

Chapter 7

External Controls

Because of the CIA's intelligence role and the resulting special need for secrecy, the Agency is subject to different external checks from other government agencies.

It does not fit within any regular pattern of executive supervision and control.

Its development during a period of "cold war," in which the needs for national security supported a broad construction of CIA's authority, limited control by Congress over its activities.

Until recently, there has been little public scrutiny of its activities.

Devices which have been utilized for external control of CIA are as follows:

A. Control by the Executive Branch

1. The National Security Council and Related Bodies

Primary executive control over CIA activities is exercised by the National Security Council (NSC), which by statute is responsible for supervising the CIA.

Despite its nominally supervisory position, the control exercised by the NSC relates almost entirely to basic policies and allocation of resources.

NSC determines where and how the CIA should undertake some activities and their scope. The NSC generally does not consider the desirability of specific operational methods, questions of administrative management, or whether particular projects are within the CIA's statutory authority.

The current members of the NSC are the President, Vice President, and Secretaries of State and Defense; although not members of the NSC, the Director of Central Intelligence and the Chairman of the Joint Chiefs of Staff attend all NSC meetings as observers and advisers.

The NSC establishes policy for the CIA primarily through National Security Council Intelligence Directives (NSCID's). Addressed to the entire intelligence community, they often assign responsibilities to the CIA in addition to those assigned explicitly by the 1947 National Security Act. Each is issued under authority of that Act.

In general, these directives are broad delegations of responsibility; they do not focus on particular methods for meeting the assignments. To some extent, NSCID's may also limit the activities of the CIA by assigning tasks to other agencies.

NSC authority over the CIA is also exercised through two committees: The NSC Intelligence Committee and the 40 Committee.

The NSC Intelligence Committee, created in 1971 following the recommendation of a report on the intelligence community by James R. Schlesinger (then of the Office of Management and Budget), represents the viewpoint of users of intelligence estimates and evaluations. Its members are subcabinet officials, including the President's Assistant for National Security Affairs and the Director of Central Intelligence. It meets infrequently.

The other NSC subcommittee, now named the 40 Committee,¹ reviews foreign covert operations and collection activities involving high risk and sensitivity. It has existed in some form since 1948, shortly after the NSC first authorized the CIA to engage in such activities. It is now chaired by the Assistant to the President for National Security Affairs; it includes the Chairman of the Joint Chiefs of Staff and the Director of Central Intelligence as members, and has representatives from the State and Defense Departments as well. The investigation disclosed no cases in which domestic activities—even those recognized by the Agency as highly sensitive—were submitted to the 40 Committee for approval.

In addition to the subordinate committees of the NSC, the President has, by Executive Order, established a Foreign Intelligence Advisory Board of private citizens to advise him on the objectives and management of the nation's intelligence effort and to conduct studies on specific topics of interest to him.

President Eisenhower first established the Board in 1956. President Kennedy reorganized it in 1961, and gave it the assignment of reviewing the events at the Bay of Pigs.

The Board has a staff of two but employs consultants and receives personnel on loan from intelligence agencies.

It meets for twelve days each year (two days each two months). Meetings frequently consist of briefings by intelligence services and policymakers.

¹ So called because its charter is contained in National Security Decision Memorandum 40—it does not have 40 members.

The Advisory Board does not exert control over the CIA. In fact, the CIA is the Board's only source of information about CIA activities. It has not considered domestic intelligence activities, except that in the early 1970's it explored the relationship between the CIA and the FBI in connection with foreign intelligence activities which could successfully be accomplished within the United States.

Thus in June 1972, the Board recommended to the President that the jurisdictional lines be clarified, either legislatively or administratively, so that some government agency might undertake certain specific intelligence activities within the United States.

2. Other Intelligence Committees

As one component of the federal government's foreign intelligence services—albeit the one with the widest authority—the CIA receives at least nominal direction and control from coordinating committees established by the NSC.

The independence of these committees as a means of external control is limited, however, by the fact that they are chaired by the Director of Central Intelligence in his role as coordinator of the intelligence community.

In this supervisory role over the entire intelligence community, the Director has issued directives (DCID's) addressed to all intelligence agencies including the CIA. These are similar to their NSC counterparts (NSCID's), but are more detailed. Their primary purpose is to allocate responsibility for intelligence-related activities among the several intelligence services. For example, one DCID spells out the procedures for treatment of foreign defectors within the United States and divides responsibilities in this area between the CIA and the FBI.

In performing this oversight function, the Director is assisted by a staff of about 50 professionals assigned to him from the various intelligence agencies (including the CIA), normally headed by a flag-rank military officer. This Intelligence Community Staff provides the Director with support to coordinate the various intelligence services.

In this role, the Director is also advised by two other organizations, the Intelligence Resources Advisory Committee and the United States Intelligence Board.

The Intelligence Resources Advisory Committee, formed at the recommendation of the 1971 Schlesinger Report, advises the Director on the preparation of a consolidated intelligence program budget.

The United States Intelligence Board, in existence since 1948, is composed of the heads of the principal foreign intelligence agencies. It advises the Director on the intelligence community's operating responsibilities. These include establishing intelligence needs and

priorities, producing intelligence evaluations and estimates, and supervising the distribution of intelligence material. Of the Intelligence Board's eleven standing committees, the Security Committee has the greatest relevance to this report. It advises the Director on the protection of intelligence sources and methods from unauthorized disclosure. For example, it has proposed uniform standards of physical and personnel security and recommended investigations of some security leaks.

3. Office of Management and Budget

The Office of Management and Budget (OMB), an agency in the Executive Branch, supervises the budget of the federal government. In this connection, it controls the CIA's budget and, therefore, its resources, in much the same manner as it does for other government agencies. The CIA's proposed budget and support materials are reviewed by one budget examiner and his supervisor (who is also responsible for all other intelligence agencies) of the Office of Management and Budget.

The impact of the OMB budgetary process on some CIA activities is limited by the information supplied to OMB by the CIA. For example, the proposed budget for the divisions of the Directorate of Operations lumps all personnel costs under a "Management Support" category rather than allocating them to functional areas within each division. Yet, personnel costs represent a large percentage of the directorate's budget. Budgets of other directorates reveal more detailed information.

OMB prepares a final CIA budget, with the President's approval, for submission to Congress. If the CIA disagrees with an OMB recommendation, it may, and frequently does, appeal to the President. In accordance with the 1949 Act, the CIA budget is not identified in the budget submitted to Congress, but is included in other appropriation accounts. Congressional oversight committees are informed which portions of the budget are intended for the CIA.

After Congress appropriates the funds, OMB transfers them to the CIA under the authority of the 1949 Act. Other transfers of funds to the CIA may take place without OMB approval under the Economy Act of 1932 (31 U.S.C. 686). Funds so transferred constitute significant portions of CIA expenditures. These funds are subject to OMB oversight, however, since it reviews them when they are first proposed for inclusion in the budget of the transferring agency.

OMB also reviews CIA requests to make expenditures from its contingency reserve fund. This fund, replenished by annual appropriations as well as unobligated funds from previous CIA appropriations, is available for unanticipated needs. Although the Director has statu-

tory authority to spend reserve funds without consulting OMB, administrative practice requires that he first obtain the approval of OMB and the chairmen of the appropriations subcommittees of the Congress.

OMB exercises control over resources allocated to the CIA. It does not control the CIA's operational activities, it is not an audit agency, and the budget process is not designed to establish intelligence policy or to perform an oversight function. OMB is generally aware of the large-scale CIA activities, but their approval or disapproval is controlled by the National Security Council and its subordinate committees.

4. The Department of Justice

The Department of Justice is charged by statute with the responsibility of investigating and prosecuting criminal cases on behalf of the United States. In so doing, it exercises the President's Constitutional responsibility to take care that the laws are faithfully executed. Criminal prosecution is the most drastic form of external control of misconduct in official positions.

In most federal agencies, a report of possible criminal conduct is investigated on a preliminary basis to determine whether there is any basis for it. If it appears to have some substance, it is referred to the Department of Justice for investigation and for a decision on whether there will be prosecution.

In 1954, the CIA pointed out to the Department of Justice that, in many cases involving CIA, prosecution would require public disclosure of sensitive Agency operations and procedures.

Even investigation and prosecutive consideration by outsiders would disseminate this information more widely than the Agency believed appropriate.

The Department of Justice responded that the Agency should investigate such allegations affecting its operations. If, after investigation, it appeared that prosecution would be precluded by the need to reveal sensitive information, then the Agency should so indicate in its files and not refer the case to the Department of Justice.

In doing this, the Department of Justice abdicated its statutory duties and placed on the Director of Central Intelligence the responsibility for investigating criminal conduct and making the prosecutorial decision—clearly law enforcement powers. (There is, however, no evidence that these powers were ever abused by the Agency.)

This state of affairs continued until January 1975, when the Department of Justice directed that cases with a potential for criminal prosecution be referred to it for consideration.

B. Control by the Congress

1. Congressional Committee Oversight

The armed services committees of Congress have exclusive legislative jurisdiction over any bill, other than for appropriations, whose primary focus is on the CIA. These committees, therefore, exercise primary congressional policymaking control over the CIA. Each has delegated this authority over CIA matters to an intelligence subcommittee. The House subcommittee has seven members (and the approximate equivalent of one and one-half full-time professional staff members). The Senate subcommittee has five members (with a staff of similar size).

Although not involved in the appropriation process, these subcommittees also receive CIA budget information supplied to the appropriations subcommittees.

Since there has been no substantive CIA legislation since 1947, the role of these intelligence subcommittees has generally been to exert policy-making influence informally through personal discussions with the Director of Central Intelligence.

The appropriations committees also examine CIA activities in reviewing CIA budget requests. Both appropriations committees rely on subcommittees to perform this task. The information submitted to congressional oversight subcommittees on the CIA budget is identical to that submitted to OMB. It is considered in secret sessions of the subcommittees (whose chairmen are also chairmen of the parent committees) but is not revealed to the full committee membership or the Congress as a whole.

There has been little further discussion in Congress (outside of the oversight committees) of the CIA's budget or activities except when they otherwise become matters of public discussion. After the CIA appropriation is passed, the chairmen of the appropriations subcommittees retain limited de facto fiscal control over the CIA. Before any of its contingency reserve fund is spent, they are consulted. On the other hand, the CIA is not required to notify Congress before shifting appropriated funds from one program to another.

Neither the members of the oversight committees nor other members of Congress have generally received detailed information on CIA operations. Public hearings are not held. Although secret hearings are held, they are confined by the scope of the information made available. While it appears that the subcommittees or at least their leaders and the leaders of Congress have been informed of major

CIA activities,² the amount of information provided does not always correspond with that available to Congress in other sensitive areas.

In sum, congressional oversight of the CIA has been curtailed by the secrecy shrouding its activities and budget. At least until quite recently, Congress has not sought substantial amounts of information of a sensitive nature. Correspondingly, the CIA has not generally volunteered additional information.

There have been occasional efforts to extend congressional oversight of CIA activities. Since 1967, three members of the Senate Foreign Relations Committee have been invited to attend intelligence briefings given to the Senate oversight subcommittees, but these briefings do not identify specific CIA operations.

In addition, certain members of Congress have proposed more intensive congressional oversight over the CIA. These proposals have usually been defeated.

In January 1955, Senator Mansfield (Democrat-Montana) introduced a resolution to establish a Joint Committee on Central Intelligence; it was defeated 50 to 27. In 1966, the Senate Foreign Relations Committee proposed a Senate Committee on Intelligence Operations; the proposal was defeated 61 to 28. However, the Hughes Amendment to the Foreign Assistance Act of 1974 prohibits CIA expenditure of funds "for operations in foreign countries, other than intelligence activities intended solely for obtaining necessary intelligence" unless the President determines that it is "important to the national security" and reports the operation to the "appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives." Both the Senate and House recently formed select committees with temporary charters to investigate the activities of all intelligence agencies.

2. General Accounting Office

The General Accounting Office (GAO) is responsible for making accounting and auditing reports to the Congress. It studies the efficiency, propriety, and legality of executive agency operations and conducts financial audits on its own initiative or at the request of a member or committee of Congress.

The CIA Act of 1949 authorizes the Director of Central Intelligence to make confidential (unvouchered) payments; these payments, constituting approximately one half of total CIA spending, are beyond

² A compilation from CIA files of its contacts with Congress shows that over a five-year period (1967-1972) the CIA averaged 26 briefings of congressional committees or subcommittees per year and 81 briefings of individual members of Congress per year.

the GAO's audit authority. The 1949 Act further protects CIA spending from GAO challenge by providing that:

The sums made payable to the Agency may be expended without regard to the provisions of law and regulations relating to the expenditure of Government funds . . .

For a time, GAO audited the nonconfidential expenditures of the CIA; however, after adoption of the 1949 Act, no challenges to the legality of any payments were made. Any questions about the lawfulness of CIA expenditures were instead referred to the CIA's Comptroller.

When GAO broadened its activities in 1959 to include studies of agency efficiency, it included the CIA on a "trial basis." After two years, the Comptroller General (who heads GAO) decided that because of statutory and security restrictions on GAO audits of CIA activities, GAO "did not have sufficient access to make comprehensive reviews on a continuing basis which would produce evaluations helpful to the Congress."

GAO also concluded that it would not be worthwhile to continue its limited financial audits of the CIA. This decision to eliminate GAO audits of CIA activities was related to a CIA internal reorganization which increased the scope of its internal comptroller and audit operations. Since 1962, the GAO has not conducted any reviews at the CIA nor any reviews which focus specifically on CIA activities.

C. Control by the Courts

The CIA has only rarely been involved in litigation. In the CIA's history, there have been only seven judicial decisions relating to it. None operated as a substantial check on the CIA's activities.

The CIA's actions are not readily challenged in the courts. Most CIA activities relate to foreign intelligence and as a consequence are not reviewed by the courts. Moreover, since practically all of the CIA's operations are covered by secrecy, few potential challengers are even aware of activities that might otherwise be contested; nor can such activities be easily discovered.

The CIA is also specifically freed from statutory requirements which often constrain government activities and are enforced by courts. For instance, the 1947 Act authorizes the Director to discharge employees whenever he deems "such termination necessary or advisable in the interests of the United States." This discharge power has been held to be unreviewable. Accordingly, employees have rarely initiated suits against the Agency for wrongful termination and have never successfully done so.

D. The Effects of Publicity

Reports of CIA activities in newspapers and magazines and on television are another form of external control on its activities.

Until recently, the secrecy which protected the CIA's activities effectively limited the impact of this control. Recent events indicate that the CIA will be subject to more intensive scrutiny in the press, but as a practical matter the news media cannot effectively "police" CIA activities.

Publicity about the CIA tends to be an unrefined control mechanism. The press can examine only what is leaked; it cannot consider all relevant details; it may be inaccurate and incomplete; and it may have unintended results on CIA operations.

E. Control by Special Commissions and Panels

Since the creation of the CIA in 1947, it has been reviewed by a number of special panels, commissions and committees. Some were created in response to particular issues, most notably in 1961 after the Bay of Pigs and in 1967 after disclosure that nonprofit institutions had been used to assist the CIA. The primary studies were:

1. Dulles, Jackson, Correa Report to the NSC on the CIA and National Organization for Intelligence (January 1949): A study of the structure and organization of the CIA, existing CIA activities, and the relationship of those activities to those of other departments and agencies.

2. Jackson Report (President's Committee on International Information Activities) (June 1953): A survey and evaluation of the international policies and activities of the executive branch.

3. Doolittle Report (September 1954): A report on covert operations of the CIA.

4. Clark Report (Task Force on Government Intelligence Activities) (May 1955): A survey of the CIA and intelligence activities of the State and Defense Departments and the National Security Council.

5. Sprague Report (President's Committee on Information Activities Abroad) (December 1960): A review of the impact of international actions of the United States government on world public opinion and on other governments, with particular reference to the CIA.

6. Kirkpatrick Report (Joint Study Group Report on Foreign Intelligence Activities of the U.S. Government) (December 1960): A series of recommendations to assist the Director of Central Intelligence in coordinating foreign intelligence activities.

7. Kirkpatrick, Schuyler, Coyne Report (April 1962) : A study of the organization and activities of the CIA and its relationship with other agencies in the intelligence community.

8. Katzenbach Report (March 1967) : A review of the relationships between government agencies and educational and voluntary organizations which operate abroad.

9. Lindsay Report on Covert Operations of the U.S. Government (December 1968) : A study of supervision by Congress and within the CIA of covert operations.

10. OMB Report (Schlesinger Study of the Intelligence Community) (March 1971) : A study of the organization of the intelligence community and its cost-effectiveness.

Most recommendations have focused on the organization of the intelligence community and were preludes to a reorganization. The Katzenbach Report ended CIA funding of educational and voluntary organizations. The issue of CIA activities within the United States was not given major attention by any other of these review panels.

Conclusions

Some improvement in the congressional oversight system would be helpful. The problem of providing adequate oversight and control while maintaining essential security is not easily resolved. Several knowledgeable witnesses pointed to the Joint Committee on Atomic Energy as an appropriate model for congressional oversight of the Agency. That Committee has had an excellent record of providing effective oversight while avoiding security leaks in a highly sensitive area.

One of the underlying causes of the problems confronting the CIA arises out of the pervading atmosphere of secrecy in which its activities have been conducted in the past. One aspect of this has been the secrecy of the budget.

A new body is needed to provide oversight of CIA within the Executive Branch. Because of the need to preserve security, the CIA is not subject to the usual constraints of audit, judicial review, unlimited publicity, or open congressional budget review and oversight. Consequently, its operations require additional external control. The authority assigned the job of supervising the CIA must be given sufficient power and significance to assure the public of effective supervision.

The situation whereby the Agency determined whether its own employees would be prosecuted must not be permitted to recur.

Recommendation (3)

The President should recommend to Congress the establishment of a Joint Committee on Intelligence to assume the oversight role currently played by the Armed Services Committees.³

Recommendation (4)

Congress should give careful consideration to the question whether the budget of the CIA should not, at least to some extent, be made public, particularly in view of the provisions of Article I, Section 9, Clause 7 of the Constitution.⁴

Recommendation (5)

a. The functions of the President's Foreign Intelligence Advisory Board should be expanded to include oversight of the CIA. This expanded oversight board should be composed of distinguished citizens with varying backgrounds and experience. It should be headed by a full-time chairman and should have a full-time staff appropriate to its role. Its functions related to the CIA should include:

1. Assessing compliance by the CIA with its statutory authority.
2. Assessing the quality of foreign intelligence collection.
3. Assessing the quality of foreign intelligence estimates.
4. Assessing the quality of the organization of the CIA.
5. Assessing the quality of the management of the CIA.
6. Making recommendations with respect to the above subjects to the President and the Director of Central Intelligence, and, where appropriate, the Attorney General.

³ Commissioner Griswold adds the following statement:

"The assignment given to the Commission relates only to the domestic activities of the C.I.A. But the problems which have arisen in the domestic field cannot be fully understood and evaluated unless they are viewed against the role which the CIA has undertaken to play outside the United States. Because of the secret nature of its operations, legal and moral limitations may not always be kept in mind. In this situation, it should not be surprising that personnel, when working in the United States, should not always feel that they are subject to ordinary restraints.

"Congress should, in my opinion, decide by law whether and to what extent the CIA should be an action organization, carrying out operations as distinguished from the gathering and evaluation of intelligence. If action operations were limited, there would be a lessened need for secrecy, and the adverse effect which the activities of the CIA sometimes have on the credibility of the United States would be modified.

"One of the great strengths of this country is a deep and wide-flung capacity for goodwill. Those who represent us, both at home and abroad, should recognize the potentiality of that goodwill and take extreme care not to undermine it, lest their efforts be in fact counterproductive to the long-range security interests of the United States."

⁴ "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

b. The Board should have access to all information in the CIA. It should be authorized to audit and investigate CIA expenditures and activities on its own initiative.

c. The Inspector General of the CIA should be authorized to report directly to the Board, after having notified the Director of Central Intelligence, in cases he deems appropriate.

Recommendation (6)

The Department of Justice and the CIA should establish written guidelines for the handling of reports of criminal violations by employees of the Agency or relating to its affairs. These guidelines should require that the criminal investigation and the decision whether to prosecute be made by the Department of Justice, after consideration of Agency views regarding the impact of prosecution on the national security. The Agency should be permitted to conduct such investigations as it requires to determine whether its operations have been jeopardized. The Agency should scrupulously avoid exercise of the prosecutorial function.