. Senator Roberts explained to his colleagues that “This bill is not perfect. No bill is.” Its Senate conferees “were forced to put the Senate bill through the filter of the demands of the House and still manage to get a bill that is a step in the right direction—a big step.”³⁶ Representative Hunter, for his part, assured his allies that the new DNI would not do positive harm: “for the House, walking through this conference report has been largely a defensive action, if you will, a holding action.” The House conferees had “managed to hold off a political stampede that would have passed a piece of legislation that would have accrued to the detriment of the people who wear the uniform of the United States.”³⁷ His colleague Rep. Jane Harman (D-CA), who had opposed Hunter on much of the substance of the legislation, explained that the conference had been a grueling process. “There were fights about almost every issue. We worked it out as best we could.” Many powers that the Senate bill had proposed for the DNI, such as “full control over reprogramming of personnel and budget,” had to be “given up in the effort to reach a carefully balanced, bipartisan, bicameral compromise.”³⁸ Representative Hoekstra summed up the proceedings: “[a]s I have said earlier, we did not get everything we wanted.”³⁹

CONCLUSION

With the final compromises on the wording of these provisions, on December 8, 2004, Congress was able to pass intelligence reform on a scale unmatched since 1947. So history does rhyme, as Mark Twain declared, but even rhymes have their differences. There are differences aplenty between the National Security Act and the amendments to it in the Intelligence Reform Act. Most obviously, the former was an act of creation; the latter an act of revision. Indeed, what made the compromises of the 2004 Act mirror those of its predecessor was that the Intelligence Reform Act was a grand series of amendments that adjusted but did not set aside the compromises reached in 1947. The National Security Act, of course, was passed soon after the greatest war in history, when America had fought for its very survival, and while the

34. 150 CONG. REC. S11953 (daily ed. Dec. 8, 2004) (statement of Sen. Roberts).

35. *Id.* at S11971 (statement of Sen. Collins).

36. *Id.* at S11954 (statement of Sen. Roberts).

37. 150 CONG. REC. H11005 (daily ed. Dec. 7, 2004) (statement of Rep. Hunter).

38. *Id.* at H11014 (statement by Rep. Harman).

39. *Id.* at H11003 (statement by Rep. Hoekstra).

chaos caused by that conflict was spawning many new threats and opportunities for the United States. The Intelligence Reform Act was not passed in such circumstances. It was clearly a response to intelligence failures and uncertainty over the prospect that terrorists could strike the United States with weapons of mass destruction. But the Intelligence Reform Act was not the sweeping reorganization of national institutions and attitudes that its predecessor was.

Comparing the two acts suggests possible reasons why other attempted reforms failed over the intervening decades. Remove the parallel circumstances surrounding the passage of the 1947 and 2004 Acts, and either one of them might not have gained enough support to become law. Intelligence change would have continued at its unhurried and meandering pace and might or might not have eventually resulted in something like a Director of National Intelligence. The absence of those circumstances, it seems, could explain the historical insignificance of several well-intentioned reform efforts, such as the Carter Administration's effort to persuade Congress to pass a charter for the CIA and Sen. David Boren's (D-OK) attempt to emulate the Goldwater-Nichols Act for the Intelligence Community in 1992.⁴⁰ It may be that the conditions and circumstances detailed above were not present in these counter-examples in the requisite strength and scope to make the White House, Congress, the departments, and the agencies feel that some sort of change was inevitable—and that it could with luck be guided to some beneficial goal.

Reading the histories behind the National Security Act and the Intelligence Reform Act also suggests that the attitudes, goals, and concerns of those who implement a law are almost as important as its text when officials, Members of Congress, and judges interpret the new statute. After all, the rhetorical markers set down in the debates over the passage of any bill are often quickly revisited soon after its ratification. That was certainly the case under the National Security Act of 1947, as it will be under the Intelligence Reform Act. What is perhaps most interesting—for interpreting any law—is the series of compromises struck among the major players at both ends of Pennsylvania Avenue that allowed coalitions to form and gave opponents opportunities to protect vital concerns, or to leave the field with dignity after the bill's final passage (and thus to work constructively to implement or oversee it once it becomes law).

We may see Halley's Comet again before we undergo another major rewriting of the intelligence provisions in the National Security Act. The last word on this topic, as on many others, belongs to Mark Twain, who was born

40. See MICHAEL WARNER & J. KENNETH McDONALD, *CENTRAL INTELLIGENCE AGENCY, U.S. INTELLIGENCE COMMUNITY REFORM STUDIES SINCE 1947* (2004); Michael Warner, *Preface to CENTRAL INTELLIGENCE AGENCY, CENTRAL INTELLIGENCE: ORIGIN AND EVOLUTION* (Michael Warner ed., 2001) (discussing earlier Congressional and official reform proposals).

in a year when the comet appeared and died in the year when it next returned. Several months before his passing, he reflected that the Comet held some sway over him: “[t]he Almighty has said, no doubt: ‘Now here are these two unaccountable freaks; they came in together, they must go out together.’”⁴¹ Intelligence reform via legislation may be neither unaccountable nor freakish, but it is certainly rare because so many stars have to align for the music of the spheres to echo its refrain.

41. JUSTIN KAPLAN, *MR. CLEMENS AND MARK TWAIN: A BIOGRAPHY* 355 (1966). The quotation is attributed to Twain’s first biographer, Albert Bigelow Paine.