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Squaring the Circle:

Security, Accountability and Congress

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**Squaring the Circle:
Security, Accountability and Congress**

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Squaring the Circle:
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This analysis considers the security-accountability paradox: in a democracy, how can the People consent to what they cannot see? Congress is the branch of government most concerned with democratic representation and is directed by Article I to give a public accounting of expenditures from time to time. However, when it comes to national security and the intelligence community (IC), Congress has abdicated this responsibility and fails to use tools such as hearings to exercise meaningful oversight. This analysis lays out qualitative standards for adjudicating between responsible legislative delegation and irresponsible legislative abdication. It finds that in routinizing unvouchered funds through the CIA Act of 1949, Congress systematized abdication of budgetary control over the IC. Using data from the Comparative Agendas Project, this study finds that, since the CIA Act, Congress has failed to adequately compensate for its initial abdication through meaningful use of congressional IC hearings. Rather, Congress continues routinized abdication at the expense of accountability to the public.

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How can the people consent to what they cannot see? In a democracy, secrecy of government operations demands the toleration and management of this key paradox. The passage of the 1949 CIA Act codified this paradox through its routinization of unvouchered funds, or ‘dark money,’ for the then-newborn Central Intelligence Agency. The Act states that “the Agency shall be exempted from the provisions of... any other laws which require the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency.”¹ This marked a decisive step away from the appropriations clause of the U.S. Constitution, which requires “a regular Statement and Account of the Receipts and Expenditures of all public Money [to] be published from time to time.”² Rather, as the Act states, “for objects of a confidential, extraordinary, or emergency nature, such expenditures [shall be] accounted for solely on the certificate of the Director [of Central Intelligence] and every such certificate shall be deemed a sufficient voucher for the amount therein certified.”³

Through this Act, Congress relinquished budgetary control over peacetime foreign intelligence gathering, agreeing to nurture executive secrecy for the sake of security at the expense of transparency. Without transparency in a democracy, there is no accountability. The CIA Act exemplifies the difficulty in resolving the secrecy-accountability contradiction between the executive-legislative branches.

¹ Central Intelligence Agency Act, 50 U.S.C. §403g (1949).

² U.S. Const. art. 1, §9, cl.7.

³ Central Intelligence Agency Act, 50 U.S.C. §403j (b) (1949).

Indeed, the Constitution creates the difficulty by design. This is evident in *The Federalist Papers*. James Madison, in *Federalist Paper* No. 53 calls for biannual elections in the House to encourage legislative expertise in members of Congress.⁴ Yet, even with a level of House expertise, the *Papers* argue that foreign affairs are still too sensitive and dynamic for the House. Thus, in *Federalist Paper* No. 64, John Jay defends excluding the House from treaty-making and leaving it to the more-qualified Senate. Yet, even with the higher national vision and expertise held by Senators, the Presidency still requires independence. Jay argues “that although the President must, in forming [treaties], 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.”⁵ Under this formulation, the Executive maintains a vital independence, secrecy and flexibility to conduct foreign affairs.

Yet, the power to make treaties (and deal with foreign affairs more generally) remains intermixed between the Executive and Congress. In *Federalist Paper* No. 75, Alexander Hamilton explains that while treaties are not laws per se, they do carry the force of law in their dealings with foreign entities. Therefore, the responsibility must be split between both branches. He says, “The qualities... detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws,

⁴ James Madison, *Federalist* No. 53, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 2003), 327-331.

⁵ John Jay, *Federalist* No. 64, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 2003), 388-394.

plead strongly for the participation of the whole or a portion of the legislative body in the office of making them.”⁶ The House, again, is out of the question: best to leave it to the more wise and prudent Senate. Yet, as Rahul Sagar points out, even the Senate, charged with giving advice and consent to treaties, would not have access to executive secrecy. He says, “The Framers authorized the president to employ secrecy in the public interest, but did not fully explain how citizens and lawmakers could know whether the president is in fact exercising this power responsibly.”⁷ Thus, a paradox in constitutional design demands constitutional contestation between the need for secrecy and the need for legislative consent.

Since the Act’s passage at the beginning of the Cold War, the paradox of secret operations within a democratic government has been subsumed in what Arthur Schlesinger Jr. calls “a religion of secrecy.”⁸ As he says, after World War II “the high priests had only to utter their incantation – ‘national security’ – and international actions and policies of the United States were supposed to vanish into some *sanctum sanctorum*.”⁹ To an extent this is appropriate and necessary. The Executive must retain the capacity to ensure the nation’s security. As David Crockett argues, “If secrecy and speed are qualities essential to effective national security, and one of the president’s principal duties is ensuring the security of the

⁶ Alexander Hamilton, *Federalist No. 75*, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 2003), 448-452.

⁷ Rahul Sagar, *Secrets and Leaks* (New Jersey: Princeton University Press, 2016), 49.

⁸ Arthur Schlesinger Jr., *The Imperial Presidency* (Boston: Mariner, 2004), 331.

⁹ *Ibid.*

nation, it stands to reason that secrecy and speed are integral features of a properly functioning executive branch.”¹⁰ Crockett goes so far as to argue that secrecy is “*the* defining quality of what we might call the deliberative and active part of leadership.”¹¹

Yet, even if a measure of executive secrecy is essential, the paradox continually plays out in American foreign policy. Several well-known CIA mishaps, such as the failure of the Bay of Pigs operation or the illicit funding of Nicaraguan Contras, have occurred within the national security *sanctum sanctorum*, calling into question the instrumental value and normative implications of the legislature’s role in supporting unvouchered Intelligence Community (IC) funding. Such events suggest an imbalance in the relationship between executive secrecy and legislative accountability.

Relinquishing decision-making power that is rooted in democratic representation for the sake of security signifies a move away from democratic principles (even if it is justified for the sake of democratic survival). If the Constitution intends the legislature to be accountable to the people, embodying the representative principle of democracy, then congressional budget control and oversight of the use of the budget stand as key elements of democratic control over security decisions. As Jasmine Farrier explains, “Budgetary delegation of power is at heart about the complexities and conflicts surrounding

¹⁰ David Crockett, “Executive Privilege” (publication forthcoming), 18.

¹¹ *Ibid*, 21 (italics added).

representation.”¹² If budgetary decisions are not exercised in the first place, then clear accounting must be demanded after the fact in congressional hearings.

Legislative abdication within the secrecy-accountability paradox plays out in two key spaces. First, in the initial abdication through routinized unvouchered funds. The second key space is congressional hearings. Using a variety of standards to evaluate delegations of power to the Executive, this analysis argues that the initiation of unvouchered funds through the CIA Act and the continuing lack of congressional hearings on intelligence issues constitute a profound abdication of legislative power to the Executive.

This analysis will examine the theoretical standards for appropriate delegation of congressional power – specificity, decision-ownership, institutional capacity, and quality of deliberation - and apply them to the constitutional problematic created by the passage of the CIA Act. Congressional hearings offer a partial solution to the Act’s abdication. Yet, the tiny amount of hearings related to intelligence issues fails to adequately compensate for the Act’s original abdication of legislative power (let alone provide meaningful practical checks on the use of such funds). Abdication of budget decision-making and lack of oversight perpetuate an imbalance in the secrecy-accountability paradox.

The demands of the modern administrative state and the demands of the Executive within this state generate a legitimate need for congressional delegation of power. In turn,

¹² Jasmine Farrier, *Passing the Buck: Congress, the Budget, and Deficits* (Kentucky: The University Press of Kentucky, 2004), 4.

the need for delegation requires standards for identifying justified and unjustified delegation, or abdication. These distinctions serve as diagnostic tools for judging the integrity of Congress's institutional performance. Specificity in delegation, ownership of decision making, honest assessment of institutional capacity to accomplish certain tasks and the quality of deliberation surrounding legislative delegation serve as four standards for discerning justified delegation from unjustified delegation. The legislature's ability or inability to reclaim allotted powers after-the-fact serves as a final criterion for distinguishing between delegation and abdication.

Specificity justifies delegation because it signals that Congress actively engages with decision-making on behalf of the public. Through specificity Congress empowers an outside group to accomplish particular tasks of governance. Theodore Lowi argues that concrete rules and standards justify delegation by keeping decision-making power in the hands of the people.¹³ According to his conception, when Congress engages in abstract delegation it places the mechanisms of political control in the hands of non-elected entities. When non-elected bodies make decisions regarding who gets what and when, they create forms of privilege beyond the reach of representative institutions. This degrades respect for public institutions by producing a democratic deficit, ultimately rendering government less representative.¹⁴ Here, decision making in a democracy is always political in nature. When

¹³ Theodore Lowi, *The End of Liberalism: The Second Republic of the United States* (New York: W. W. Norton & Company, 1979), 108.

¹⁴ *Ibid*, 117.

representative bodies decline to make decisions and pass them off to a non-elected entity, they fail to give voice to the people.

Specificity in this sense complements Sotirios Barber's standard for justified delegation, which depends on the answer to this question: is Congress using the delegation of power to avoid making difficult decisions? Looking to the deliberative arguments on both sides of an issue pre-delegation provides evidence on whether Congress considered delegation from a range of articulated options.¹⁵ This implies a rigor in decision-making which, when coupled with specificity, marks a responsible legislature. Conversely, it is possible that little or no deliberation was held and Congress simply chose not to decide. Avoiding tough decisions marks an act of delegation as unjustified.

Growing out of this conception is a practical consideration: Congress may very well have an honest conversation about the practical limitations of its own capacities and delegate to empower a more capable group of achieving desired legislative ends. In this conception, Congress makes specific choices about when it needs expertise to carry out the will of the people.¹⁶ Institutional self-assessment, then, may lead to justifiable delegation of power as the delegation would enable Congress to achieve its legislative goals.

These three standards build on one another and point toward the fourth standard here addressed: deliberation. Inter and intra-branch deliberation produces constitutional

¹⁵ Sotirios A. Barber, *The Constitution and the Delegation of Congressional Power* (Illinois: University of Chicago Press, 1975), 48.

¹⁶ Jeffrey K. Tulis, "Constitutional Conflict," lecture, the University of Texas at Austin, Austin, TX, September 21, 2016.

authority by offering institutional reasons for taking one political path over another. Particularly when it comes to the ambiguity regarding war powers, deliberation is an essential component of institutional decision-making. Regarding Congress' role in foreign policy and war powers, Mariah Zeisberg says:

Branches that accompany their uses of the shared war power with a policy and constitutional position that the other branch may judge, and that use their powers in ways that are more rather than less responsive to the positions of their rivals, generate more constitutional authority for their behavior and for the larger war-making system.¹⁷

In this conception, inter and intra-branch deliberation produces political justifications for action relating to war, defensive and offensive. Deliberation reinforces constitutionalism. This “relational conception” of constitutionalism acknowledges how constitutional organization establishes zones of potential conflict, paradoxes to be worked out over time (such as the tension between executive secrecy and legislative accountability).¹⁸ Yet, in confronting these tensions, “the practices of discernment, elaboration, and review... *generate* constitutional authority for acts of war...”¹⁹ Deliberation holds the potential for the production of specificity, ownership of difficult decisions, good-faith assessment of institutional capacity and, ultimately, constitutional authority.

¹⁷ Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (New Jersey: Princeton University Press, 2013), 38.

¹⁸ *Ibid*, 45.

¹⁹ *Ibid*.

Considering the first of these standards, the passage of the CIA Act shows clear movement away from specificity toward obscurity. At its passage, members of the House Armed Services Committee, who had been approved to see the entire bill and receive details of its justification from the Executive, explained to the rest of the House that the CIA budget would be approved in private committee meetings and by the Bureau of the Budget – except for unvouchered funds, designated as worthy of such exceptional treatment by the Director of Central Intelligence. Historian David Bartlett explains further, “The [unvouchered] funds would go predominantly toward covert operations that could not be anticipated, due to the uncertainties of world politics... The act also allowed the CIA budget to be hidden in other agencies’ accounts.”²⁰ The Act routinized obscurity.

Since its passage, it has been impossible for the public to determine how much money goes toward funding the CIA, or the general intelligence community.. Recent leaks by whistleblower Edward Snowden do show, however, the CIA’s transformation “from a spy service struggling to emerge from the Cold War into a paramilitary force” that likely enjoys more funding now than it ever did during the Cold War.²¹ Based on the leaked 2013 ‘black budget,’ the CIA requested approximately \$14.7 billion for 2013, a huge increase from the last (accidentally) available data in 1994, which suggested an annual budget of

²⁰ David A. Barrett, *The CIA and Congress: The Untold Story from Truman to Kennedy* (Kansas: University Press of Kansas, 2005), 45.

²¹ Barton Gellman and Greg Miller, “‘Black budget’ summary details U.S. spy network’s successes, failures and objectives,” *The Washington Post*, August 29, 2013, https://www.washingtonpost.com/world/national-security/black-budget-summary-details-us-spy-networks-successes-failures-and-objectives/2013/08/29/7e57bb78-10ab-11e3-8cdd-bcdc09410972_story.html?tid=a_inl&utm_term=.ca96631defaa.

\$4.8 billion. Currently, \$2.6 billion of the CIA budget goes to covert action abroad.²² How any of this budget is used is kept classified. Indeed, Executive control over what becomes classified does not support the specificity standard. Through classification, “the executive branch can directly control what Congress can or cannot see, indirectly influencing the legislative branch’s overall ability to make decisions.”²³ This becomes particularly problematic when Congress’ “most important source of leverage” over the executive - appropriation – has largely been legalized and routinized through automated unvouchered funding.²⁴

Currently, Congress shows little motivation to challenge Executive classification choices or exert serious oversight, expanding on the original lack of specificity by continuously turning a blind eye. Indeed, Congress is largely deferential to the Executive in controlling the classification of information relating to the IC.²⁵ Further, scholars generally understand that “Congress is informed to the degree that it wants to be informed.”²⁶ This is supported by recent news reports showing that Senators choose to skip on intelligence briefings made available to the entire chamber. In a recent example, only 43 Senators

²² Wilson Andrews and Todd Lindeman, “\$52.6 Billion: The Black Budget,” *The Washington Post*, August 29, 2013, <http://www.washingtonpost.com/wp-srv/special/national/black-budget/>.

²³ Eric Rosenback and Aki J. Peritz, *Confrontation or Collaboration? Congress and the Intelligence Community* (Cambridge: Belfer Center for Science and International Affairs, 2009), 20.

²⁴ *Ibid.*

²⁵ Sagar, *Secrets and Leaks*, 44; Stephen R. Weissman, *A Culture of Deference: Congress’s Failure of Leadership in Foreign Policy* (New York: Basic Books, 1995), 19.

²⁶ Loch K. Johnson, *Secret Agencies: U.S. Intelligence in a Hostile World* (New Haven: Yale University Press, 1996), 111.

attended a major briefing. Many considered this lack of attendance particularly heinous, as it followed soon after the Snowden leaks when several Senators had claimed to have never been briefed on NSA surveillance programs in the first place.²⁷ Congressional oversight through hearings is developed below. The relevant point here is that by delegating budgetary decision-making power through the CIA Act, Congress actively avoided specificity – and continues to do so. This calls into question the merit of this substantial delegation of power.

Regarding the second standard: did delegation of control over the CIA budget to the executive reflect a deliberated choice by the legislature? Or did Congress use delegation to avoid making difficult decisions? Barrett suggests that secrecy, not deliberation, best characterizes the bill's passage, moving from private committee hearings to fast-paced passage on the floor to the acquiescence of most major newspapers to stay quiet on the Act.²⁸

In the House, Representative Imanuel Celler offered resistance, expressing colorful concern over the bill allowing the Director of Central Intelligence to admit into the U.S. up to 100 foreign nationals a year without the advice of the Commissioner of Immigration. The bill could allow "Fascists, Communists, Hitler sadists, morons, moral perverts, syphilitics, or lepers" into the country. The same issue would come up in the Senate and an amendment

²⁷ Alexander Bolton, "Senators skip classified briefing on NSA snooping to catch flights home," *The Hill*, June 15, 2013, <http://thehill.com/homenews/senate/305765-senators-skip-classified-briefing-on-nsa-snooping-to-catch-flights-home>.

²⁸ Barrett, *The CIA and Congress*, 40-51.

would be added to include the Commissioner on Immigration, housed in the Department of Justice, in the decision-making process regarding foreign nationals. This constitutes an example of Congress taking ownership of a specific decision after deliberating its merits. However, it is not deliberation over the question at hand: ceding budget control. Indeed, with the immigration question addressed, Representative Celler conceded, “Mr. Speaker, although I do not like the hush-hush business surrounding this bill, I shall not oppose it.”

Yet, some members of Congress, including Representative Celler, did frame floor discussion in terms of abdication of responsibility, frustrated with both the secrecy of the bill’s production and the ceding of budget control. Representative Celler challenged further, asking “If the members of the Armed Forces Committee can hear the detailed information to support this bill, why cannot our entire membership? Are they the Brahmins and we the untouchables?” Representative Vito Marcantonio also protested the privileged position of the Armed Services committee. “If, under the wave of hysteria, you want to abdicate your legislative functions to just one committee of the House, that is your privilege, but, as for me, I refuse to do it.”²⁹ Without detailed knowledge of the actual bill or operations of the CIA, members of both chambers’ privileged committees were asking their compatriots to trust them and sign-off on something deliberate obscured.³⁰ However, only four in the House would vote against the bill. Despite strong support there is evidence of widespread uneasiness. Representative Arthur Klein would support the bill but also go

²⁹ *Congressional Record* (hereafter *CR*), 3-7-49, 1942-1949.

³⁰ Barrett, *The CIA and Congress*, 45.

out of his way to say on the floor, “I regard this kind of legislative proceeding in the United States as dangerous and subversive to our form and philosophy of government.”³¹ Even the bill’s supporters had a sense of the problematic nature of the proceedings.

Such ambiguity was overwhelmed, however, by the argument in support of increased national security. In the Senate, Senator Millard Tydings offered the protection of the lives of CIA servicemen already in action as the core justification for the bill’s secrecy and the suspension of normal budget accounting. He pleaded, “The committee, after thorough consideration, determined that it would be better to have this general procedure followed in order to protect the men, rather than to follow the orthodox procedure, which might result in the loss of their lives.”³² The Senator went so far as to decry having any public debate over the bill at all:

I think this debate is unfortunate. I think it out to be in executive session. I think there is a great deal of meat in what must be said here in order to get the bill through, which is serving those who are not friends of the United States. This is one time where there ought to be secrecy. The whole atmosphere of the bill is secrecy.

Senator Tydings made the case for secrecy, acknowledging that the functions being carried out by the CIA in its foreign data collection was an exception to regular politics. If it were “like building a bridge, or buying an airplane” then the need for unvouchered funds would not be necessary. But this, he argued, was not normal. Peacetime intelligence collection for

³¹ *CR*, 3-7-49, 1949.

³² *CR*, 5-27-49, 6954.

the sake of military preparedness – avoidance of a second Pearl Harbor – required suspension of regular accounting processes.³³ Floor debates in both chambers suggest that Congress understood the stakes involved and yet voted, overwhelmingly, in favor of secrecy for security.

While the above suggests a reasonable amount of deliberation on the issue, discussion in the Senate suggests that, overall, Congress avoided making the hard choice to stay involved in the budgeting process in a meaningful way. The end of discussion on the Senate floor saw Senator Kenneth Wherry question “the dangerous ways the bill’s vague language might be interpreted in the future,” says Barnett.³⁴ Senator Wherry asked if the Executive was already carrying out clandestine intelligence activities with unvouchered funds. Senator Tydings responded, “Yes.” When Senator Wherry asked why, then, the legislation was even necessary in the first place, Tydings offered a fascinating reply, worth quoting:

I think it’s a question whether or not the law is being winked at, unless the bill is written into law. Ours will perhaps be the only Government having a law providing for such an activity. Other governments simply appropriate a disguised sum of money, without any authority of law, to handle the whole matter through some government official. We are wringing the whole law out. I regret we cannot proceed in any other way. If the Senate knew about the details, it might be willing to do business as other countries do, but we do not do business that way. We are not

³³ *CR*, 5-27-49, 6952-6954.

³⁴ Barnett, *The CIA and Congress*, 48.

doing what other countries do. We are throwing every possible democratic safeguard around it as we go along.³⁵

Tydings argued that congressional abdication, in this case, would help democratize secret government action, with the U.S. going further than other democracies to codify and thus limit potential abuses of secrecy. His reply offers an unexpected mix of American exceptionalism and democratic principle in defense of opaque, problematic lawmaking.

Regarding the third standard of institutional capacity, the legislature here acknowledges that the Executive must be enabled to carry out its responsibilities and that, to do so, a measure of secrecy is required. Defending the nation is the prerogative of the Executive, and intelligence gathering is naturally a justified part of that defense. Thus, by the third standard mentioned above, there is a powerful sense that, in this instance, Congress examined its institutional role and capacity and appropriately delegated with the intention of attaining certain governmental ends (here, intelligence gathering and the secrecy required to perform it). If Congress cannot be expected to carry out the actual function of intelligence gathering or maintain an appropriate level of secrecy, the CIA Act meets the third standard.

On the first point, this holds. Yet, it's not entirely clear whether Congress was incapable then or is now of the level of secrecy required to be informed and in command of the details of clandestine spending. Representative Cellers said that secrecy was

³⁵ *CR*, 5-27-49, 6955.

required because Congress lacks the capacity for the appropriate measures of silence. “In Washington three men can keep a secret if two men die.”³⁶ Offered as an institutional-capacity argument at the time, this does not hold. In theory, at least, members of Congress do not receive or require security clearances to access classified information. Election itself is considered an adequate determination of trustworthiness. Even so, as mentioned previously, members of Congress rely on executive classification choices and, therefore, are at the mercy of the Executive for access to sensitive information. If members of Congress do not require security clearances because they are assumed to have the capacity to keep state secrets, then this institutional excuse to defer to the Executive does not hold.

Further, it is not clear that congressional staff are incapable of the secrecy necessary to properly exercise intelligence powers. At the time of its passage, a key reason Congress relinquished budget control was the notion that its large staff would create too many opportunities for breaches of security. This argument does not stand the test of time when one considers that, as of 2015 the entire Congressional staff, including support agencies and miscellaneous staff such as the Capitol Police, amounted to approximately 19,600 individuals.³⁷ In contrast, as of 2012 the entire IC employed approximately 107,000

³⁶ *CR*, 3-7-49, 1942-1949.

³⁷ Molly Reynolds, Thomas E. Mann, Norman J. Ornstein, Raffaella Wakeman, Andrew Rugg, “Vital Statistics on Congress” (Washington, D.C: *The Brookings Institution*, 2017) ch. 5 pg. 3, <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/>.

individuals. Evidently, institutional capacity for secrecy is not a function of employee count.³⁸

Finally, the debate around the CIA Act cannot be said to have produced a large amount of constitutional authority, as per the fourth and final standard. The Congressional Record shows that the bill passed with a relatively small amount of deliberation, enjoying unanimous support in the Senate and near-unanimous support in the House.³⁹ What little deliberation occurred centered not on relinquishing control over budget decisions but various and sundry details (one member of congress wondered if the bill would allow “moral perverts, syphilitics and lepers” into the country without congressional approval).⁴⁰ Indeed, if Congress’s “institutional performance” must be judged by the quality of its deliberation, the limited debate over a major moment of delegation does not suggest this as an example of Congress operating at the height of its powers or as an example of high institutional integrity.⁴¹

The CIA Act fails as an example of responsible Congressional delegation. Further, as Congress has shown a lack of interest, let alone capacity, to reign in covert spending and establish transparent control over spending, this delegation of congressional power will hereafter be referred to as abdication. Louis Fisher distinguishes delegation from

³⁸ Wilson Andrews and Todd Lindeman, “\$52.6 Billion: The Black Budget,” *The Washington Post*, August 29, 2013, <http://www.washingtonpost.com/wp-srv/special/national/black-budget/>.

³⁹ *Congressional Record* (hereafter *CR*), 81st, 1949-1951.

⁴⁰ *CR* 3-7-49, 6948.

⁴¹ Zeisberg, *War Powers*, 45.

abdication by the degree to which powers acceded by Congress may be re-acquired through congressional will. Put differently, a high degree of permanence in delegation connotes abdication.⁴² This distinction matters because while there was a measure of deliberation held at the time of the bill's passage, the deliberation did not center on the enduring question addressed here of budget abdication. Concerns over admitting foreigners ("communists" and "syphilitics") as well as congressional ego over access to information ("Are they the Brahmins?") dominated the discussion, with concern over the sacrifice of accountability, transparency and representativeness addressed as an afterthought.⁴³ And, while Congress has made attempts at increasing oversight, particularly in the 1970's, the CIA budget has only increased, reflecting an enlargement of the IC in general.

Thus, the debate around the CIA Act cannot be said to have produced a large amount of constitutional authority, as per the fourth and final standard. Indeed, if Congress's "institutional performance" must be judged by the quality of its deliberation, the limited debate over a major moment of abdication does not suggest this as an example of Congress operating at the height of its powers or as an example of high institutional integrity.⁴⁴

⁴² Louis Fisher, *Congressional Abdication on War & Spending* (College Station: Texas A&M University Press, 2000), 28.

⁴³ *CR*, 3-7-49, 1942-1949.

⁴⁴ Zeisberg, *War Powers*, 45.

Rather, it is an instance of Congress acquiescing to Executive action after-the-fact. Recall the exchange between Senators Tydings and Wherry: Tydings acknowledged that the Executive was already spending covert funds; that passing the bill would be an act of trust by Congress; that what was already happening in the CIA was constitutionally appropriate; and that there would be no major future expansion of activities.⁴⁵ There were protests against the lack of explicit language in the bill barring internal espionage, and there were protests of secrecy within Congress.⁴⁶ However, overall, the bill passed with a relatively small amount of deliberation, enjoying unanimous support in the Senate and near-unanimous support in the House.

Instead of offering an example of rigorous, thorough deliberation, the passage of the CIA Act routinized abdication of congressional power, effectively shutting down future deliberation for revisiting the issue or reclaiming decision-making power over CIA activities.

As Farrier explains:

First, delegation [or abdication] of decision making can significantly reduce deliberation and public debate. Second, excessive power shifts cloud responsibility and accountability between the government and the people. Third, related to both points, extraordinary power growth in one part of the government, usually the executive branch, can negatively affect the institutional virtues of the other branches.⁴⁷

⁴⁵ *CR*, 5-27-49, 6955.

⁴⁶ Bartlett, *The CIA and Congress*, 48.

⁴⁷ Farrier, *Passing the Buck*, 22.

Senator Tydings had argued that codifying covert spending would be a step forward for democracy in the U.S., as no other democracy had made the effort to do so. Yet, formalizing it by codifying it helped remove the issues at hand from contestation, normalizing a problematic relationship between the legislature and the presidency, between democracy and secrecy. Over time, distortions manifest themselves as abuses of power (Bay of Pigs, Iran-Contra scandal, etc...). The executive relies on a continuously unchallenged resource to pursue covert action, retaining the power to classify information and decide what to share and withhold from the peoples' representatives.

Yet, given the (albeit limited) measure of deliberation that was offered surrounding the passage of the bill, there is a partial defense to be made: in passing the CIA Act, Congress actively articulated and legislated in a way that was logically consistent with the demands of the Cold War security order. The actions of Congress both developed and reflected U.S. attitudes of insecurity regarding the end of World War II and the specter of Soviet competition in the international arena. By way of definition, Zeisberg explains the concept of a security order. She says:

A security order is a combined policy and constitutional construction that specifies and enacts the content of a national security interest; what will be construed as threats to that interest; and a supportive construction of constitutional war authority. The concept of a security order helps make sense of the fact that different

regimes in American political development have developed different practices for managing executive-legislative relations in security.⁴⁸

The Cold War security order demanded a reckoning with newfound U.S. global leadership, a shattered Europe and the perception of communist contagion spreading out of the Soviet Union. This logic encouraged “the construction of a politics of presidential empowerment,” enabled by “broad delegations and resolutions” that signaled a “pro-presidency construction of constitutional war powers” and congressional support for executive leadership throughout the Cold War.⁴⁹ Zeisberg suggests that, overall, Congress used its institutional strengths to grant more, not less, constitutional authority to the Cold War security order.

By so doing Congress encouraged the notion that politics (and therefore deliberation) stops at the border. Security is, fundamentally, necessary to regime survival. In certain political and historical contexts, inter-branch trust softens the security-accountability paradox. “Trust is central to the legitimacy of the IC because it is an inherently secret group of institutions.”⁵⁰ Surely the Executive has the nation’s best interests at heart, which in turn makes it obvious that, “ideally, national security debates should not be politicized.”⁵¹ Given the historical Cold War context, this makes sense.

⁴⁸ Zeisberg, *War Powers*, 95.

⁴⁹ *Ibid.*, 134; 105.

⁵⁰ Stephen B. Slick and William C. Inboden, directors, “Intelligence and National Security in American Society” (Austin, Texas: Lyndon B. Johnson School of Public Affairs, 2016): 67.

⁵¹ *Ibid.*

The notion of identity serves a fundamental role in any given security order. If a security order is a dynamic policy and constitutional construction that helps conceptualize what will be a threat to the national interest, then identity congruently constitutes and legitimizes those interests in the first place.⁵² Foreign policy – a constitutive component of a given security order – is one mechanism by which the dynamic national ‘self’ negotiates its own existence vis-à-vis the existence of others, those both threatening and non-threatening. David Campbell says, “It is the objectification of the self through the representation of danger that Foreign Policy helps achieve.”⁵³ A nation articulates its vision of self through its foreign policy. Problematic as it is, the CIA Act (and the debates surrounding its passage) exemplifies an iteration of American identity responding to perceived external threats. This reinforces Zeisburg’s notion that security orders help explain why the American regime, in different moments in history, responds to perceived threats differently. Shifts in American identity play a part in development of security orders and, thus, in the credibility of certain constitutional arguments at different points in time.

The CIA Act contributed in part to the deficiencies of the Cold War Congress and remains a problematic remnant of that security order, breaking down the trust necessary to legitimize it in the first place. Regarding “their institution’s lawmaking strengths,” Zeisberg argues that there could have been “more rigorous legal structures” around their

⁵² Alexander Wendt, *Social Theory of International Relations* (Cambridge: Cambridge University Press, 1999); David Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* (Minneapolis: University of Minnesota Press, 1992).

⁵³ Campbell, *Writing Security*, 73.

empowerment of the presidency.⁵⁴ The CIA Act typifies this category of less-rigorous legal structures. Indeed, for the way it eliminated regular discussion over CIA funding through routinization, it contributed to the decline in congressional institutional integrity throughout the Cold War. Speaking generally, Zeisberg observes, “As the legislature lost its vitality as a forum for deliberation about security, the value of its assent to presidential adventures correspondingly declined.”⁵⁵ Politics are necessary for meaningful deliberation. The CIA Act continues to help Congress avoid the inherently political nature of intelligence and war-making. The unvouchered funds created by the CIA Act did not cease with the end of the Cold War. Indeed, based on the limited knowledge available, the CIA dark money budget has increased well beyond the peak of known Cold War spending in the 1980s.

While a logical outgrowth of the early Cold War security order, the CIA Act nurtures a powerful presidency at the expense of a dynamic legislature through continuous unvouchered funding. The notion that Congress cannot keep a secret continually builds the expectation that Congress does not need to know in the first place. In turn, this low expectation diminishes the principle that Congress represents the people and that the people deserve to know what their government is doing in order that they may have a say. Continuously privileging the executive at the expense of the legislature suggests that the U.S. wants democracy right up to the point that it truly begins to matter. Unvouchered

⁵⁴ Zeisberg, *War Powers*, 143.

⁵⁵ *Ibid*, 144.

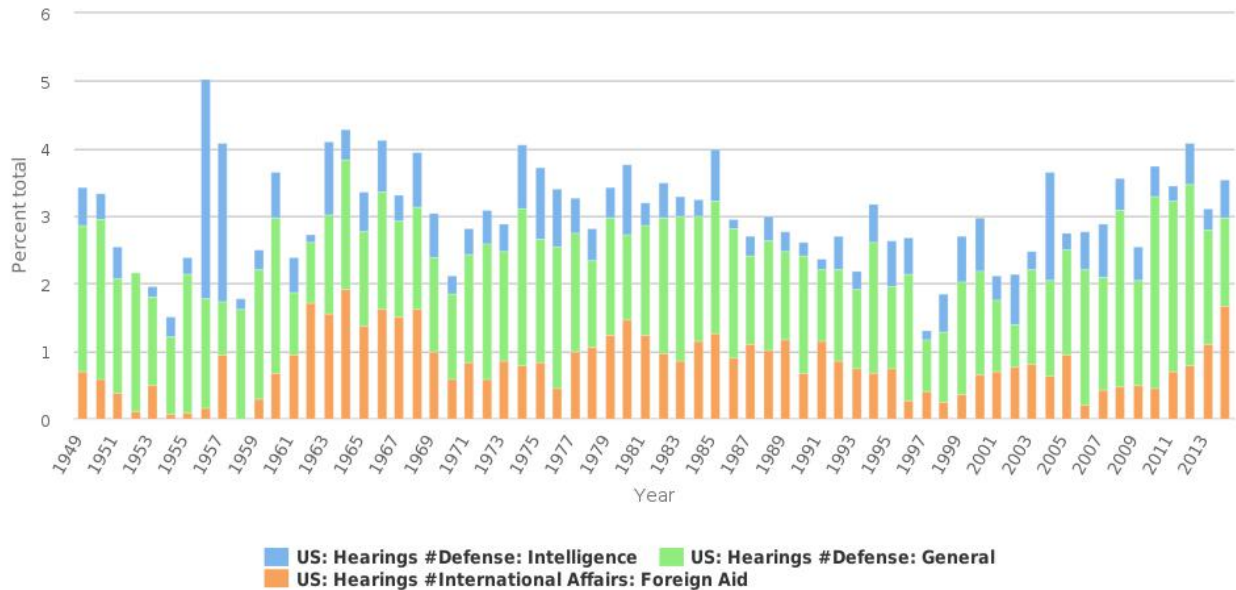
funding in this sense does not encourage a distinctive or exceptional form of American democracy, as Senators Tydings suggested. It erodes it.

Legislative decision-making power could be retrieved through active oversight through congressional hearings. Evidence suggests Congress exerts little control over the bureaucracy through the production of new laws. Rather, hearings serve as the primary source of information collection, issue direction and agenda setting for Congress over the bureaucracy.⁵⁶ Regarding the IC, assertive committee hearings could demand specific accounts of the use of the intelligence budget, could debate proposals and challenge the requests of the IC. By so doing, Congress would revive its institutional capacity for dealing with the complex issues of national security by gaining expertise. Expertise and time dedicated to issues makes space for deliberation, which would in turn produce choices for Congress to make regarding intelligence issues. When necessary, a portion of these hearings could well be held in executive session (in secret). Assertive hearings offer a means by which accountability and secrecy can go hand in hand.

Empirically, the percentage of congressional hearings dedicated to intelligence issues offer a measurement of congressional attention - and thus oversight – over the IC. Data from the Policy Agendas Project show a low proportion of hearings dedicated to intelligence issues, indicating that Congress underuses hearings as an oversight tool. Graph 1 shows the percentage of congressional hearings having to do with the IC, general defense

⁵⁶ Sam Workman, *The Dynamics of Bureaucracy in the U.S. Government* (New York: Cambridge University Press, 2015).

funding and foreign aid funding. A brief look shows that, even combined, congressional attention to these three categories is low, never reaching more than 5% of congressional attention and generally hovering around 3%.



Graph 1: Percent of Congressional Hearings on Intelligence compared to appropriations/funding hearings on Defense & International Affairs

From 1949 (the passage of the CIA Act) to 2014, hearings on intelligence issues tend to reflect historical trends: institutional turf battles over the initial creation of the CIA; concern over the perceived Soviet threat throughout the Cold War (particularly in the mid-50's with the Eisenhower Administration's covert use of its new covert toy, the CIA); a spike of interest during the 1970's when Congress attempted to reign in the intelligence community after Watergate and the Gulf of Tonkin affair; a decline toward the end of the Cold War, a revival mid-90's during NATO involvement in the Balkans; and, finally, a general increase post-9/11.

Including the percentage of hearings regarding 'Foreign Aid' and 'Defense: General' offers perspective on the large difference between congressional attention to general foreign policy funding decisions (where the legislature still exercises a measure of control) and the attention given the IC (where the legislature is almost entirely ignorant of unvouchered funding choices). This matters because funding is a primary source of legislative power over the Executive.

Foreign aid decisions reflect congressional foreign policy goals and priorities.⁵⁷ The foreign aid hearings, including above, offer a measure of congressional attention spent gathering information and deciding how those funds are spent. Richard Lugar notes that foreign aid is the "humanitarian impulse" that mutually reinforces the "security imperative."⁵⁸ Evidence suggests that foreign aid avoids falling prey to pork-barrel, district-specific politics, reflecting instead Congress's institutional perspective on world events.⁵⁹ The data suggests that, with the exceptions of the mid-50s and mid-70s, Congress has given more attention to foreign aid than to the intelligence community. This makes sense: foreign aid funding is transparent, specific and therefore deliberate. Congress often offers aid with specific strings attached, tending to emphasize human rights and non-proliferation over infrastructure and, more generally wielding the withdrawal of funds as an international

⁵⁷ David Leyton-Brown, "The Role of Congress in the Making of Foreign Policy," *International Journal* 38 (1982/1983): 59-76.

⁵⁸ Richard G. Lugar, "Foreign Assistance: Strengthen the 'Third Pillar' of National Security," *Human Rights* 35 (2008): 3-6, 8.

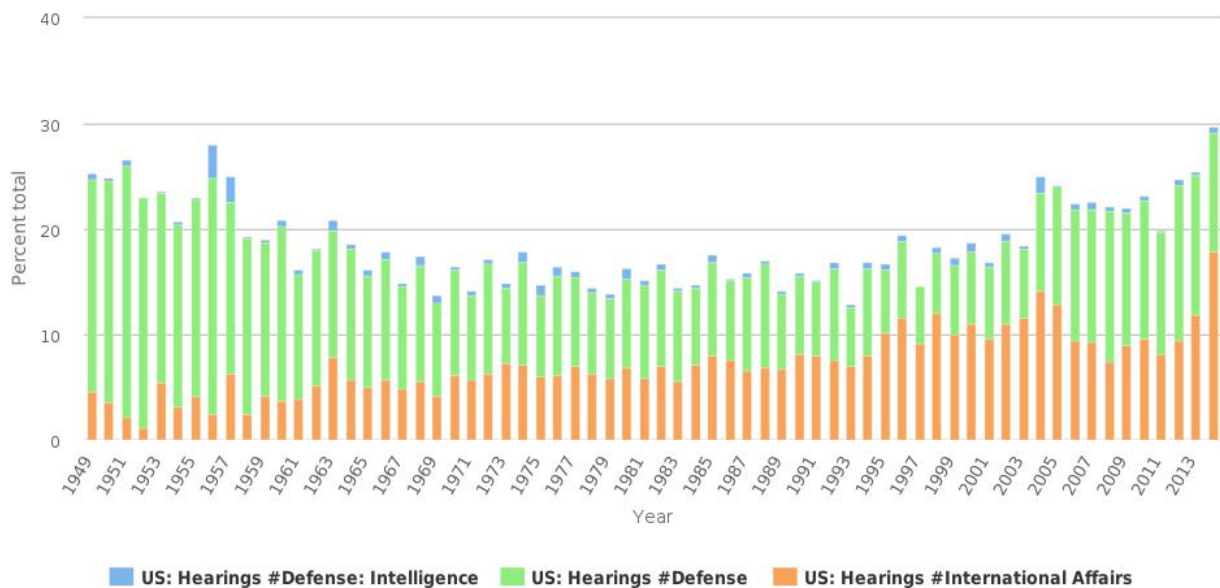
⁵⁹ Robert K. Fleck and Christopher Kilby, "Foreign Aid and Domestic Politics: Voting in Congress and the Allocation of USAID Contracts across Congressional Districts," *Southern Economic Journal* 67 (2001): 598-617.

stick to balance the use of funding carrots.⁶⁰ Through decisions on foreign aid funding, Congress participates in foreign policy.

Second, the 'Defense: General' category reflects hearings relating specifically to budget and appropriations control over the entire defense establishment. These hearings address budget requests and authorizations. Here again we see a larger amount of congressional attention given to general military matters. Across the decades, general military funding has received more attention than foreign aid or the intelligence community. Even so, on the whole hearings relating specifically to general military funds, foreign aid and intelligence never reach more than 5% of congressional attention in any given year.

The large difference between congressional attention to general foreign policy funding decisions and congressional attention given the IC becomes stark when the graph includes all hearings regarding defense and international affairs (not just those specific to funding). Attention toward the IC is miniscule compared to the rest of governmental security and humanitarian efforts.

⁶⁰ Leyton-Brown, "Congress in Making Foreign Policy," 64.



Graph 2: Hearings of Congressional Hearings on Intelligence compared to entirety of hearings on Defense & International Affairs

The hearings above measure congressional attention to everything from developing nations, human rights, terrorism, personnel issues, appointments, and the like. Graph 2 could suggest that Congress exerts a powerful influence, through hearings, on foreign affairs (largely considered a Presidential domain). This may be the case. However, in relation to the security-accountability problem, Congress gives little attention to the segment of executive activity that operates in darkness. For example, in 2013 Congress held 166 hearings relating to defense, 149 relating to international affairs, and a mere four hearings relating to intelligence. These four intelligence hearings compose approximately 0.01% of congressional attention given to defense and international issues. 0.01% appears drastically low considering the IC's intimate involvement in defense and international affairs.

The low amount of hearings becomes only more disproportionate when one considers how much of the military budget the intelligence community receives through unvouchered funds. The 2013 Snowden leaks offer partial perspective. Of the entire 2013 military budget of approximately \$500 billion, \$52.6 billion - or roughly 10.5% - was tucked away as the so-called 'black budget' to secretly fund the IC.⁶¹ The abdication of budget control initiated by the CIA Act continually plays out in the disconnect between the large amount of money secretly funneled into the IC and the lack of attention given by Congress.

Individual members of Congress have little electoral incentive to abandon its abdication of power over the IC. A recent poll suggests that the more the public knows about the IC, the less they support it.⁶² This suggests members of Congress have a vested interest in continuing public ignorance of the situation to avoid shifts in the current status quo. All the while, the Pentagon cannot pass an audit because, aided by the CIA Act, it continually masks the locations and uses of this significant budget percentage.⁶³ Thus, in both the Executive or legislative branches, IC accountability is hard to find. Regarding the IC, Harry Howe Ransom says, "In the absence of such accountability, 'oversight' as currently

⁶¹ Andrews and Lindeman, "\$52.6 Billion: The Black Budget."

⁶² Amy Zegart and Marshall Erwin, "The NSA's image problem," *Los Angeles Times*, November 1, 2013, <http://articles.latimes.com/2013/nov/01/opinion/la-oe-zegart-nsa-effectiveness-20131101>.

⁶³ William D. Hartung, "The Pentagon's dark money: Billions of federal dollars are vanishing into thin air," *Salon*, May 28, 2016, http://www.salon.com/2016/05/28/the_pentagons_dark_money_billions_of_federal_dollars_are_vanishing_into_thin_air_partner/; Martin Matishak, "Why Can't the Pentagon Audit its Books?" *The Fiscal Times*, November 30, 2015, <http://www.thefiscaltimes.com/2015/11/30/Why-Can-t-Pentagon-Audit-Its-Books-Excuses-Pile>.

exercised is best defined in the dictionary's other meaning of the word – 'overlooking' or the absence of careful attention."⁶⁴

Given the historical congressional abdication of budgetary and oversight power, future research could look toward mechanisms of oversight as a way of mitigating the worst effects of congressional abdication, while keeping its benefits (such as an Executive that is, in fact, empowered to maintain national safety). As it stands, Sagar suggests, there is "a mismatch between *who should* and *who does serve*" as limiting overseers of clandestine activities.⁶⁵ Indeed, Sagar suggests that a credible Presidency and a robust, aggressive 4th estate (in conjunction with whistleblowers) are the best ways to mitigate the negative effects of executive secrecy. Yet, looking to the executive or whistleblowers and the media to curb potential abuses does not ameliorate the long-term damage done to a Congress that abdicates substantial power and encourages its own institutional atrophy.

Congress, meanwhile, nurtures the continuing paradox by not fully using tools such as hearings (let alone anything close to reclaiming budgetary authority) to meaningfully oversee IC activities. Meanwhile, Article I's Statement and Account Clause sits neglected, a bygone relic of a different era. Writing on the necessity of public information in a representative democracy, James Madison clarified the need for such a clause. In a personal letter, he wrote:

⁶⁴ Harry Howe Ransom, "Congress and the Intelligence Agencies," *Proceedings of the Academy of Political Science* 32 (1975): 158.

⁶⁵ Sagar, *Secrets and Leaks*, 51.

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.⁶⁶

Forgoing transparency for the sake of security is not necessarily a failure of constitutionalism. Meaningful deliberation in forums such as hearings can generate constitutional authority and contribute toward resolving, or at least mitigating, the security-accountability paradox. However, today historic abdication of budgetary control combines with current limpid oversight, suggesting that Congress comfortably condones a distortion in democratic representation under the guise of security.

⁶⁶ James Madison, as quoted in “The CIA’s Secret Funding and the Constitution,” *The Yale Law Journal* 84 (1975): 612.

Bibliography

Barber, Sotirios A. *The Constitution and the Delegation of Congressional Power*. Illinois: University of Chicago Press, 1975.

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

Campbell, David. *Writing Security: United States Foreign Policy and the Politics of Identity*. Minneapolis: University of Minnesota Press, 1992.

Congressional Record, 81st, 1949-1951.

Crockett, David, "Executive Privilege." Manuscript (publication forthcoming).

Farrier, Jasmine. *Passing the Buck: Congress, the Budget, and Deficits*. Kentucky: The University Press of Kentucky, 2004.

The Federalist Papers, ed. Clinton Rossiter. New York: New American Library, 2003.

Fisher, Louis. *Congressional Abdication on War & Spending*. College Station: Texas A&M University Press, 2000.

Fleck, Robert K. and Christopher Kilby. "Foreign Aid and Domestic Politics: Voting in Congress and the Allocation of USAID Contracts across Congressional Districts." *Southern Economic Journal* 67 (2001): 598-617.

Johnson, Loch K. *Secret Agencies: U.S. Intelligence in a Hostile World*. New Haven: Yale University Press, 1996.

Leyton-Brown, David. "The Role of Congress in the Making of Foreign Policy." *International Journal* 38 (1982/1983): 59-76.

Lowi, Theodore. *The End of Liberalism: The Second Republic of the United States*. New York: W. W. Norton & Company, 1979.

Lugar, Richard G. "Foreign Assistance: Strengthen the 'Third Pillar' of National Security." *Human Rights* 35 (2008): 3-6, 8.

Ransom, Harry Howe. "Congress and the Intelligence Agencies." *Proceedings of the Academy of Political Science* 32 (1975): 153-166.

Reynolds, Molly, Thomas E. Mann, Norman J. Ornstein, Raffaella Wakeman, & Andrew Rugg. "Vital Statistics on Congress." Washington, D.C: *The Brookings Institution*, 2017. Ch. 5 pg. 3. <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/>.

Rosenback, Eric, and Aki J. Peritz. *Confrontation or Collaboration? Congress and the Intelligence Community*. Cambridge: Belfer Center for Science and International Affairs, 2009.

Sagar, Rahul. *Secrets and Leaks*. New Jersey: Princeton University Press, 2016.

Schlesinger Jr., Arthur. *The Imperial Presidency*. Boston: Mariner, 2004.

Slick, Stephen B. and William C. Inboden, directors, "Intelligence and National Security in American Society." Austin, Texas: Lyndon B. Johnson School of Public Affairs, 2016.

Tulis, Jeffrey K. "Constitutional Conflict." Lecture, the University of Texas at Austin, Austin, TX, September 21, 2016.

Weissman, Stephen R. *A Culture of Deference: Congress's Failure of Leadership in Foreign Policy*. New York: Basic Books, 1995.

Wendt, Alexander. *Social Theory of International Relations*. Cambridge: Cambridge University Press, 1999.

Workman, Sam. *The Dynamics of Bureaucracy in the U.S. Government*. New York: Cambridge University Press, 2015.

The Yale Law Journal. "The CIA's Secret Funding and the Constitution." *The Yale Law Journal* 84 (1975): 608-636.

Zeisberg, Mariah. *War Powers: The Politics of Constitutional Authority*. New Jersey: Princeton University Press, 2013.