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INTELLIGENCE STUDIES PROJECT
UNIVERSITY OF TEXAS AT AUSTIN



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INTELLIGENCE AND NATIONAL SECURITY IN AMERICAN SOCIETY



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THE UNIVERSITY OF TEXAS AT AUSTIN
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Project Directed by

Stephen B. Slick

William C. Inboden

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Policy Research Project Participants

LBJ School Graduate Students

Meenakshi Awasthi, M.S. (Global Medicine), University of Southern California; B.A. (English), Rice University

MAJ Steven Brackin, M.M.A.S. (Operational Art and Science) and M.M.A.S. (Homeland Security Studies), United States Army Command and General Staff College; B.A. (Government), University of Texas at Austin

Raheem Chaudhry, B.A. (English Language and Literature), The University of Maryland, College Park

Matthew Farrar, B.S. (Economics), The University of Alabama at Birmingham

Imaad Khan, B.A. (Religious Studies), The University of Texas at Austin

CPT Liam Kozma, B.S. (American History), United States Military Academy

Chelssie Lopez, B.A. (International Relations), St. Mary's University

Eric Manpearl, B.A. (History), Rice University

Darby O'Rear, B.A. (English and Spanish), Abilene Christian University

Danielle Oxford, J.D. and B.A. (Plan II Honors), The University of Texas at Austin

Keith Pitstick, B.A. (International Relations and Global Studies) and B.A. (History), The University of Texas at Austin

Sydney Taylor, B.A. (Political Philosophy, Policy, and Law) and B.A. (French Language and Literature), University of Virginia

Anna Waterfield, B.A. (International Studies), American University

Courtney Weldon, B.S. (Forensic and Investigative Sciences), Texas A&M University

U.S. Army War College Fellow

LTC Kristine Henry, M.S. (Computer Science), Hood College; B.S. (Mathematics), The College of William and Mary

Project Directors

Stephen B. Slick, J.D., University of California, Los Angeles; M.P.P., Princeton University; B.A. (Political Science), Pennsylvania State University

William C. Inboden, Ph.D. (History) and M.A. (History), Yale University; A.B. (History), Stanford

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Foreword

The Lyndon B. Johnson School of Public Affairs has established interdisciplinary research on policy problems as the core of its educational program. A major element of this program is the nine-month policy research project, in the course of which one or more faculty members direct the research of ten to twenty graduate students of diverse disciplines and academic backgrounds on a policy issue of concern to a government or nonprofit agency. This “client orientation” brings the students face to face with administrators, legislators, and other officials active in the policy process and demonstrates that research in a policy environment demands special knowledge and skill sets. It exposes students to challenges they will face in relating academic research, and complex data, to those responsible for the development and implementation of policy and how to overcome those challenges.

The curriculum of the LBJ School is intended not only to develop effective public servants, but also to produce research that will enlighten and inform those already engaged in the policy process. The project that resulted in this report has helped to accomplish the first task; it is our hope that the report itself will contribute to the second.

Finally, it should be noted that neither the LBJ School nor The University of Texas at Austin necessarily endorses the views or findings of this report.

Angela Evans
Dean

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Preface

We were approached in Spring 2015 by the Office of the Dean at the LBJ School of Public Affairs about developing a Policy Research Project (PRP) that would address a pressing question in the broad field of intelligence and national security. This timely request allowed us to test and exercise the philosophy underlying UT-Austin's new Intelligence Studies Project (ISP). The ISP was established by the Strauss Center for International Security and Law and the Clements Center for National Security to redress the relative lack of scholarly attention paid to intelligence by major American universities. The project's aim is to combine academic course work with policy-relevant research and public events to advance understanding in this vital, yet poorly understood, discipline.

With the collapse of the Soviet Union and the end of the Cold War, attention to American intelligence waned both within and outside government. Al Qaeda's successful attacks on New York and Washington, D.C., on September 11, 2001, immediately refocused attention on the agencies charged with gathering information on our adversaries and warning against impending threats. An unprecedented infusion of money, personnel, and urgency spawned a range of new collection and other programs by the disparate agencies that comprise the American intelligence community (IC).

By 2005, the danger of a second catastrophic terrorist attack on the U.S. homeland appeared to have abated. Media accounts of classified counterterrorism programs started to appear, often sourced to concerned or disgruntled government employees. More recently, a former National Security Agency (NSA) contractor attracted global attention by disclosing previously classified details of large-scale surveillance programs designed to detect terrorists' communications.

Following these disclosures, many Americans began to question the adequacy of supervision and oversight of the activities undertaken by America's sprawling, highly capable intelligence agencies. Were the civil liberties and privacy rights of U.S. citizens being respected in the IC's aggressive effort to penetrate and disrupt terror groups? Had international or domestic laws been violated in the course of interrogating captured terrorists? Did the IC's penchant for excessive secrecy prevent the American public from passing informed judgment on actions being carried out in its name?

Fourteen masters-level students and an Army War College Fellow enrolled in our PRP to research these issues. The students' challenge was straightforward: to reach a consensus judgment on the adequacy of existing intelligence oversight mechanisms, and to recommend reforms to a complex regulatory system that is no longer limited to the three branches of the U.S. government. The Office of the Director of National Intelligence (ODNI), itself a product of post-9/11 reforms to improve the IC's performance and accountability, expressed interest in the PRP and agreed to serve as our "client."

An informal poll during the first class session revealed among the students a broad range of attitudes regarding U.S. intelligence including, perhaps not surprisingly, considerable skepticism about the lawfulness, morality, and candor of our intelligence agencies. The fall semester

focused on learning about an arcane profession from books, memoirs, journal articles, and frequent classroom visits by current and former intelligence leaders. Through newspapers and the proliferating number of websites devoted to national security issues, students tracked multiple ongoing debates over intelligence policies and practices. The spring semester was dominated by research interviews in Austin and the Washington, D.C., area with dozens of current and former government officials, journalists, and representatives of non-governmental organizations interested in intelligence. With this data, the class began building an internal consensus on how to describe and assess the myriad forces that serve to constrain, empower, or otherwise shape U.S. intelligence policies.

In March 2016, the PRP helped organize and support a large public conference at UT-Austin on the course's theme of "Intelligence and National Security in American Society." In keynote remarks at the conference, White House Homeland Security and Counterterrorism advisor Lisa Monaco described the administration's policy for ensuring the legality, efficacy, and propriety of IC activities. Panels of current and former officials, members of Congress, and leading national security journalists debated the same topics and provided helpful research interviews to the students.

The PRP concluded with a visit to Washington, D.C., to brief the report's recommendations to senior IC leaders. In a visit to ODNI, the students briefed the IC's Civil Liberties and Privacy Officer (CLPO) and the Principal Deputy Director of National Intelligence. At Ft. Meade, the briefers met with the NSA's Director, Executive Director, and General Counsel. During a visit to Langley, the students briefed the Central Intelligence Agency's Deputy Director for Analysis and held separate meetings with the directors of CIA's public and legislative affairs offices. During a rain-soaked stop on Capitol Hill, the class briefed a bipartisan group of staff members from the House and Senate intelligence oversight committees. The officials were uniformly complimentary of the students' substantive knowledge, persuasive presentations, and practical recommendations to improve oversight while maintaining intelligence effectiveness and respect for civil liberties.

We were impressed with the hard work, curiosity, and objectivity that our students brought to this unconventional project. We join the students in thanking our principal client at the ODNI, CLPO Alex Joel, an exemplary public servant who works daily to build bridges between our secretive IC and the public it serves. We also appreciate the many distinguished figures listed in the report who contributed their time and expertise by participating in research interviews. Finally, we thank Larry Hirsch for a generous gift that underwrote this PRP along with the ISP Spring 2016 intelligence conference. We regard the investment in these future leaders, and their effort to define a comfortable space for an effective IC within our democratic society, as unquestionably worthwhile.

Professor Stephen B. Slick

Professor William C. Inboden

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We would like to thank Alex Joel, the ODNI's CLPO, for his guidance and support throughout this year-long research project. Mr. Joel and the ODNI were engaged and helpful "clients" from the beginning to the end of the project. We would also like to thank Director of National Intelligence James Clapper and Principal Deputy Director of National Intelligence Stephanie O'Sullivan for their outreach to higher education institutions generally and their specific interest in our project.

We would also like to thank the dozens of current and former officials and outside experts whom we interviewed for their unique points of view, unfailing candor, and invaluable input to the project's final report. Over 70 experts visited our class, participated in the "Intelligence in American Society" conference, and/or agreed to participate in research interviews with our team in Austin, Texas, and the Washington, D.C., area. We appreciate their time, inspiring stories, and insights into this topic.

This project required travel to Washington, D.C., for research interviews, client meetings at ODNI, and our final report presentations. We would like to thank the Intelligence Studies Project at the University of Texas at Austin, the William P. Clements Jr. Center for National Security, and the Robert S. Strauss Center for International Security and Law for their support to the project. Neither the ISP nor this academic project would have been possible without the generous support and interest in intelligence education of the Clements and Strauss Centers. In particular, we are grateful to Mr. Larry Hirsch for his gift to the Clements Center to support this project.

We would like to recognize the administrative staff at the LBJ School of Public Affairs for their continuous support. Special thanks are due to LBJ Writing Center Director Jen Cooper for her helpful advice and guidance during the writing of this report and Lauren Jahnke for her timely assistance with copyediting and formatting. Many University of Texas professors made time in their busy schedules to speak to our class, including Admiral (Ret.) Bobby Inman, Philip Bobbitt, and Robert Chesney. They helped us understand the historical, legal and philosophical background for many of the topics included in this report.

Finally and most importantly, we would like to convey special appreciation to Professors Steve Slick and Will Inboden for the opportunity to contribute to the ongoing academic and public conversations on intelligence oversight. They provided constant guidance and encouragement throughout this research project. We thank you for your time and expertise that helped us better understand this important topic.

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Executive Summary

Since the birth of our nation, intelligence has played a critical role in protecting and strengthening American national security and informing our nation's policymakers. From George Washington's spy rings to the decoding of German and Japanese codes during World War II, from the centrality intelligence played in the Cold War against the Soviet Union and now to the vast array of intelligence tools developed since the September 11th attacks for the ongoing conflict with militant jihadism, the United States Intelligence Community (IC) is truly a central and indispensable part of the American national security system.

Alongside the development of the IC and its capabilities came the evolution of intelligence oversight. Since the passage of the National Security Act of 1947 and the development of a more integrated IC, oversight has become increasingly institutionalized and complex. Oversight not only involves ensuring that the IC adheres to the country's laws and values, but also ensures the IC is effective in carrying out its national security mission. While this important oversight role was formerly concentrated almost exclusively within the Executive Branch, since the 1970s all three branches of government now conduct IC oversight. Furthermore, many actors outside of the U.S. government, such as the media and various non-governmental organizations (NGOs) have also become engaged in overseeing and influencing the IC.

First, the Executive Branch conducts extensive oversight through the National Security Council (NSC), the President's Intelligence Advisory Board (PIAB) and Intelligence Oversight Board (IOB), the Privacy and Civil Liberties Oversight Board (PCLOB), and Inspectors General (IGs). The NSC is not only a primary adviser to the President on national security issues, but also a consumer and overseer of intelligence activities. The Directorate of Intelligence Programs leads the NSC's oversight of the IC, which focuses on operational effectiveness based on the President's intelligence priorities. The PIAB and IOB consist of private citizens outside of government who provide the President with independent intelligence advice and oversight. Boards comprised of members with an array of expertise, and that have a close relationship with the President, have provided the most impactful recommendations and shaped the structure and focus of the IC. However, as many other oversight mechanisms have been established, these boards' influence has diminished.

The PCLOB is the most recent oversight addition within the Executive Branch. This five-member independent, bipartisan Executive Branch agency was established to ensure that the government's counterterrorism efforts were balanced with the need to protect privacy and civil liberties. Although the 9/11 Commission recommended the creation of the PCLOB, the did not come to fruition until 2013. Since then, the PCLOB has produced two major oversight reports that examined Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008. So far, 22 of the board's recommendations have been implemented in full or in part.

IGs have also played an increasing role in protecting American civil liberties. Although IGs were created with the limited mandate to investigate waste, fraud, and abuse in federal agencies, their

responsibilities have expanded since 9/11. IGs now monitor complaints of human rights and civil liberties violations in addition to their original charge.

Congress serves as the most direct representative of the American people and, thus, Congress's intelligence oversight role is vital to fulfilling the government's basic social contract with the public. While congressional oversight was initially "laissez faire," oversight fundamentally changed following the revelations in the 1970s of the abuses the IC had committed under previous presidencies. This led to major efforts by Congress to constrain the IC and resulted in the creation of select oversight committees in both the Senate and the House of Representatives, which remain in place today. The Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI) have become increasingly engaged in intelligence activities in the post-9/11 era. However, these committees and Congress as a whole have handled much of their oversight responsibilities in a reactive manner rather than an anticipatory one. In general, congressional oversight is heavily dependent on relationships built on trust between committee members and IC leaders, and is paramount to shaping the public's perception of the IC.

The Judicial Branch has a limited but important role in the oversight of the IC. Although there are significant impediments to claims involving intelligence being litigated in domestic courts, judicial rulings have had an increasing impact on intelligence activities. This is especially true for surveillance, which is regulated by the Foreign Intelligence Surveillance Court (FISC), and other counterterrorism measures. The Judicial Branch's independence and neutrality have allowed this arm of government to earn a high level of public trust.

External actors have also shaped intelligence activities. International governmental organizations (IGOs) and foreign governments play a significant but little-understood role in IC oversight. Recently, IGOs, foreign governments, and foreign security services contributed to the debate about the right to privacy when they expressed outrage regarding Edward Snowden's revelations of National Security Agency (NSA) intelligence programs. The foreign reactions from the Snowden disclosures represent only one instance where foreign entities have had an impact on the U.S. IC, namely through creating diplomatic friction. In response to these revelations, President Obama issued Presidential Policy Directive 28 (PPD 28), which represents an unprecedented recognition by the U.S. government that all persons, regardless of their nationality, have legitimate privacy interests. It bears noting that no other government in the world has made a similar recognition binding on its intelligence services.

Non-governmental organizations also engage directly and indirectly with the IC and seek to influence intelligence activities. NGOs are often critical of the IC and advocate for greater privacy and civil liberties protections, which often creates a tension between the two entities. There has also been a rising tension between the media and the IC. While the relationship between the media and the IC had shifted to a more adversarial posture as early as the 1970s, the advent of the digital age has further altered this relationship, and trust has been further eroded due to disagreements involving disclosure of classified material.

Unauthorized disclosures of classified data often reveal intelligence programs and therefore shape the public perception of the U.S. government. Leaks often result in public controversy that can adversely affect the public perception of the IC, and sometimes can force the IC to alter its

operations. There is considerable debate whether leaks help strengthen democracy or undermine it; proponents of both views have ample evidence to marshal. Public trust is critical for the IC to be able to fulfill its mission effectively because trust underlies the social compact between the government and governed. Intelligence is inherently secret though, which means the public cannot be made aware of many of its activities. This makes building trust with the American people difficult. Today, the ODNI's Transparency Initiative seeks to enhance the public's understanding of intelligence to improve public confidence and assure the public that the IC is protecting Americans' privacy and civil liberties. Finally, ethics and morality play a role in every decision regarding intelligence activities. Although ethics and morality are not concrete constraints, they are a critical form of regulation of the IC and the behavior of its professionals.

In this report, we analyze the history and current effectiveness of these internal and external actors that supervise, oversee, and influence the IC. Following our introduction, we proceed to an in-depth analysis of the internal and external actors we have discussed here. We first analyze governmental actors—the NSC, the PIAB, the PCLOB, IGs, Congress, and the Judicial Branch. Next, we examine non-governmental actors and forces—IGOs and foreign governments, NGOs, the media, whistleblowers and leakers, the public, and ethics and morality. Overall, the U.S. has the most extensive intelligence oversight system in the world. Although the oversight system is robust, there are still areas where it can be improved. Thus, through a thorough analysis of past studies and through many expert interviews we have developed 34 recommendations to improve IC oversight and enhance public trust—see list below.

We hope that our recommendations will contribute to finding a proper balance between secrecy, transparency, and oversight with the ultimate goal of protecting civil liberties without compromising national security.

Recommendations

White House/National Security Council

1. The NSC should require a formal contingency plan for managing the unauthorized public disclosure of all sensitive collection programs in the same manner now required for covert actions. This plan would be developed at the same time that an intelligence program is reviewed and initially approved.
2. The President should direct limited notice of intelligence programs to Congress on rare occasions, and only as authorized by statute for covert actions and not for collection and other programs.

President's Intelligence Advisory Board

3. The PIAB Chairman should be appointed for a four-year term, and regular board members appointed for terms of two years.
4. The Intelligence Oversight Board should be abolished.

5. The President should notify and consult with the SSCI and HPSCI on appointments to the PIAB.
6. The PIAB staff should include more direct-hire personnel and fewer officers detailed from IC agencies.
7. PIAB reports should include specific recommendations and a formal procedure for follow-up reporting on implementation actions taken.

Privacy and Civil Liberties Oversight Board

8. Congress should amend relevant statutes to:
 - Grant full-time status to all PCLOB members, and authorize a larger full-time staff;
 - Require greater functional diversity among PCLOB members and staff, in particular highlighting relevant national security and intelligence experience;
 - Create a post of executive director with the authority to hire necessary board staff;
 - Exempt PCLOB from the “Sunshine Act”;
 - Rescind the requirement that PCLOB inform Congress when an IC agency declines to follow a board recommendation.
9. PCLOB should prioritize actions to raise the board’s profile by publicizing its existence, activities, and substantive reports.

Inspectors General

10. Congress should pass the Empowerment Act to preserve the essential investigatory powers of IGs.
11. All IC IGs should issue public reports at least semiannually that include statistics and other appropriate information on, for example, major investigations and audits and whistleblower complaints.
12. IG reports to Congress should include specific recommendations for corrective actions and the identities of senior officials described in reports.

Congress

13. All congressionally directed actions that require written reports by IC agencies should include a three-year sunset provision, with the requirement subject to renewal if the same information is required in future years.

14. Senate and House leaders should prioritize bipartisanship in appointing leaders and members to serve on the intelligence oversight committees.
15. Congress should institutionalize the practice of assigning members to the intelligence oversight committees who also serve on the Armed Services, Foreign Affairs, Appropriations, Judiciary, *and* Homeland Security committees.
16. SSCI and HPSCI members should be assigned to fewer other committees to accommodate the workload associated with rigorous intelligence oversight.
17. HPSCI should either increase or remove its term limits for members.
18. SSCI and HPSCI should hold more open hearings to increase public awareness of congressional oversight of intelligence activities.
19. Congress should direct a study of the growth over time of IC staff and other resources committed to servicing oversight requirements imposed by the Congress and relevant Executive Branch bodies.

Judiciary

20. Each Supreme Court justice should designate judges to serve on the FISC from the circuits for which they serve as the Circuit Justice.
21. Congress should monitor the use of *amici* by the FISC, but not establish a special advocate for the Court at this time.
22. Congress should authorize judges to transfer cases to a newly created classified judicial forum, modeled after the FISC, instead of dismissing claims based on the state secrets privilege. The new court would hear proceedings *in camera* in permanently sealed bench trials.

Foreign Security Services, International Governmental Organizations, and International Law

23. IC agencies should consult with lawyers in the planning, approval, and execution stages of sensitive foreign operations in order to anticipate potential legal risks from foreign courts or international organizations.
24. IC agencies, in consultation with the State and Justice Departments, should engage directly with international human rights organizations when it is necessary to clarify misconceptions about U.S. IC activities.

Non-Governmental Organizations

25. IC agencies that have not already done so should establish Civil Liberties and Privacy Offices to help demonstrate to the NGO community—and the public more broadly—that the IC is committed to the same American values.

Media

26. The leading media organizations should establish a Media Advisory Board, comprising a small number of respected former government officials and journalists, to assist in evaluating the potential damage to national security by publication of classified defense information. The IC should support this initiative by granting security clearances and sharing relevant information to board members to inform their advice.
27. IC leaders should decline requests from the White House to provide background briefings to journalists. Substantive interaction between IC experts and the media should be considered exclusively in response to a media request or the IC's independent judgment of public interest in a topic.

Leakers and Whistleblowers

28. IC agencies should strengthen mandatory, periodic training sessions for employees on whistleblower protections and procedures and for entry-level supervisors on how to facilitate a culture of openness via leadership skills.
29. IC agencies should implement reward or encouragement programs for employees who voice their concerns through the appropriate channels.
30. IC agencies should form Employee Advisory Boards as expert counsel available to IC employees who request assistance in navigating correct whistleblower procedures. This recommendation also moves away from the term "whistleblower," which may deter employees from coming forward with concerns.

Public Opinion

31. The ODNI should continue implementing the IC Transparency Initiative.
32. Congress should authorize the ODNI or a third party to conduct appropriate polling designed to measure public attitudes toward U.S. intelligence and the effectiveness of IC efforts to build trust through greater transparency.

Ethics and Morality

33. The ODNI through IC-wide personnel directives should emphasize and enforce high standards for moral and ethical conduct by intelligence professionals.
34. The ODNI or an IC agency should pilot a system of peer review and potential punishment for violations of professional standards that are different from legal and regulatory provisions that apply to all federal employees. The American Bar Association's Code of Professional Responsibility may serve as a model for such a system.

Introduction

In recent years, the United States Intelligence Community (IC) has been subjected to increased scrutiny and public criticism, most directly linked to former IC contractor Edward Snowden's disclosure of electronic surveillance programs and the Senate Select Committee on Intelligence's (SSCI) majority report on the Central Intelligence Agency's (CIA) Rendition, Detention, and Interrogation (RDI) program. These incidents reignited a public debate about the adequacy of intelligence oversight and, more broadly, the appropriate role of the IC in modern American society. In researching how the U.S. IC is supervised and overseen, we encountered at each turn the challenge of finding an appropriate balance between the secrecy needed for our intelligence services to protect American national security interests and the transparency and accountability that citizens expect in an open, democratic society.

Almost seven decades after legislation establishing the nation's first peacetime intelligence agency, debates regarding the proper level of IC oversight remain contentious and unsettled. Some attribute this disagreement to the fact that the IC is the least understood of all the established instruments of national power, given its brief existence relative to the armed forces and diplomatic corps.¹ Others attribute the discord to the shroud of secrecy that cloaks the intelligence profession. This debate is a manifestation of the ongoing interaction between the American government and its citizens aimed at reconciling the nation's democratic values with the imperatives of national security.

Two competing narratives emerge. In the era of advanced technology and rapidly evolving threats, many hold the view that the survival of the nation will depend on timely, accurate, and insightful intelligence concerning the intentions and capabilities of foreign competitors and non-state adversaries.² Others question how the consent of the governed—the backbone of our democracy—can be gained when the citizens are uninformed about intelligence activities carried out by the government in their name.³ Therefore, while the security of the nation may depend on an effective intelligence apparatus, the secrecy it requires may automatically call the legitimacy of its actions into question.

These competing narratives emerge during Congress's periodic efforts to transform how it relates to the IC—including efforts to expand its supervisory role or to constrain objectionable IC activities. The Cold War set the stage for a large, permanent intelligence establishment, expanded intelligence collection and global operations to implement anti-Soviet policies. Significant intelligence failures and abuses of power often led to strong congressional reactions. Most famously, the Church and Pike committees investigated unlawful domestic intelligence

¹ John McLaughlin, interview by PRP class, Austin, Texas, November 19, 2015.

² Daniel Benjamin, Bruce Hoffman, Frank Kisner, John McLaughlin, and Michael Vickers, "Great Powers, Failed States, and New Frontiers: National Security Challenges in the 21st Century—Terrorism Panel" (Austin, Texas: The University of Texas at Austin Clements Center for National Security, November 21, 2015).

³ Loch K. Johnson, *America's Secret Power: The CIA in a Democratic Society* (New York: Oxford University Press, 1989), 6. Johnson sets up this position quoting C. Douglas Lummis' observations about the meaning of democracy and the implicit requirement of transparency in a democratic system of government.

activities by the CIA, NSA, and Federal Bureau of Investigation (FBI) in the 1970s. In response to these abuses, permanent select committees were established in the House of Representatives and the Senate to oversee the IC and an executive order was issued that regulated intelligence activities. More recently, the blue-ribbon panel established to investigate the 9/11 terror attacks recommended structural changes to the IC, including the creation of the post of Director of National Intelligence to more closely integrate the IC's activities and a National Counterterrorism Center to merge terror threat reporting. Congress acted to implement the 9/11 Commission's recommendations through legislation, although it declined to act on a recommendation to alter the structure of the congressional committees that oversee the IC.

Our analysis begins with a definition of oversight. Oversight includes at a minimum, monitoring relevant intelligence activities to ensure they conform to the Constitution and U.S. laws, but also gauging their effectiveness in achieving the intelligence mission. Through a structured review of the available literature, class discussions, and dozens of expert interviews over the course of a full academic year, we sought to understand the relevant history and current practice of intelligence oversight. We identified the full range of individuals and institutions that play some role in monitoring, supervising, and overseeing the U.S. IC. This list included stakeholders inside the U.S. government as well as entities outside the government that seek to influence how the U.S. engages in intelligence. The internal stakeholders included Executive Branch bodies such as the NSC, PIAB, IOB, PCLOB, IGs, SSCI and HPSCI in the Legislative Branch, and the Foreign Intelligence Surveillance Court (FISC) and traditional Article III courts. We also considered actors outside the government that are engaged on intelligence policy and operational matters like the media, leakers and whistleblowers, non-governmental organizations, international organizations, as well as foreign governments and security services. Finally, we examined the constraining role ethics and morality play in decision-making by intelligence professionals.

In the background research that informed our final report and recommendations, we employed qualitative methodologies including expert interviews, research in extant primary documents, and analyses of past studies. We conducted 58 expert interviews in Austin, Texas, and the Washington, D.C., area (see Appendix A for list). All the interviews were documented, and the interview data was systematically gathered and recorded. All responses representing diverse thought, actions, and decisions associated with our research topics were reported. After evaluating the effectiveness of existing and proposed oversight mechanisms through literature review and interviews, the team reached consensus on a set of recommendations to improve the quality of intelligence oversight that, if implemented, would contribute to enhanced public trust in our intelligence agencies. With this report, we are presenting 34 recommendations to the ODNI, our client.

We were honored that so many current and former government officials and other professionals interested in intelligence matters took time from their busy schedules to contribute to our research project. This is a testament to their dedication to their crafts and passion for protecting both American national security and civil liberties.

Chapter 1.

National Security Council Oversight of U.S. Intelligence Activities

by Courtney Weldon, Steve Brackin, and Eric Manpearl

The National Security Council's purpose is to advise the President on national security matters. The NSC, principally through its professional staff within the Executive Office of the President, also routinely monitors and oversees U.S. intelligence activities on behalf of the President. The NSC staff is able to fulfill this role because of its daily interaction with IC agencies, physical proximity to the President and the Assistant to the President for National Security Affairs (National Security Advisor), and familiarity with the President's policies and priorities.

History of the National Security Council

The National Security Act of 1947 centralized command and promoted information-sharing between institutions by establishing a Secretary of Defense, Joint Chiefs of Staff, Director of Central Intelligence, and NSC.⁴ The President, Secretary of State, Secretary of Defense, Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, and Chairman of the National Security Resources Board composed the original statutory members of the NSC.⁵ The President was also authorized to designate other specified officials to the NSC.⁶ The NSC staff, which is separate from "the Council," comprises politically appointed experts and career civil servants organized in specialized directorates. The primary function of the NSC is to advise the President on "domestic, foreign, and military policies relating to the national security."⁷ The NSC acts as a coordinator between departments and agencies across government, and relies on accurate and insightful reports from them to develop national security policy recommendations for the President.⁸ The NSC is unique because it both consumes intelligence to inform recommendations to the President, and also directs and oversees intelligence activities on behalf of the President.

In 1949, the NSC was reorganized to include the Vice President, Secretary of the Treasury, and Joint Chiefs of Staff, as well as to remove the Secretaries of the Army, Navy, and Air Force from the Council.⁹ President Harry Truman originally did not regularly attend NSC meetings, though, which diminished the NSC's ability to fulfill its mission.¹⁰ Truman instead relied on direct interactions with senior officials for national security advice. However, the Korean War spurred Truman's increased engagement with the NSC, which empowered the NSC to become a more

⁴ Michael Warner, *Central Intelligence: Origin and Evolution and U.S. Intelligence Community Reform Studies Since 1947 - Central Intelligence Agency (CIA) Reports* (Washington, D.C.: Progressive Management, 2001), 1.

⁵ National Security Act of 1947, Pub. L. 80-253, 50 U.S.C. 15, § 101 (1947).

⁶ Ibid.

⁷ Ibid.

⁸ Ronald Reagan, Executive Order 12333- United States Intelligence Activities, 46 Fed. Reg. 59941 (1981).

⁹ National Security Act Amendments of 1949, Pub. L. 81 – 216, 63 Stat. 579 (1949).

¹⁰ Richard Best, *The National Security Council: An Organizational Assessment*, CRS Report No. RL30840 (Washington, D.C.: Congressional Research Service, 2011), 7, accessed April 7, 2016, <https://www.fas.org/sgp/crs/natsec/RL30840.pdf>.

prominent source of national security policy recommendations.¹¹ The NSC institutionalized a formal mechanism for developing and managing covert actions undertaken by the CIA during the Truman Administration.¹²

The NSC emerged as the President's principal source of advice on national security issues during the Dwight Eisenhower Administration. President Eisenhower embraced the NSC's structured policymaking process. Under Eisenhower's NSC, agencies and departments developed policy recommendations, sent these recommendations to the Planning Board for review, and vetted recommendations that then went to the full NSC, which was chaired by the President.¹³ Eisenhower also created an Operations Coordinating Board (OCB) as an extension of the NSC to coordinate the implementation of national security policies.¹⁴ However, Eisenhower's NSC had a relatively large staff, which impeded its ability to react quickly during crises.¹⁵

President John F. Kennedy sought to loosen the rigid structure of the NSC and preferred to conduct policymaking in a more intimate manner than Eisenhower had. President Kennedy drastically cut the staff size of the NSC and held formal NSC meetings much less frequently than his predecessor.¹⁶ Kennedy even abolished the OCB and instructed the NSC not to monitor policy implementation.¹⁷ Notably, the NSC was not involved in coordinating the Bay of Pigs operation, which was undertaken by the CIA with the President's authorization, with disastrous results.¹⁸ Kennedy's approach to national security policymaking significantly changed following the Bay of Pigs failure. The NSC resumed monitoring the implementation of policies, and became more directly involved in covert actions than it had been during the Eisenhower Administration.¹⁹

Like Kennedy, President Lyndon Johnson preferred small, informal meetings with his senior advisors. Although Johnson believed the NSC was leak-prone, he used the NSC extensively and was actively involved in the details of the policymaking process and evaluation of future threats.²⁰ The most significant national security decisions were made by the "Tuesday Lunch Group," which was a small set of advisors who met with President Johnson over lunch on Tuesdays. He rarely convened formal NSC meetings.

President Richard Nixon and his National Security Advisor, Henry Kissinger, dominated foreign policymaking in the Nixon Administration. Kissinger worked through the NSC in developing

¹¹ *Ibid.*, 8.

¹² I.M. Destler, "The Presidency and National Security Organization," in *The National Security*, ed. Norman A. Graebner (New York: Oxford University Press, 1986), 227-229; and David J. Rothkopf, *Running the World: The Inside Story of the National Security Council and the Architects of American Power* (New York: Public Affairs, 2004), 57-60.

¹³ Richard Best, *The National Security Council*, 8.

¹⁴ David J. Rothkopf, *Running the World*, 67-68; see also Dwight D. Eisenhower, Executive Order 10483, Establishing the Operations Coordinating Board, 18 Fed. Reg. 5379 (1953).

¹⁵ Richard Best, *The National Security Council*, 9.

¹⁶ *Ibid.*, 10.

¹⁷ *Ibid.*, 11.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 12.

²⁰ David J. Rothkopf, *Running the World*, 99-103.

policies, thereby empowering it. Kissinger created a new intelligence committee within the NSC to assess intelligence needs and evaluate intelligence products.²¹ This committee was tasked with developing recommendations for decision-makers based on these assessments.

Under President Gerald Ford, Air Force Lt. General Brent Scowcroft assumed the role of National Security Advisor and ensured the NSC produced well-crafted, clear analyses for the President.²² Following the revelations of intelligence abuses through the Church and Pike Committee investigations, Congress began crafting a “statutory charter” for the IC to restrain Executive Branch intelligence activities.²³ President Ford preempted Congress’s effort by issuing Executive Order (EO) 11905 in 1976 to reform the IC. Ford’s order restricted intelligence activities and created Executive Branch oversight mechanisms, including within the NSC, to ensure the effectiveness and lawfulness of intelligence operations.²⁴ The Executive Order affirmed the NSC’s primacy on matters of intelligence policy.

President Jimmy Carter assumed office determined to correct the abuses of the Nixon Administration. Carter also believed that Henry Kissinger had been able to amass too much power while serving simultaneously as National Security Advisor and Secretary of State. Therefore, Carter sought to diversify the national security policymaking process beyond the NSC structure, although the NSC continued to be involved in policy coordination and advising the President. The NSC rarely convened under President Carter and operated in a much less structured manner than during previous administrations.²⁵ President Carter replaced Ford’s Executive Order on intelligence with EO 12036 in 1978, which further intensified oversight of the IC and imposed new restrictions on intelligence activities.²⁶ Carter’s EO directed the NSC to establish intelligence priorities and review intelligence products.²⁷

The Reagan Administration made several changes to the NSC’s structure and also rescinded Carter’s EO. In 1981, President Ronald Reagan issued EO 12333 to emphasize the need for “accurate and timely information about the capabilities, intentions, and activities of foreign powers.”²⁸ The purposes of the new order were to maximize operational effectiveness during the Cold War, ensure IC activities were lawful, and constrain the IC to respect Americans’ privacy and civil liberties.²⁹ EO 12333 clarified the NSC’s responsibility to review and advise the National Security Advisor and President on all important national security policies and programs.

²¹ Richard Best, *The National Security Council*, 14.

²² John Prados, *Keepers of the Keys: A History of the National Security Council from Truman to Bush* (New York: William Morrow and Company, Inc., 1991), 387-388.

²³ Stephen Slick, “Modernizing the IC ‘Charter’,” *Studies in Intelligence* 59, no. 2 (June 2014): 58.

²⁴ The “Family Jewels” documents were compiled under the direction of the Director of Central Intelligence James Schlesinger in December 1974. See generally Britt L. Snider, *The Agency and the Hill: CIA’s Relationship with Congress, 1946-2004* (Berkshire: Books Express P, 2008); see also Gerald Ford, Executive Order 11905- United States Foreign Intelligence Activities, 41 Fed. Reg. 7703 (1976).

²⁵ Richard Best, *The National Security Council*, 15.

²⁶ Jimmy Carter, Executive Order 12036- United States Foreign Intelligence Activities, 43 Fed. Reg. 3674 (1978).

²⁷ *Ibid.*

²⁸ Ronald Reagan, Executive Order 12333- United States Intelligence Activities, 46 Fed. Reg. 59941 (1981).

²⁹ *Ibid.*

President Reagan established three cabinet-level Senior Interagency Groups (SIGs) on foreign, defense, and intelligence issues within the NSC.³⁰ Below the SIGs, several Assistant Secretary-level Interagency Groups (IGs) were set up.³¹ The NSC staff sent proposed policies up this chain for review.³² Also, William Clark, Reagan's second National Security Advisor, actively sought to coordinate intelligence policies across agencies.³³

In 1986, the NSC violated the Boland Amendment and Executive Branch declarative policy by facilitating CIA support to the Contra rebels in Central America. The Iran-Contra affair involved NSC operational, and not policy, activities that were undertaken without the required covert action "finding" approved by the President.³⁴ Thus, the NSC failed in its oversight role and a congressional investigation further concluded that the Reagan Administration withheld information and "deliberately deceived the Congress, [investigators], and the public about the level and extent of official knowledge of and support for these operations."³⁵ The administration's attempt to evade congressional oversight weakened the relationship between the White House and Congress, and called into question the NSC's role as an overseer of intelligence activities, especially in regards to covert action programs. The Iran-Contra affair illustrated the risks inherent when the NSC staff strays outside its statutory policy development and advisory roles into policy implementation and operations.

President George H. W. Bush restructured the NSC slightly upon taking office, and appointed a number of experienced officials to his national security team. President Bush established the NSC Principals Committee, composed of top-ranking officials; the Deputies Committee, composed of second-ranking officials in cabinet departments; and several Policy Coordination Committees, composed of department officials and staff members.³⁶ This basic policy development hierarchy continues to be used today. President Bush's NSC functioned extremely effectively and contributed to several notable foreign policy successes including the reunification of Germany and Operation Desert Storm.³⁷ President Bill Clinton issued Presidential Decision Directive 2 to enlarge the NSC and emphasized economic issues more than past presidents.³⁸ Clinton's NSC staff played an important role in developing the administration's Balkan policies.³⁹ The NSC played a prominent role in initiating, coordinating, and reviewing intelligence initiatives and under both Presidents Bush and Clinton.

Following the 9/11 attacks, the NSC played a central role in reforming the IC based on the 9/11 Commission's recommendations. The White House and NSC staff worked with Congress to develop the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004, which passed

³⁰ David J. Rothkopf, *Running the World*, 225-227.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ John Prados, *Keepers of the Keys*, 530-534.

³⁵ Lawrence E. Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters*, Division for the Purpose of Appointing Independent Counsel (Washington, D.C.: U.S. Court of Appeals, 1993), accessed March 31, 2016, <http://fas.org/irp/offdocs/walsh/index.html>.

³⁶ Richard Best, *The National Security Council*, 22-23.

³⁷ *Ibid.*, 20.

³⁸ *Ibid.*, 21.

³⁹ *Ibid.*, 22.

in December of that year.⁴⁰ The IRTPA established the new position of the Director of National Intelligence (DNI) to lead the IC.⁴¹ The NSC staff helped coordinate amendments to EO 12333 to ensure its consistency with the new IRTPA structures. That order had only undergone minor amendment since 1981.⁴² The 2008 amendments to EO 12333 sought to enhance the DNI's authorities to lead a fully integrated IC while at the same time ensuring that Americans' privacy and civil liberties were respected in the course of intelligence activities.⁴³

President Barack Obama's NSC staff has expanded to become larger than at any time since the Eisenhower Administration.⁴⁴ Obama combined the staffs of the now-disbanded Homeland Security Council and NSC into a single staff, but maintained the separate posts of National Security Advisor and Homeland Security Advisor.⁴⁵ The decision-making power in Obama's NSC has largely been concentrated with a few top-level advisors, which is similar to several past administrations.⁴⁶ Despite the intense public scrutiny of intelligence oversight following Edward Snowden's unauthorized disclosures of classified information in 2013, President Obama has not amended EO 12333. In Presidential Policy Directive 28 (PPD 28), Obama expanded the NSC's oversight of signals intelligence (SIGINT) collection operations.⁴⁷ The NSC was instrumental in drafting the directive, which set out guidelines governing the collection of SIGINT and also declared for the first time that the U.S. IC would take into account the privacy interests of all people, regardless of nationality in conducting bulk surveillance activities.⁴⁸ The NSC's responsibilities to oversee the effectiveness and legality of intelligence programs now includes a wide range of sensitive collection activities along with its more traditional oversight of covert actions.

Current Perspectives and Analysis

The NSC's Directorate for Intelligence Programs is the main locus of NSC intelligence oversight activity.⁴⁹ The NSC's oversight focuses on evaluating both the effectiveness and legality of intelligence activities.⁵⁰ As a significant consumer of intelligence, the NSC as an institution can gauge the effectiveness of an operation based on its familiarity with the President's policies and priorities. The current Senior Director for Intelligence Programs, Brett Holmgren, and a recent predecessor, Rodney Snyder, agreed that the NSC staff's dual roles as "consumer" of

⁴⁰ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638 (2004).

⁴¹ Lawrence Walsh, *Final Report of the Independent Counsel for Iran/Contra Matters*.

⁴² The order was slightly amended in 2003 by EO 13284 to incorporate the establishment of the Department of Homeland Security (DHS) and in 2004 by EO 13355 to incorporate the 9/11 Commission's recommendation to allocate more authority to the DCI.; Stephen Slick, "Modernizing the IC 'Charter'," 58.

⁴³ *Ibid.*

⁴⁴ Richard Best, *The National Security Council*, 23.

⁴⁵ *Ibid.*, 24.

⁴⁶ *Ibid.*

⁴⁷ White House, "Presidential Policy Directive—Signals Intelligence Activities" (January 17, 2014), accessed December 8, 2015, <https://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities>.

⁴⁸ *Ibid.*

⁴⁹ For more information on the traditional organization of the NSC, see National Security Policy Directive 1.

⁵⁰ Rodney Snyder, interview by Anna Waterfield and Courtney Weldon, Washington, D.C., February 29, 2016.

intelligence and “overseer” enable it to provide rigorous oversight and well-informed advice to the President.⁵¹

The NSC’s legal advisor and the NSC legal staff play prominent roles in reviewing proposed and ongoing intelligence operations to ensure that they are lawful. In particular, the Legal Advisor participates in the initial and periodic reviews of all covert action programs presented to the President for approval.

The White House and IC agencies have been fairly criticized for slow and ineffective public responses to the unauthorized disclosure of sensitive intelligence programs.⁵² The NSC should require the development of a contingency plan that would be executed in the event a sensitive operation were disclosed prematurely and it proved necessary to explain the purpose, legal authority, and any other aspects of a compromised operation. This plan would be reviewed and approved at the same time the underlying operation is considered by the White House. This new requirement would apply to collection activities in the same manner that such a contingency plan is already required for new covert action findings.⁵³

John Bellinger and Judge James Baker, both former legal advisors to the NSC, observed that the NSC acts more as a conduit for initial policy approval between the President and IC agencies and less as an oversight body that provides continuing detailed review of intelligence operations.⁵⁴ However, Rodney Snyder and Steve Slick, both former Senior Directors for Intelligence Programs, contend that the NSC Intelligence Programs Directorate routinely monitors the implementation of ongoing intelligence programs and is not simply engaged at the start of an operation.⁵⁵ In addition to overseeing ongoing operations and providing recommendations on new covert action programs, the NSC Intelligence Directorate manages the annual review of intelligence programs, prepares the National Security Advisor for meetings, and leads the assistant secretary-level interagency committee that reviews sensitive collection operations that require the approval of the National Security Advisor or President.⁵⁶

The ability of the NSC’s Directorate of Intelligence Programs to provide effective guidance and conduct adequate oversight depends greatly on the expertise of the Directorate’s staff, the relationships developed between the Senior Director and IC agencies, and the support of other NSC directorates.⁵⁷ The Intelligence Programs Directorate has remained relatively small,

⁵¹ Brett Homgren, interview by Eric Manpearl and Chelssie Lopez, Washington, D.C., January 14, 2016; and Snyder interview.

⁵² Gregory Treverton, interview by Steven Brackin, Eric Manpearl, Anna Waterfield, and Courtney Weldon, Austin, Texas, April 13, 2016.

⁵³ Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113–126, § 308, 128 Stat. 1390 (2014). The statute requires that “[f]or each type of activity undertaken as part of a covert action, the President shall establish in writing a plan to respond to the unauthorized public disclosure of that **type of activity.**”

⁵⁴ John Bellinger, interview by Eric Manpearl and Chelssie Lopez, Washington, D.C., January 16, 2016; and James Baker, interview by Eric Manpearl, Austin, Texas, February 5, 2016.

⁵⁵ Snyder interview; and Stephen Slick, interview by Steven Brackin and Courtney Weldon, Austin, Texas, April 11, 2016.

⁵⁶ Slick interview.

⁵⁷ *Ibid.*

consisting of four to six professional staffers in addition to the Senior Director.⁵⁸ Bellinger questioned whether an Intelligence Programs Directorate with such a small staff could actually monitor all ongoing intelligence operations.⁵⁹ His former colleague, Steve Slick, acknowledged that the NSC staff is unable to monitor every IC activity but was capable of staying informed of the most important, expensive, and sensitive programs and identifying issues for closer scrutiny.⁶⁰ In Slick's view, a small NSC intelligence staff is adequate to the task provided if the staff members have the necessary expertise, IC relationships, and political support.⁶¹

Snyder and Slick also emphasized the importance of strong relationships and trust between the Senior Director and IC leaders, the National Security Advisor, and the President.⁶² The state of these relationships greatly affects the ability for the NSC Intelligence Programs Directorate to conduct effective oversight and produce recommendations for the National Security Advisor and the President.⁶³ Slick acknowledged that although extensive intelligence experience is important for a Senior Director, a Senior Director without a preexisting relationship with the National Security Advisor or President might not have sufficient influence.⁶⁴

Recommendations

We recommend:

- The NSC should require a formal contingency plan for managing the unauthorized public disclosure of all sensitive collection programs in the same manner now required for covert actions. This plan would be developed at the same time that an intelligence program is reviewed and initially approved; and
- The President should direct limited notice of intelligence programs to Congress on rare occasions, and only as authorized by statute for covert actions and not for collection and other programs.

⁵⁸ Holmgren interview.

⁵⁹ Bellinger interview.

⁶⁰ Slick interview.

⁶¹ *Ibid.*

⁶² *Ibid.*; and Snyder interview.

⁶³ *Ibid.*

⁶⁴ Slick interview.

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Chapter 2.

Executive Branch Oversight of the Intelligence Community: The PIAB and IOB

by Darby O’Rear and Eric Manpearl

The President’s Intelligence Advisory Board and its Intelligence Oversight Board serve as important links between the President and the intelligence community.⁶⁵ The PIAB and the IOB are both elements within the Executive Office of the President.⁶⁶ The PIAB provides the President with independent advice on intelligence matters, and every President since Eisenhower, with the sole exception of Jimmy Carter, has used the PIAB for this purpose.⁶⁷ The IOB oversees the IC’s compliance with the Constitution, the law, and relevant presidential orders.⁶⁸

The PIAB, unlike the IOB, “was intended from the beginning to serve as an advisory body to the President and not as an oversight body for the intelligence community.”⁶⁹ Although the board is not a formal oversight entity, it does monitor and exercise influence over how the IC operates, and is therefore included in our report.

History

President Eisenhower created the first version of the PIAB, called the President’s Board of Consultants on Foreign Intelligence Activities (PBCFIA), by Executive Order 10656 in 1956.⁷⁰ Three events that occurred at that time spurred President Eisenhower to create the PBCFIA: concerns about the capabilities and intentions of the USSR, increasing congressional efforts to establish an intelligence oversight function, and the knowledge that previous administrations had relied on similar advisory bodies comprised of private citizens after World War II.⁷¹ The original EO called for the President to appoint private citizens outside of government “on the basis of ability, experience, and knowledge of matters relating to the national defense and security” to conduct oversight of the government’s intelligence activities.⁷²

⁶⁵ Kenneth Michael Absher, Michael C. Desch, and Roman Popadiuk, *Privileged and Confidential: The Secret History of the President’s Intelligence Advisory Board* (Lexington, KY: University Press of Kentucky, 2012), 11, 13. The PIAB was formerly the President’s Foreign Intelligence Advisory Board (PFIAB). President George W. Bush renamed the PFIAB the PIAB in 2008.

⁶⁶ *Ibid.*, 2, 12; see also The White House, “**President’s Intelligence Advisory Board and Intelligence Oversight Board- PIAB History**,” accessed May 11, 2016, <https://www.whitehouse.gov/administration/eop/piab/history>.

⁶⁷ *Ibid.*

⁶⁸ Joan Dempsey, Former Executive Director of PFIAB under George W. Bush, interview by Darby O’Rear, Austin, Texas, March 29, 2016; and The White House, “**President’s Intelligence Advisory Board and Intelligence Oversight Board- PIAB History**.”

⁶⁹ Absher et al, *Privileged and Confidential*, 226.

⁷⁰ Dwight D. Eisenhower, Executive Order 10656- Establishing the President’s Board of Consultants on Foreign Intelligence Activities, 21 Fed. Reg. 167 (1956); and Absher et al, *Privileged and Confidential*, 1, 15, 17, 21.

⁷¹ Absher et al, *Privileged and Confidential*, 15-18.

⁷² Dwight D. Eisenhower, Executive Order 10656.

The board originally consisted of eight people, including a chair, drawn from the ranks of former businessmen, military officers, diplomats, politicians, and academics.⁷³ Unlike his successors, President Eisenhower did not use board appointments to reward political supporters and, consequently, the original board had a wealth of general expertise.⁷⁴ The board met (and continues to meet) only a few times a year for a duration of a couple of days.⁷⁵ Despite the part-time nature of the board, Eisenhower's panel was successful in developing impactful recommendations.⁷⁶ For instance, the board recommended that the Director of Central Intelligence (DCI) have an executive director or chief of staff to manage the day-to-day operations of the CIA so that the DCI could devote more time to managing the IC as a whole.⁷⁷ President Eisenhower approved many of the board's recommendations, especially those that addressed technological intelligence activities and the IC's organizational structure.⁷⁸

The original board succeeded for several reasons. First, it benefitted from the fact that President Eisenhower valued and prioritized intelligence due to his experiences in World War II.⁷⁹ Additionally, the fact that the intelligence community was still fairly new—the CIA had only been established a few years earlier—may have meant it was easier for the IC to take the board's constructive criticism and make changes.⁸⁰ Finally, the board had an ally in DCI Allen Dulles, who was particularly supportive of the board's activities.⁸¹ Although Dulles appears to have resisted the board's recommendations aimed at reforming the DCI's role, the relationship between the board and the DCI was much less contentious during Eisenhower's administration than subsequent ones.⁸²

President John F. Kennedy reconstituted the board with EO 10938 in May 1961, which renamed the board the President's Foreign Intelligence Advisory Board (PFIAB).⁸³ During Kennedy's term as President, the disastrous Bay of Pigs operation highlighted the need for the board.⁸⁴ Some argued that the major flaw with the Bay of Pigs operation was not necessarily the original CIA plan to invade Cuba, but rather Kennedy's revisions of the plan, which arguably "watered down" the operation to the point of rendering it "militarily impossible."⁸⁵ While James Olson, a former CIA officer and now a professor at Texas A&M University, believes the responsibility for not objecting to the infeasible version of the plan lies with the CIA, an advisory board containing members with military expertise close to President Kennedy may also have been able to derail the plan—especially since Kennedy's PFIAB ultimately included noted experts in

⁷³ Absher et al, *Privileged and Confidential*, 18-20.

⁷⁴ *Ibid.*, 233-234.

⁷⁵ *Ibid.*, 7; and Dempsey interview.

⁷⁶ Absher et al, *Privileged and Confidential*, 47.

⁷⁷ *Ibid.*, 33.

⁷⁸ *Ibid.*, 27-29, 31, 34-35, 37, 40-42, 44-49.

⁷⁹ *Ibid.*, 49.

⁸⁰ *Ibid.*, 49, 185.

⁸¹ *Ibid.*, 18, 20-21.

⁸² *Ibid.*, 47, 62.

⁸³ John F. Kennedy, Executive Order 10938- Establishing the President's Foreign Intelligence Advisory Board, 26 Fed. Reg. 3951 (1961).

⁸⁴ Absher et al, *Privileged and Confidential*, 51-54.

⁸⁵ James Olson, Class lecture, The Bush School of Government and Public Service, Texas A&M University, College Station, Texas, June 18, 2013.

military affairs and intelligence.⁸⁶ Also, CIA officials may have been able to use the board as a vehicle to voice their concerns regarding Kennedy's revisions to the original invasion plan.

Kennedy's board, once empaneled, also included experts in science, technology, politics, and foreign affairs, which allowed the board to give well-rounded advice and focus specifically on the intelligence technologies prominent in the early Cold War.⁸⁷ Kennedy's board attempted to meet regularly and had considerable access to national security officials in the administration, working primarily through the National Security Advisor.⁸⁸ The PFIAB "heard briefings by senior intelligence and defense officials," met with cabinet officials, and sometimes met with Kennedy directly.⁸⁹ The PFIAB analyzed an array of problems ranging from structural issues—such as the organization of the IC and specific agencies, the role of the DCI, and intelligence collection—to specific intelligence efforts in Southeast Asia and Cuba.⁹⁰ Notably, the PFIAB's recommendations during the Kennedy Administration resulted in the creation of the CIA's Directorate of Science and Technology.⁹¹ Ultimately, Kennedy approved 125 of the PFIAB's 170 recommendations to him.⁹² The Eisenhower and Kennedy Administrations represented a "golden era" for the board. Both Presidents utilized the board in an effective manner, and the boards developed many useful recommendations for each President.

Presidents Johnson, Nixon, and Ford all continued to use the PFIAB, though Johnson's presidency marked the beginning of a decline in presidential interest in the board.⁹³ Johnson's PFIAB was successful principally due to a good relationship between its chairman, Clark Clifford, and the President, which allowed the board to avoid the red tape that might otherwise have hindered it.⁹⁴ It was fortunate that this particular board had so much clout with the President because it had to address a variety of unique and significant intelligence issues during Johnson's administration, including those related to Vietnam and the Soviet threat.⁹⁵ The board also tackled numerous important issues during the Nixon Administration, including assessing the Soviet nuclear threat to the U.S. and the IC's need to collect better intelligence on international economic activities that would affect the U.S.⁹⁶ However, the PFIAB's prominence waned over the course of the administration, especially as the Watergate scandal consumed the President's attention.⁹⁷

As the abuses of the Nixon Administration sparked congressional investigations of the IC, President Ford used the PFIAB to demonstrate that he was personally committed to the oversight

⁸⁶ Ibid.

⁸⁷ Absher et al, *Privileged and Confidential*, 54-57, 87-89.

⁸⁸ Ibid., 59-62.

⁸⁹ Ibid., 59.

⁹⁰ Ibid., 59-61, 63-65.

⁹¹ Ibid., 62.

⁹² Ibid., 102.

⁹³ Ibid., 154, 184-185, 225.

⁹⁴ Ibid., 154.

⁹⁵ Ibid.

⁹⁶ Ibid., 161, 167-168, 171-172.

⁹⁷ Ibid., 184-185.

and proper management of intelligence activities.⁹⁸ In 1975, the Rockefeller Commission released a report on “Oversight of the Activities of the CIA.”⁹⁹ The report noted, “A new body is needed to provide oversight of the Agency within the Executive Branch.”¹⁰⁰ This report prompted President Ford to establish the IOB.¹⁰¹ This board differs from the PIAB in that its mandate is oversight, while the PIAB is not principally an oversight body.¹⁰² The IOB is concerned with whether the IC (expanded from the original report’s focus on the CIA) is following the law, which is a more specific and limited role than that of the PIAB.¹⁰³ While the PFIAB’s main focus was on the effectiveness and status of intelligence agencies, programs, and officials, the IOB was specifically designed to be responsible for legal issues within the IC.¹⁰⁴

Jimmy Carter abolished the PFIAB, but kept the IOB.¹⁰⁵ President Carter’s DCI, Stansfield Turner, did not believe the PFIAB was necessary and worried the board would interfere with his work as DCI.¹⁰⁶ The administration also determined that the newly created Senate Select Committee on Intelligence (SSCI) and House Permanent Select Committee on Intelligence (HPSCI) could be partially responsible for overseeing the IC and would take on responsibilities previously assigned to the PFIAB.¹⁰⁷ However, the PFIAB’s importance was reinforced by the fact that, even during this time, several administration officials wanted to bring back the board.¹⁰⁸

Ronald Reagan reconstituted the board in 1981.¹⁰⁹ However, President Reagan’s board members in many cases were not chosen on the basis of their relevant expertise. Instead, Reagan added members as he pleased.¹¹⁰ The board’s membership expanded, reaching 21 in 1984, and many members were clearly appointed based on their political loyalty to President Reagan, rather than their qualifications to serve on the PFIAB.¹¹¹ The large size of the board limited individual participation and substantive discussion, which in turn prevented the board from operating

⁹⁸ Ibid., 189-191.

⁹⁹ Rockefeller Commission on CIA Activities within the United States, *Report to the President by the Commission on CIA Activities within the United States* (June 1975), 15, accessed May 11, 2016, <https://www.fordlibrarymuseum.gov/library/document/0005/1561495.pdf>.

¹⁰⁰ Ibid., 15.

¹⁰¹ Absher et al, *Privileged and Confidential*, 193; and The White House, “President’s Intelligence Advisory Board and Intelligence Oversight Board- PIAB History.”

¹⁰² Rockefeller Commission on CIA Activities within the United States, *Report to the President by the Commission on CIA Activities within the United States*, 15; and Absher et al, *Privileged and Confidential*, 15-18.

¹⁰³ Dempsey interview; and The White House, “President’s Intelligence Advisory Board and Intelligence Oversight Board- PIAB History.”

¹⁰⁴ Absher et al, *Privileged and Confidential*, 192-193; and The White House, “President’s Intelligence Advisory Board and Intelligence Oversight Board, About the PIAB,” accessed May 11, 2016, <https://www.whitehouse.gov/administration/eop/piab/about>.

¹⁰⁵ Absher et al, *Privileged and Confidential*, 225.

¹⁰⁶ Ibid., 226-227; and Admiral Bobby Inman, Lecture, The LBJ School of Public Affairs, The University of Texas, Austin, Texas, February 18, 2016.

¹⁰⁷ Absher et al, *Privileged and Confidential*, 225-226.

¹⁰⁸ Ibid., 228-229; and David. M. Abshire, “For a Presidential Advisory Board,” *The New York Times*, May 3, 1980, 23.

¹⁰⁹ Absher et al, *Privileged and Confidential*, 233.

¹¹⁰ Ibid., 233-234, 237, 261-262.

¹¹¹ Ibid.

effectively.¹¹² Furthermore, IC officials were wary of sharing information with the board because the large number of members increased the likelihood of leaks.¹¹³

President Reagan decreased the board's size, appointed fewer politically connected members, and took a greater personal interest in the board during his second term, which allowed the PFIAB to be more effective.¹¹⁴ Overall, President Reagan's PFIAB was assessed to be somewhat successful, with its influence minimized by the creation of a multitude of oversight bodies in all branches of government following the revelation of abuses in the 1960s and 1970s.¹¹⁵ The creation of the SSCI and HPSCI, for instance, diminished the previously unique role the PFIAB had played.¹¹⁶

Following Reagan's term, President George H. W. Bush allowed Reagan's board members to continue serving, but the board may not have met at all until a year and a half into the Bush Administration.¹¹⁷ President Bush's previous experiences with the board as DCI in the Ford Administration and as Vice President in the Reagan Administration caused him to have a generally unfavorable opinion of the PFIAB.¹¹⁸ Instead, the President preferred to rely on his own foreign affairs experience, as well as his relationships with Secretary of State James Baker and National Security Advisor Brent Scowcroft.¹¹⁹ Senator David Boren, Chairman of the SSCI, spurred President Bush to ultimately appoint a board when the senator threatened to compel appointments to the board by legislation.¹²⁰

President Bush's board consisted only of six members, who were mainly scientists and intelligence experts.¹²¹ After the First Gulf War, President Bush used the PFIAB to examine how the IC had miscalculated the likelihood of Iraq invading Kuwait and also to improve the use of intelligence on the battlefield.¹²² However, President Bush did not rely on the PFIAB to address the most significant intelligence and national security concerns, such as CIA and IC reform following the Soviet Union's collapse in 1991.¹²³

President Bill Clinton expanded the board when he took office and once again used it to appoint political supporters.¹²⁴ In 1993, President Clinton established the IOB as a committee of the PFIAB instead of the independent entity it had previously been.¹²⁵ Clinton did not prioritize

¹¹² Ibid., 239.

¹¹³ Ibid.

¹¹⁴ Ibid., 261-262

¹¹⁵ Ibid., 262.

¹¹⁶ Ibid.

¹¹⁷ Ibid., 263.

¹¹⁸ Ibid.

¹¹⁹ Inman lecture.

¹²⁰ Absher et al, *Privileged and Confidential*, 264-265.

¹²¹ Ibid., 264-265, 267.

¹²² Ibid., 270-273.

¹²³ Ibid., 274-275.

¹²⁴ Ibid., 279.

¹²⁵ Absher et al, *Privileged and Confidential*, 283; and The White House, "President's Intelligence Advisory Board and Intelligence Oversight Board- History."

intelligence issues, though, and he rarely engaged with the PFIAB during his presidency.¹²⁶ Although Clinton's PFIAB did deal with several sensitive issues, it was not influential within the White House or the IC.¹²⁷

President George W. Bush did not initially appoint a new board and, even once he did, he appointed a number of political supporters to the board.¹²⁸ President Bush's relationship with the board soured during his first term after the chairman, Brent Scowcroft, publicly criticized the Iraq War.¹²⁹ However, the board's role and influence grew enormously during Bush's second term, when investigations of the IC's shortcomings during 9/11 and overestimate of Iraq's weapons of mass destruction (WMD) programs led to major IC structural reforms.¹³⁰ The board assumed a notable role in monitoring and advising President Bush on the implementation of these reforms.¹³¹

President George W. Bush's second-term board worked well with national security officials across the administration.¹³² The board's chairman, Steve Friedman, and several other board members had close personal and professional relationships with the President, which gave the board access and clout within the administration and IC.¹³³ Friedman insisted that the board only work on issues that personally mattered to the President, which enabled the board to become a valuable resource for the chief executive.¹³⁴

President Obama ordered changes to both the IOB and the PIAB after he took office.¹³⁵ In addition to restoring the IOB's obligation to report unlawful IC activity to the Attorney General, which had been eliminated during the Bush Administration, Obama replaced most of President Bush's PIAB members with his own selections.¹³⁶ However, President Obama's restoration of a legal reporting obligation to the IOB was mainly political posturing. The IOB had become redundant to the extent that IC agencies already were obliged by statute to refer evidence of

¹²⁶ Absher et al, *Privileged and Confidential*, 283-284.

¹²⁷ *Ibid.*, 307.

¹²⁸ *Ibid.*, 278, 309.

¹²⁹ Inman lecture; and Absher et al, *Privileged and Confidential*, 312, 320.

¹³⁰ Absher et al, *Privileged and Confidential*, 321-323.

¹³¹ *Ibid.*, 323.

¹³² James Langdon, Jr., lecture, the LBJ School of Public Affairs, The University of Texas, Austin, Texas, February 25, 2016; and Absher et al, *Privileged and Confidential*, 313, 321.

¹³³ Stefanie Osburn, interview by Chelssie Lopez and Eric Manpearl, Washington DC, January 14, 2016; and Absher et al, *Privileged and Confidential*, 321-322.

¹³⁴ Osburn interview.

¹³⁵ The Board's name was changed from the President's Foreign Intelligence Advisory Board (PFIAB) to the President's Intelligence Advisory Board (PIAB) by President George W. Bush to reflect that intelligence is not solely a foreign venture. See Josh Gerstein, "Obama overhauls intelligence panel," *Politico: Under the Radar: Josh Gerstein on the Courts, Transparency, & More*, September 10, 2014, accessed May 11, 2016, <http://www.politico.com/blogs/under-the-radar/2014/09/obama-overhauls-intelligence-panel-195235>; Josh Gerstein, "Snooping reports' pileup problem," *Politico*, accessed May 11, 2016, http://www.politico.com/story/2014/05/surveillance-reform-privacy-nsa-106264_Page2.html; and Charlie Savage, "Obama Order Strengthens Spy Oversight," *The New York Times*, October 29, 2009, accessed May 11, 2016, http://www.nytimes.com/2009/10/30/us/politics/30intel.html?_r=0.

¹³⁶ Gerstein, "Obama overhauls intelligence panel"; Gerstein, "Obama upends intel panel"; and Gerstein, "Snooping reports' pileup problem."

potential crimes to the Attorney General, Office of the Director of National Intelligence, and the relevant Inspector General.¹³⁷ Overall, President Obama’s PIAB has had only limited contact with the President and does not seem to have been impactful on the IC. Evidence of the board’s limited role includes the fact that the President chose to establish an independent panel to review and analyze intelligence and surveillance programs following the unauthorized disclosures of the NSA’s surveillance programs.

Current Perspectives and Analysis

The PIAB is able to act as a neutral party and honest broker regarding intelligence activities because its members have no influence over budgets, no “institutional interests to protect,” little inclination to be in the spotlight, are not paid a salary, and can only make recommendations.¹³⁸

Although the board’s advantages are several, the board also has certain institutional weaknesses that have led practitioners involved with it to conclude that it does not do an adequate job of oversight.¹³⁹ Over time, the board’s influence has declined as other oversight mechanisms have been established, and the IOB is redundant, if not entirely superfluous.¹⁴⁰ As the President’s power has expanded in recent history, more advisory and oversight bodies have become institutionalized.¹⁴¹ This is especially true for the IC, which has expanded to 17 different agencies and organizations since 9/11. Thus, it has become more difficult for the board, which lacks time, resources, and sometimes relevant expertise, to break through the normal bureaucratic channels to offer meaningful advice.¹⁴²

Board members who do not have past experience in national security can face a steep learning curve when they begin their tenure. Joan Dempsey, the Executive Director of George H. W. Bush’s PFIAB, assessed that “it takes months, if not years, [for members] to get up to speed on the issues.”¹⁴³ This inhibits the board’s productivity and effectiveness because members need to understand the IC before they can begin conducting investigations and making recommendations on how to improve it. Appointing members for fixed terms, and the chair and vice chair for longer terms than normal members, may help provide continuity and a solid knowledge base on the board.¹⁴⁴ This can be pursued by designating four-year term limits for the chair and vice chair (if any) and two-year terms for other members. This idea of staggered lengths of terms for PIAB

¹³⁷ Office of the Director of National Intelligence Office of General Counsel, *Intelligence Community Legal Reference Book* (Washington, D.C.: Office of the Director of National Intelligence, 2012), 911-914.

¹³⁸ Absher et al, *Privileged and Confidential*, 3-4, 5-6, 8, 334; and The White House, “**President’s Intelligence Advisory Board and Intelligence Oversight Board- About the PIAB.**”

¹³⁹ Dempsey interview; and Osburn interview.

¹⁴⁰ Judge James Baker, interview by Eric Manpearl, Austin, Texas, February 29, 2016 (Judge Baker expressed the IOB was redundant); Osburn interview (Osburn expressed the IOB was redundant).

¹⁴¹ Lyn Ragsdale and John J. Theis III, “The Institutionalization of the American Presidency, 1924–92,” *American Journal of Political Science* 41, no. 4. (Oct. 1997): 1280-1318.

¹⁴² Absher et al, *Privileged and Confidential*, 7, 47, 309-310; Dempsey interview.

¹⁴³ Dempsey interview.

¹⁴⁴ Ibid.

members is in keeping with the original plan for the board, which was to have members “appointed for terms of varying length.”¹⁴⁵

In addition, the board is rarely able to meet more than once every month or two, and at times, it can undergo extended periods of transition. Former Executive Director Dempsey does not believe the board meets frequently enough to be effective, an attribute that further diminishes the board’s influence.¹⁴⁶

Dempsey advocated for a “hybrid board” made up of experts in various fields, as it is now, but that would also include former or current intelligence officials. Dempsey argued it would be beneficial to have not only staff but board members with such specialized backgrounds. This could help members without past intelligence experience learn about the IC more quickly, and it would also help alleviate problems caused by infrequent meetings by enabling the PIAB “to meet in subgroups and deal with special projects” between scheduled board meetings.¹⁴⁷ Enhanced expertise on the board would mean fewer members would be needed to analyze issues.¹⁴⁸ Such a step, however, would diminish the objectivity of the board. Despite this risk, Dempsey’s view that a strong intelligence background can be beneficial to board members was once favored. A proposed member of Eisenhower’s board was rejected because of uncertainty about his “intelligence bonafides,” implying “that at least some on the PFIAB thought that [it] was an important qualification” for members to have an understanding of intelligence.¹⁴⁹ Dempsey’s recommendation to consider naming current intelligence officials to the PIAB is novel. It has never been attempted before and, while it would provide the board with the most current expertise in intelligence, it could also be seen as a disqualifying conflict of interest.

Dempsey also recommended that new Presidents only appoint a few new members to their own board, while the rest would carry over from the previous administration’s board—a recommendation that has been made by others.¹⁵⁰ The goal of this recommendation is to ensure there are always knowledgeable members serving on the board during transition periods, so there is not a lack of expertise. However, boards are most successful when the members have a close, trusting relationship with the President.¹⁵¹ Such relationships enable the members to have access to the President and increase the likelihood the President will be favorably inclined toward the board’s recommendations.¹⁵²

PIAB staff members play an important role in educating the members and adding expertise to the board’s work. Staffers who are “detailed” from IC agencies may have a conflict of interest in overseeing their home agencies, though. They may also have an incentive to feed information on an administration’s concerns back to their home agency, rather than focusing solely on the

¹⁴⁵ Absher et al, *Privileged and Confidential*, 18.

¹⁴⁶ Dempsey interview. Dempsey also issued “a ... broad indictment” of intelligence oversight in general because she believes the oversight system as a whole is ineffective.

¹⁴⁷ Dempsey interview.

¹⁴⁸ Dempsey interview.

¹⁴⁹ Absher et al, *Privileged and Confidential*, 114-115.

¹⁵⁰ Ibid.; and Dempsey interview.

¹⁵¹ Absher et al, *Privileged and Confidential*, 8, 124, 154; Dempsey interview.

¹⁵² Ibid.

board's and the President's best interests. The PIAB staff would benefit from more direct-hire personnel with correspondingly fewer officers detailed from IC agencies.

Although the PIAB's success is heavily dependent on its relationship with the President, board appointments have been used as a political reward in the past with negative consequences.¹⁵³ This politicization results in fewer knowledgeable members, the board not being capable of conducting adequate oversight, and ultimately, the board having less influence.¹⁵⁴ This tendency might be less attractive (i.e., more politically risky) if the President were required to notify Congress of intended appointments to the PIAB.¹⁵⁵ These appointments would not be subject to the advice and consent of the Senate, so the President would still have complete control over who is appointed to the board. The notification requirement would incentivize the President to use more care in appointing members and not appoint someone to the board for purely political reasons.¹⁵⁶ The intelligence oversight committees could even use tools at their disposal to influence the President to reconsider an appointment the committee members believed was especially egregious. The President should choose board members that will ensure that the PIAB has a diversity of thought and expertise.

Some commentators have criticized the board as just a vehicle through which IC leaders can move their own agendas forward with the administration.¹⁵⁷ However, this is not inherently a negative feature. As noted, the board might have provided skeptical IC officials a platform to challenge aspects of the Bay of Pigs planning, possibly allowing the administration to avert the ill-advised operation.

The board has been criticized as duplicative as well. This claim is ironic because the first set of recommendations made to President Eisenhower by the PBCFIA included the "reduction of duplication" in the IC.¹⁵⁸ Judge James Baker, who served as NSC Legal Advisor during the Clinton Administration, opined that the board has been redundant at times in the past.¹⁵⁹ However, Judge Baker stressed that redundancy can sometimes be beneficial because it mitigates the possibility that oversight will miss some illicit activity.¹⁶⁰ The IOB's functions overlap extensively with other oversight bodies and mechanisms, and it is not needed to prevent or detect illegality in the IC.¹⁶¹

Finally, PIAB recommendations should be as specific as possible and there should be a formal mechanism to follow up on the implementation of recommendations that are approved by the President.¹⁶² More specific recommendations will give clearer direction to the IC. To make the board's recommendations more specific and actionable, it would be useful for the President to

¹⁵³ Absher et al, *Privileged and Confidential*, 8, 233-234; and Dempsey interview.

¹⁵⁴ Absher et al, *Privileged and Confidential*, 233-234.

¹⁵⁵ *Ibid.*, 336.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*, 328-329.

¹⁵⁸ Absher et al, *Privileged and Confidential*, 28; and Osburn interview.

¹⁵⁹ Baker interview.

¹⁶⁰ *Ibid.*

¹⁶¹ Osburn interview.

¹⁶² Absher et al, *Privileged and Confidential*, 339-340.

give the board clear reporting requirements and narrow questions to answer. A formal mechanism to follow up on the implementation of PIAB recommendations would aid the board in assessing the effectiveness of its reports.¹⁶³

Recommendations

We recommend:

- The PIAB Chairman should be appointed for a four-year term, and regular board members appointed for terms of two years;
- The IOB should be abolished;
- The President should notify and consult with the SSCI and HPSCI on appointments to the PIAB;
- The PIAB staff should include more direct-hire personnel and fewer officers detailed from IC agencies; and
- PIAB reports should include specific recommendations and a formal procedure for follow-up reporting on implementation actions taken.

¹⁶³ Ibid.

Chapter 3.

The Privacy and Civil Liberties Oversight Board: Protecting Civil Liberties while Countering Terrorism

by Matthew Farrar and Danielle Oxford

In the aftermath of the 9/11 terror attacks, the U.S. government initiated an unprecedented array of intelligence and law enforcement programs to prevent further attacks on the homeland. The Privacy and Civil Liberties Oversight Board was established in order to ensure that the privacy and civil liberties of American citizens would not be sacrificed in what was expected to be a prolonged fight against terrorism. PCLOB was charged with ensuring the government's efforts to prevent terrorism were balanced with the need to safeguard privacy rights and civil liberties. Since its inception, PCLOB has succeeded in promoting transparency and accountability within the intelligence community and the rest of the government in surveillance activities, legal analyses, and information-handling procedures. While PCLOB's role as an oversight body for intelligence activities is paramount, it also serves as a channel to the public and non-governmental organizations that advocate for the protection of civil liberties. PCLOB's unique standing and mandate allow it to make the IC more effective while also helping build public trust.

Historical Perspective: Genesis of the Privacy and Civil Liberties Oversight Board

The PCLOB was created by an executive order that was informed by a recommendation of the National Commission on Terrorist Attacks Upon the United States, more commonly known as the 9/11 Commission.¹⁶⁴ In its 2004 report, the 9/11 Commission wrote that there was “no office within the government whose job it is to look across the government at the actions we are taking to protect ourselves to ensure that liberty concerns are appropriately considered.”¹⁶⁵ The commissioners envisioned a special board to fill this gap. In a series of executive orders issued in August 2004, President George W. Bush accepted and acted to implement many of the recommendations of the 9/11 Commission. In EO 13353, President George W. Bush created the President's Board on Safeguarding Americans' Civil Liberties.¹⁶⁶

The panel described in EO 13353 never came into existence. Before board members were appointed, Congress enacted the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 that included provisions, *inter alia*, creating a PCLOB.¹⁶⁷ Under the IRTPA, PCLOB

¹⁶⁴ Privacy and Civil Liberties Oversight Board, “About the Board,” accessed March 19, 2016, <https://www.pclob.gov/about-us.html>.

¹⁶⁵ National Commission on Terrorist Attacks, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (New York: W.W. Norton & Company, 2004), 395.

¹⁶⁶ Executive Order 13353 of August 27, 2004, Establishing the President's Board on Safeguarding Americans' Civil Liberties, *Federal Register* 69, no. 169 (September 1, 2004): 53585, <https://www.gpo.gov/fdsys/pkg/FR-2004-09-01/pdf/04-20049.pdf>.

¹⁶⁷ Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, § 1061 (b), 118 Stat. 3684 (2004): 3684.

comprised two members appointed by the President, by and with the advice and consent of the Senate, and three additional board members appointed by the President. The board was also moved into the Executive Office of the President, reducing its independence.¹⁶⁸ The first board members were Chairwoman Carol E. Dinkins, Vice Chairman Alan Charles Raul, Theodore B. Olson, Lanny Davis, and Francis X. Taylor. The Senate confirmed the Chairwoman and Vice Chairman on February 17, 2006. All board members were sworn in and held their first meeting on March 14, 2006.

Although the board was technically functioning, critics claimed that PCLOB would be “devoid of the capability to exercise independent judgment and assessment or to provide impartial findings and recommendations.”¹⁶⁹ In fact, in May of 2007, board member Lanny Davis resigned because he believed the board did not have “adequate independence.”¹⁷⁰ Specifically, Davis’ resignation letter cited “the extensive redlining of the [B]oard’s report to Congress by [Bush] administration officials and the majority of the [B]oard’s willingness to accept most of the changes.”¹⁷¹ His resignation was sparked by over 200 editorial changes made to the board’s first report to Congress, which the White House called “standard operating procedure” because the board was a part of the Executive Office of the President and subject to its supervision and procedures.¹⁷²

This controversy renewed the debate over the board’s independence and investigative power. A June 2006 report by the House Committee on Appropriations condemned the editing of the board’s first report, stating:

The Committee is concerned about the extensive editing made by the Administration to the first report to Congress of the Board, the motivation for these edits... may be detrimental to the independence of the Board. The Committee believes that the Board must have the authority to thoroughly review, assess and report accurately on privacy and civil liberties matters. The Committee strongly urges the Administration to respect the Board’s mission and to refrain from substantive editing of its work.¹⁷³

In response to these concerns, the 110th Congress reauthorized PCLOB as an independent agency within the Executive Branch through the Implementing Recommendations of the 9/11

¹⁶⁸ Ibid.

¹⁶⁹ Gary Hatch, “Privacy and Civil Liberties Oversight Board: New Independent Agency Status,” Congressional Research Service Report for Congress (August 27, 2012), accessed May 5, 2016, <https://www.fas.org/sgp/crs/misc/RL34385.pdf>.

¹⁷⁰ Ibid., 4.

¹⁷¹ John Solomon and Ellen Nakashima, “White House Edits to Privacy Board’s Report Spur Resignation,” *The Washington Post* (May 15, 2007), accessed March 19, 2016, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/14/AR2007051402198.html>.

¹⁷² Ibid.

¹⁷³ U.S. Congress, House Committee on Appropriations, *Financial Services and General Government Appropriations Bill*, report to accompany H.R. 2829, 110th Cong., 1st sess., 2008. H. Rep. 110-207, 33, <https://www.gpo.gov/fdsys/pkg/CRPT-110hrpt207/pdf/CRPT-110hrpt207.pdf>; and Hatch, “Privacy and Civil Liberties Oversight Board: New Independent Agency Status,” 5.

Commission Act (IR9/11CA), signed into law on August 6, 2007.¹⁷⁴ In January 2008, the new provisions took effect and the original board ceased to exist.

Although the new PCLOB existed in law, Congress prevented it from initiating operations until 2012 by not taking action on board nominees. President Bush nominated members to the board in February and August 2008.¹⁷⁵ Those nominations were referred to the Senate’s Judiciary Committee, which took no further action.¹⁷⁶ Likewise, in December 2010, the Obama Administration nominated James Dempsey (D) and Elisebeth Collins (R) to the board in a bipartisan gesture; however, these nominations also lapsed without action by the 111th Congress. In January 2011, Dempsey and Collins were re-nominated by the Obama Administration. In December 2011, the President also nominated David Medine (D), Rachel Brand (R), and Patricia Wald (D). These nominees included three Democrats and two Republicans because the board may not have more than three members of the same political party, and all nominees were sent to the Senate Judiciary Committee for approval.¹⁷⁷ On August 2, 2012, the Senate confirmed Dempsey, Brand, Cook, and Wald, creating a quorum to commence board operations. In May 2013, Medine was confirmed as the board’s chairman. After nine years, the board was finally fully operational as an independent agency within the Executive Branch.

Statutory Authorities

Under its current statute, PCLOB has a full-time chairman and four part-time members. Each of the five members is appointed by the President and confirmed by the Senate. They serve overlapping six-year terms with no more than three members being from the same party.

While PCLOB was structurally transformed after it was first established by executive order, the current board still seeks to respond to the 9/11 Commission’s recommendation of ensuring “that the federal government’s efforts to prevent terrorism are balanced with the need to protect privacy and civil liberties.”¹⁷⁸ PCLOB performs two principal functions: oversight and advice. More specifically, PCLOB is required by statute, to “analyze and review actions the executive branch takes to protect the Nation from terrorism, ensuring the need for such actions is balanced with the need to protect privacy and civil liberties” and to “ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism.”¹⁷⁹

To carry out its mission, PCLOB is entitled to “access from any department, agency, or element of the executive branch...to all relevant records... or other relevant material, including classified information consistent with applicable law.”¹⁸⁰ Specifically, “the Board is authorized to access

¹⁷⁴ U Hatch, “Privacy and Civil Liberties Oversight Board: New Independent Agency Status,” 5.

¹⁷⁵ *Ibid.*, 8; and Center for Democracy and Technology, “Dempsey to Be Nominated to the Privacy and Civil Liberties Oversight Board” (December 16, 2010), accessed March 20, 2016, <https://cdt.org/press/dempsey-to-be-nominated-to-privacy-and-civil-liberties-oversight-board-1/>.

¹⁷⁶ *Ibid.*

¹⁷⁷ Privacy and Civil Liberties Oversight Board, U.S. Code 42, § 2000ee(h)(2).

¹⁷⁸ Privacy and Civil Liberties Oversight Board, “About the Board.”

¹⁷⁹ Privacy and Civil Liberties Oversight Board, U.S. Code 42, § 2000ee(h)(2).

¹⁸⁰ Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, § 1061 (c)(4)(1)(A), 118 Stat. 3684 (2004): 3685.

all relevant executive agency records, reports, audits, reviews, documents, papers, recommendations, and any other relevant materials, including classified information.”¹⁸¹ PCLOB may also “interview, take statements from, or take public testimony from personnel” of any element of the Executive Branch, as well as request in writing that the Attorney General subpoena parties to produce information on the board's behalf.¹⁸² The board is also directed by statute to, “when appropriate, coordinate the activities of such privacy officers and civil liberties officers on relevant interagency matters.”¹⁸³ Biannually, the board must report to Congress and the President on its activities, making the reports unclassified and available to the public to “the greatest extent possible.”¹⁸⁴

In addition to its statutory mandate, PCLOB has also been assigned specific tasks by the President and Congress, respectively, in EO 13636, Presidential Policy Directive (PPD) 28, and Section 803 of the Implementing Recommendations of the 9/11 Commission Act. EO 13636 on Improving Critical Infrastructure Cybersecurity (2013) assigns roles and responsibilities to various Executive Branch agencies, including the PCLOB, to minimize the risk of a cyber-attack.¹⁸⁵ Specifically, Section 5 of that EO requires the Department of Homeland Security and PCLOB to prepare an annual report on how intrusions on privacy and civil liberties can be mitigated in response to the implementation of these improved cybersecurity measures.¹⁸⁶

Similarly, in 2014, PPD 28 articulated “principles to guide why, whether, when, and how the United States conducts signals intelligence activities for authorized foreign intelligence and counterintelligence purposes.”¹⁸⁷ In Section 5(b) of the Directive, the President requires PCLOB to “provide [him] with a report that assesses the implementation of any matters contained within this directive that fall within its mandate.”¹⁸⁸ Finally, Section 803 of the Implementing Recommendations of the 9/11 Commission Act “directs the privacy and civil liberties officers of eight federal agencies—and any additional agency designated by the board—to submit periodic reports to the PCLOB regarding the reviews they have undertaken during the reporting period...the number and nature of the complaints received..., along with a summary of the disposition of such complaints. PCLOB’s enabling statute directs the board to receive these reports and, when appropriate, make recommendations to the privacy and civil liberties officers regarding their activities.”¹⁸⁹

Additionally, PCLOB is subject to the Sunshine Act. The Sunshine Act provides that “every portion of every meeting of an agency shall be open to public observation.”¹⁹⁰ It requires that the

¹⁸¹ Privacy and Civil Liberties Oversight Board, “About the Board.”

¹⁸² Privacy and Civil Liberties Oversight Board, U.S. Code 42, § 2000ee(g)(1)(B); Privacy and Civil Liberties Oversight Board, U.S. Code 42, § 2000ee(g) (1)(D).

¹⁸³ Privacy and Civil Liberties Oversight Board, U.S. Code 42, § 2000ee(d)(3)(C).

¹⁸⁴ Privacy and Civil Liberties Oversight Board, U.S. Code 42, § 2000ee(e)(1)(B)(ii).

¹⁸⁵ Executive Order 13636 of February 12, 2013, Improving Critical Infrastructure Cybersecurity, accessed March 19, 2016, <https://www.whitehouse.gov/the-press-office/2013/02/12/executive-order-improving-critical-infrastructure-cybersecurity>.

¹⁸⁶ *Ibid.*

¹⁸⁷ White House, “Presidential Policy Directive—Signals Intelligence Activities.”

¹⁸⁸ *Ibid.*

¹⁸⁹ Privacy and Civil Liberties Oversight Board, “About the Board.”

¹⁹⁰ Sunshine Act, U.S. Code 5, § 552(b).

board provide advance notice to the public of meetings. The statute defines “meeting” as “the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business.”¹⁹¹ Thus, when three or more board members are in a room together, a quorum is present, and no official business or discussions of business can be undertaken unless it is conducted in public. Although the Sunshine Act is a well-intentioned statute designed to ensure government decision-making is more transparent, the Act is a major impediment to the functioning of small agencies or boards like the five-member, part-time PCLOB. Thus, the Sunshine Act serves as a serious roadblock for discussion by members outside of public hearings and limits the time and scope of discussions among members.

The board’s independence, access to information, and mandate to provide advice has permitted PCLOB to become an institution that is both capable of and willing to oversee the IC. Chairman Medine succinctly assessed the board’s independence and its follow-on ability to provide substantive advice by stating “the fact that we could flat out disagree with POTUS [the President of the United States] on the legality of [a program] is really a demonstration of our independence.”¹⁹² Medine linked PCLOB’s independence with its credibility.¹⁹³

Current Perspectives

In June 2013, four days after Chairman Medine began work on the board, Edward Snowden’s unauthorized disclosures about classified information from the National Security Agency (NSA) were published by the British newspaper *The Guardian*. The near simultaneous timing of the Snowden disclosures with separate congressional and presidential requests ensured Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act (FISA) would be initial priorities for PCLOB. Chairman Medine recalled:

I started in June 2013 on Monday. Thursday was the Snowden leaks. I had lots of thoughts about what I thought our agenda might be...but that all went out the window. We met with the President soon after and he said he wanted us to look at [the Section 215 and 702] programs. [We also] got letters from 13 senators asking us to look at the programs, and Congresswoman Nancy Pelosi asked us to look at the FISC [Foreign Intelligence Surveillance Court]. So our agenda was pretty much set to look at the 215 and 702 programs.¹⁹⁴

This sentiment was echoed by board member Beth Collins who said “there was a clear mission immediately post Snowden” to review the programs conducted under Section 215 and Section 702.¹⁹⁵ Thus, since its official establishment, PCLOB has produced detailed reports on Section 215 and Section 702 of the USA PATRIOT ACT, and is currently of this writing drafting a report on EO 12333. PCLOB’s report on EO 12333 is developing in sections. The board has conducted certain “deep-dive” inquiries into EO 12333 activities, but the board remains divided

¹⁹¹ Sunshine Act, U.S. Code 5, § 552(a)(2).

¹⁹² David Medine, interview by Matthew Farrar and Danielle Oxford, Austin, Texas, March 30, 2016.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ Elisebeth Collins, interview by Danielle Oxford, Washington, D.C., January 14, 2016.

on whether it ultimately has the capacity to produce a complete, holistic report on the broad range of intelligence activities authorized by EO 12333. Through its published reports and the government's subsequent implementation of its recommendations, PCLOB has illustrated its independence as a credible, bipartisan oversight agency within the Executive Branch.

Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court (January 2014)

PCLOB's *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* was its first official comprehensive report and was released on January 23, 2014.¹⁹⁶ The Section 215 report contains analyses of both the telephone records program and the Foreign Intelligence Surveillance Court, and it offers 12 recommendations to increase privacy and civil liberties protections. PCLOB's 238-page report included two major recommendations: (1) the end of bulk data collection and (2) the encouragement of the Foreign Intelligence Surveillance Court (FISC) to include a mechanism for opposing views inside the FISC.¹⁹⁷

Regarding the Telephone Records Program, PCLOB found that "the Section 215 bulk telephone records program lacks a viable legal foundation under Section 215, implicates constitutional concerns under the First and Fourth Amendments, [and] raises serious threats to privacy and civil liberties as a policy matter..."¹⁹⁸ Specifically, the board found that the government's interpretation of Section 215 of the PATRIOT Act was "not apparent from a natural reading of the text."¹⁹⁹ Additionally, the board concluded that the U.S. "government should immediately implement additional privacy safeguards in operating the Section 215 bulk collection program" in order to protect civil liberties.²⁰⁰ These recommended safeguards included reducing retention periods of bulk data, a review of NSA's "reasonable articulable suspicion" standards and a shift towards preventative "reasonable articulable suspicion" analysis.²⁰¹

Second, PCLOB recommended the establishment of a "panel of outside lawyers to serve as Special Advocates before the FISC in appropriate cases" whose role would be to "make legal arguments addressing privacy, civil rights, and civil liberties interests" in hopes of "hear[ing] independent views" from that of the government.²⁰² Ultimately, the use of this advocate would be at the discretion of FISC judges. Other major recommendations in this section of the report included expanding opportunities for appellate reviews of FISC decisions, the appointment of Special Masters, a declassification review of older decisions, and a swift redaction and release policy for new FISC decisions.²⁰³

¹⁹⁶ Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court*, Document Library, accessed April 9, 2016, <https://www.pclob.gov/library.html>.

¹⁹⁷ *Ibid.*, 17.

¹⁹⁸ *Ibid.*, 16.

¹⁹⁹ *Ibid.*, 198.

²⁰⁰ *Ibid.*, 17.

²⁰¹ *Ibid.*, 170.

²⁰² *Ibid.*, 183-185.

²⁰³ *Ibid.*

Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act (July 2014)

Section 702 of the FISA Amendments Act of 2008 allows the Attorney General and the Director of National Intelligence “to jointly authorize surveillance targeting persons who are not U.S. persons, and who are reasonably believed to be located outside the United States, with the compelled assistance of electronic communication service providers, in order to acquire foreign intelligence information.”²⁰⁴ In its report on application of this provision, PCLOB concluded that “the core Section 702 program is clearly authorized by Congress, reasonable under the Fourth Amendment, and an extremely valuable and effective intelligence tool,” but “the applicable rules potentially allow a great deal of private information about U.S. persons to be acquired by the government.”²⁰⁵ In order to ensure that the program remains constitutional and continues to protect civil liberties of American citizens, PCLOB listed ten proposals to enhance transparency.²⁰⁶

Most notably, the report highlighted the importance of adopting minimization procedures for U.S. citizens in line with the specific reason for targeting. PCLOB recommended that the “NSA’s targeting procedures should be revised to (a) specify criteria for determining the expected foreign intelligence value of a particular target, and (b) require a written explanation of the basis for that determination sufficient to demonstrate that the targeting of each selector is likely to return foreign intelligence information...”²⁰⁷ Additionally, PCLOB recommended that the NSA and CIA be required to provide a statement of facts explaining their foreign intelligence purpose before querying Section 702 data using U.S. person identifiers, and develop written guidance on applying this standard.²⁰⁸ In the context of transparency, PCLOB recommended releasing the current minimization procedures for the NSA, CIA, and Federal Bureau of Investigations (FBI) in order to build public trust.²⁰⁹ PCLOB also recommended “implement[ing] five measures to provide insight about the extent to which the NSA acquires and utilizes the communications involving U.S. persons” and distributing these measures to Congress and the public.²¹⁰

PCLOB Update on Government’s Implementation of PCLOB Recommendations on Section 215 and Section 702 (February 2016)

In total, PCLOB made 22 recommendations in its Section 215 and Section 702 reports. Since then, PCLOB has released two “recommendation assessment” reports to evaluate the government’s efforts to implement board recommendations. Most recently, in February 2016, PCLOB released a report that provides updates on the progress of implementation since 2014.

²⁰⁴ Privacy and Civil Liberties Oversight Board, *Report on the Surveillance Program Operated Pursuant to Section 702 of the Foreign Intelligence Surveillance Act* (July 2, 2014), 6, accessed April 9, 2016, <https://www.pclob.gov/library/702-Report.pdf>.

²⁰⁵ *Ibid.*, 11

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*, 11.

²⁰⁸ *Ibid.*, 12.

²⁰⁹ *Ibid.*, 145.

²¹⁰ *Ibid.*, 146.

The assessment report concluded, “all of the PCLOB’s 22 recommendations have been implemented in full or in part, or the relevant government agency has taken significant steps toward adoption and implementation.”²¹¹ More specifically, 13 recommendations have been fully implemented and nine “are still in the process of being implemented or have been partially implemented.”²¹²

For example, the USA FREEDOM Act, signed into law on June 2, 2015, ended the NSA’s bulk collection program under Section 215, consistent with PCLOB’s recommendation.²¹³ The Act also created *amici curiae* to allow the FISC to hear independent views on novel or significant interpretation of the law, largely in line with (but not identical to) the board’s proposal for a special advocate.²¹⁴ The USA FREEDOM Act also “expand[ed] opportunities for appellate review of FISC decisions” and largely promoted the declassification of FISC decisions through a declassification review.²¹⁵ Regarding the Section 702 report, “the government submitted revised targeting and minimization procedures for approval by the FISA court” and the FBI has adopted minimization procedures for querying of Section 702 data for non-foreign intelligence matters.²¹⁶ Additionally, the current minimization procedures of the NSA, CIA, and FBI have been publically released.²¹⁷

Adoption of PCLOB’s recommendations has bolstered privacy and civil liberties protections, and also given the PCLOB more credibility so that it might be more effective in the future. Chairman Medine addressed the relationship between ensuring civil liberties are protected and PCLOB’s ability to gain credibility through demonstrated independence.²¹⁸ Medine recalled:

In our first report on Section 215, we concluded that the program was illegal and bad policy. The very day we issued our report, [the White House] said we disagree with PCLOB. [The White House said] we think the policy is legal, although the President ultimately did agree with our policy recommendations.²¹⁹

Medine said the board’s ability to “flat-out disagree” with the President on the legality of Section 215 was a true demonstration of PCLOB’s independence, and it was this independence, Medine said, that established the board’s credibility.²²⁰ Collins suggested that “PCLOB recommendations [in the Section 215 and Section 702 reports] have made a difference,” and that is due to PCLOB “making recommendations that are feasible and implementable.”²²¹ Collins said that “the level of cooperation from the IC is quite high,” and that the IC is now reaching out to PCLOB to “weigh

²¹¹ Privacy and Civil Liberties Oversight Board, *Recommendations Assessment Report* (February 5, 2016), 1, accessed April 9, 2016, https://www.pclob.gov/library/Recommendations_Assessment_Report_20160205.pdf.

²¹² *Ibid.*, 2.

²¹³ *Ibid.*

²¹⁴ *Ibid.*, 5.

²¹⁵ *Ibid.*, 5, 8.

²¹⁶ *Ibid.*, 2, 16.

²¹⁷ *Ibid.*, 23.

²¹⁸ Medine interview.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ Collins interview.

in at the beginning of a program.”²²² She believes PCLOB’s “advice function [will be] critical going forward.”²²³ PCLOB’s independence and the response of the IC to its recommendations suggests that PCLOB can be effective in the future protecting Americans’ civil liberties.

The Future of PCLOB

PCLOB Report on Executive Order 12333

PCLOB plans to release its report on EO 12333 before the end of 2016. “The Board has received...overview briefings [from the IC] on EO 12333 activities... [and] will select two counterterrorism-related activities governed by EO 12333” to analyze in-depth.²²⁴ The board plans to analyze “one or more of the following: (1) bulk collection involving a significant chance of acquiring U.S. person information; (2) use of incidentally collected U.S. person information; (3) targeting of U.S. persons; and (4) collection that occurs within the United States or from U.S. companies.”²²⁵ “The board also plans to issue a public report that explains EO 12333 at a high level, focusing on how the legal framework established by the executive order and its implementing procedures governs the collection, use, retention, and dissemination of information concerning U.S. persons.”²²⁶

The prospect of generating an investigative report on the full scope of intelligence activities authorized by EO 12333 has created a division among board members. Board member Rachel Brand dissented on PCLOB’s decision to undertake the investigation of EO 12333.²²⁷ In her separate statement on the workplan, Brand stated that it was a mistake to give the IC and the public the impression that PCLOB “intended to conduct an omnibus review of everything the government does under the Executive Order.”²²⁸ Specifically, she reasoned, “Much... of the activity governed by [EO] 12333 is outside the board’s statutory jurisdiction... [because EO 12333] ... governs not just counter-terrorism activities, but all foreign intelligence-related activities, including those that serve foreign relations, counterintelligence, counter proliferation, and traditional defense purposes.”²²⁹ Likewise, Brand mentioned the impossibility of reviewing EO 12333 in entirety because “it governs literally everything the Intelligence Community does” and also “that reviewing activities governed by the Executive Order should not be just one short-term project for the Board,” but rather an ongoing project. EO 12333 is an all-encompassing order, and a review of it could be incomplete, possibly undermining the board’s institutional credibility.²³⁰ Any review of the order would be a massive undertaking for any board, especially considering that the five-member, part-time PCLOB has only reviewed two programs in its three years of existence. This disagreement between board members calls into question the utility of

²²² Ibid.

²²³ Ibid.

²²⁴ Privacy and Civil Liberties Oversight Board, *PCLOB Examination of E.O. 12333 Activities in 2015*, accessed March 25, 2016, https://pclob.gov/library/20150408-EO12333_Project_Description.pdf.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Rachel Brand, interview by Matthew Farrar and Danielle Oxford, Austin, Texas, March 30, 2016.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

the upcoming EO 12333 report; however, if limited to specific EO 12333 programs, the board's recommendations may be more unified.

Board Membership and Presidential Transition

It will also be a challenge for PCLOB to remain viable and relevant beyond 2016, especially with the upcoming presidential election and the subsequent transition. Chairman Medine announced his resignation in March 2016 and is scheduled to step down as chairman on July 1, 2016.²³¹ Dempsey's term officially expired January 2016, but due to the holdover provision in the statute, Dempsey will be able to serve until the end of 2016. The statute allows a board member to continue to serve until the end of the Senate session if the President re-nominates his replacement within 60 days.²³² However, a member may not serve more than 60 days without their successor being appointed.²³³

Brand's term ends in January 2017 and she can holdover until March 2017 unless the President nominates someone else, in which case her term can be extended. Brand questioned the ability of PCLOB to be effective after the presidential transition. She stated, "there is no way a new President will get to a new PCLOB nomination at the beginning of the term, especially within 60 days. So I leave in March [2017], leaving a two member board, and ... no quorum."²³⁴ Generally, during presidential transitions, it takes up to a year for most people in high-level appointments to be filled, and PCLOB is most likely not at the top of that list. Not having a full board, or even a quorum, will severely hamper PCLOB's ability to function and its ability to conduct effective IC oversight.

Current PCLOB Reform Proposals

Board Structure and Mandate

Most of the current extant recommendations to enhance PCLOB's effectiveness require amendments to PCLOB's authorizing statute. The statutory amendments would address staffing limitations, the Sunshine Act, and counterproductive reporting requirements.

With a small staff and the part-time status of four board members, working time together is extremely valuable and limited. In order for PCLOB to effectively move forward, especially after Chairman Medine steps down July 1, 2016, PCLOB's staff should be expanded and the board positions transitioned to full-time status. The four part-time members dedicate a great deal of time to PCLOB projects that is not compatible with holding another full-time position. Collins noted that the four current part-time members were generally only available 1-2 days per week, and generally work fewer than 130 days per year, leaving actual PCLOB work days completely

²³¹ Privacy and Civil Liberties Oversight Board, "Chairman David Medine to Resign from the Privacy and Civil Liberties Oversight Board," *pclob.gov*, accessed April 24, 2016, <https://www.pclob.gov/newsroom/20160329.html>.

²³² Privacy and Civil Liberties Oversight Board, U.S. Code 42, § 2000ee(h)(4)(B)(i).

²³³ *Ibid.*

²³⁴ Brand interview.

full.²³⁵ Current board members could be grandfathered, but in order to streamline the process moving forward, members should be appointed as full-time employees.

Chairman Medine and board member Brand also argued that a larger, full-time staff would greatly enhance PCLOB's ability to perform its function.²³⁶ Medine also believed full-time status would result in more direct interaction and improved day-to-day cooperation.²³⁷ "There is a certain opportunity to chat in the hallway if board members are there all the time and to discuss issues and try to work them out that does not exist when members are just coming in for meetings."²³⁸

Currently, the board and most of the staff are lawyers. When reviewing strictly the legality of an intelligence program that is defensible. But, the board is also obliged to consider the effectiveness and value of programs they review. In order to do this fairly and expertly the board should have staff members with more diverse backgrounds and professional experiences. The board and the staff should both in the future include individuals with intelligence backgrounds and national security experience. Again, Chairman Medine supported diversifying PCLOB: "There is a value of having members coming from different backgrounds and experiences."²³⁹ Brand also raised this shortcoming, stating, "ideally we need a mix of staff with generalist backgrounds and expert backgrounds."²⁴⁰

Currently only the chairman has the power to hire PCLOB staff. Vesting the hiring power exclusively in the chairman limits the board's ability to take personnel actions when there is no chairman. For example, PCLOB is currently seeking to hire professional staff. When Chairman Medine steps down in July, PCLOB may still have vacancies listed. Until the next President appoints and the Senate confirms a new chairman, which may be many months away, PCLOB will not be able to hire new staff. Therefore, amending PCLOB's statute to revise hiring procedures and the power structure for hiring will (1) streamline hiring even when a new chairman is appointed and confirmed, allowing the chairman to weigh in, but allowing the hiring procedure to function independent of the chairman, (2) enable PCLOB to increase and diversify staff when there is no chairman, and (3) allow PCLOB to continue to expand its capabilities through increased staff so that when a new chairman is appointed and confirmed, operations are able to persist and escalate.

One of the more complicated and controversial recommendations is removing PCLOB from the purview of the Sunshine Act. The Sunshine Act, as described above, is a well-intentioned act that helps ensure government decisions are made more transparently. The problem with PCLOB being subject to the Sunshine Act is the board's size and part-time nature. Whenever a quorum of the board is together, it cannot discuss PCLOB decisions or matters without calling a public meeting. Chairman Medine addressed how harmful Sunshine Act requirements can be to the

²³⁵ Collins interview.

²³⁶ Brand interview; and Medine interview.

²³⁷ Medine interview.

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Brand interview.

effectiveness of the PCLOB and how it affects the timing and ability of a part-time board to discuss work matters.²⁴¹ Medine recalled:

[The Sunshine Act] does not work very well in our context because what it means is that three board members cannot be in a room together to discuss, let's say [Executive Order] 12333, without violating the Sunshine Act because it would not be a public meeting. When a quorum of the board is meeting to make a decision, it has to be public. It is a very well intentioned law but the reality is that the opportunity for us to talk and work things out as a board and having it not always be public would be helpful. We also deal with a lot of classified information. We can still have a classified Sunshine Act meeting but we have to announce it in advance in the Federal Register and hire a court reporter. As a result, it is very cumbersome and inhibits the board's free flow of discussion and exchange of views. And so I think that exempting the board from the Sunshine Act would be a huge improvement in our ability to deliberate and form recommendations.²⁴²

Brand agreed with Medine.²⁴³ She added that the Sunshine Act "is a huge impediment to consensus building and good decision-making."²⁴⁴ And, "we can all be in the same room to be briefed by the staff, but if we all start talking, we are told to stop."²⁴⁵ Brand continued by saying that in order to reach consensus without group discussion, the board must participate in an internal notation process where a draft of reports is circulated, each member comments, and the report is edited until a consensus is reached.²⁴⁶ This process is highly inefficient because members cannot "all sit in a room and hash it out."²⁴⁷

Exempting PCLOB from the Sunshine Act would greatly enhance the board's ability to discuss matters outside of public hearings, which are limited in frequency and time. The board is part-time, and whenever there is a quorum, whether it is at a conference on a college campus or walking down the corridor in PCLOB's office, it would be a benefit if the members could discuss PCLOB matters. The board's interaction time with one another is already severely limited, which limits the actual discussion time of important PCLOB matters. Removing the Sunshine Act governance will help PCLOB (1) increase collective discussion and debate among PCLOB members, (2) encourage more public outreach and discussion due to members having the ability to discuss matters outside the formal public hearing model, which will in itself increase transparency of PCLOB happenings, (3) enhance the board's ability to spend more time delving further into issues, and (4) increase the efficiency with which the board can offer recommendations. Medine noted, "the board (is) already...transparent. We have tried to declassify facts to make them available to the public in our reports, so we are very forward

²⁴¹ Medine interview.

²⁴² Ibid.

²⁴³ Brand interview.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

leaning on transparency and public meetings, but it's just that our deliberations are severely impeded by our inability to meet as a group and discuss issues."²⁴⁸

Currently PCLOB is required to report to Congress whenever an IC agency implements a program despite PCLOB's recommendations.²⁴⁹ This, in effect, helps create strong disincentives for IC officials to engage and cooperate with PCLOB. Removing this requirement from PCLOB's statute would (1) allow PCLOB members to develop a more comprehensive understanding of intelligence matters without having to directly follow-up with Congress, (2) increase the likelihood that IC officials will voluntarily engage PCLOB on sensitive operational proposals and (3) change the image of PCLOB from that of a congressional agent monitoring intelligence activities to a partner of the IC in designing effective intelligence operations.

Public Profile

Most Americans, even government employees, are not aware of PCLOB's existence. Collins has suggested, "The public is not generally even aware of existence of oversight mechanisms."²⁵⁰ Thus, there is no appreciation for PCLOB and its mission. Collins noted that "further education of the public in explain[ing] the existence of [PCLOB and] oversight mechanisms, why and how they work, their checks and balances, how IC professionals take their jobs seriously... [and] transparency out of crisis " is needed to gain public trust.²⁵¹ PCLOB needs to increase public awareness of its work not only to increase its institutional credibility, but also to contribute to public trust in the IC.

While the board has published in the Federal Register, asked the public to weigh in on their agenda, and held multiple public meetings, a question remains about the board's effectiveness in engagement and outreach towards the general public. Brand stated, "no one knows who we are except for people in the privacy and civil liberties community or within the IC, and I suspect that a lot of people in the IC don't even know."²⁵² However, domestically and internationally, the board is being recognized for its work. Medine counters:

I would say we are moving through various stages of recognition. Reporters used to ask me what is PCLOB because the board had been dormant for some time. So, I think that with our reports, we have gotten greater recognition by people on these issues both domestically and internationally. In the Privacy Shield negotiations that have taken place with the E.U., they paid a lot of attention to our 702 report. We started off with no one knowing who we were, then moved to some recognition from people who follow privacy issues. And over time the board will try to have a greater social media presence and broader outreach.²⁵³

²⁴⁸ Medine interview.

²⁴⁹ Privacy and Civil Liberties Oversight Board, U.S. Code 42, § 2000ee(e)(2)(d).

²⁵⁰ Collins interview.

²⁵¹ Ibid.

²⁵² Brand interview.

²⁵³ Medine interview.

Although intelligence agencies are cooperating with the PCLOB and the government has already accepted many of the board's recommendations, greater public awareness could add credibility and support to the board's actions. Thus, even though the board has made significant contributions to its public image, there is still much progress that can be made.

Conclusion

Since its inception, PCLOB's charge has been to ensure privacy and civil liberties are protected in the U.S. fight against terrorism. The board has demonstrated its capacity to perform this function but it still faces notable challenges. Brand succinctly addressed PCLOB's unique mission and value-proposition: "I don't think we benefit from grabbing the lightning rod, or picking the most controversial subject... I think where we add value is finding a big picture, high level question that no one else has the motivation to look [into]."²⁵⁴

Recommendations

We recommend:

- Congress should amend relevant statutes to
 - Grant full-time status to all PCLOB members, and authorize a larger full-time staff;
 - Require greater functional diversity among PCLOB members and staff, in particular highlighting relevant national security and intelligence experience;
 - Create a post of executive director with the authority to hire necessary board staff;
 - Exempt PCLOB from the "Sunshine Act";
 - Rescind the requirement that PCLOB inform Congress when an IC agency declines to follow a board recommendation; and
- PCLOB should prioritize actions to raise the board's profile by publicizing its existence, activities, and substantive reports.

²⁵⁴ Ibid.

Chapter 4. Inspectors General in the Intelligence Community

by Raheem Chaudhry, Liam Kozma, and Courtney Weldon

Introduction

Throughout the 20th century, Congress looked for ways to promote accountability in government, particularly within the Executive Branch. Congress' frustration with its inability to check Executive Branch power reached a boiling point in the 1970s when a series of leaks revealed widespread government abuse of civil rights. In response, Congress commissioned investigations and passed a series of reform measures to check executive power. One such law was the Inspector General Act of 1978 (Act), which created a limited number of independent IGs responsible for investigating waste, fraud, and abuse in federal agencies.²⁵⁵

Since the terrorist attacks of September 11, 2001, some IGs operating within the intelligence community have moved beyond this original directive and now also monitor complaints of civil rights abuses. In this chapter we first give a brief overview of the history of Inspectors General in federal agencies, focusing particularly on the evolution of IGs in the IC and their role in intelligence oversight since 9/11. We continue by assessing competing perspectives on the efficacy and merit of IC IGs as oversight mechanisms. Finally, we conclude by recommending several ways to preserve the independence of IGs and maximize their effectiveness within the diverse oversight infrastructure.

History of Inspectors General

Overview

In the 1970s, a series of revelations undermined public confidence in the Executive Branch. The *New York Times* obtained access to the Pentagon Papers, which suggested that President Lyndon Johnson had misled the public about the course of events in Vietnam.²⁵⁶ President Nixon's involvement in the Watergate scandal further undermined public confidence in the government. And, in 1974, *Times* reporter Seymour Hersh reported that the CIA had been spying on Americans' political activities.²⁵⁷ These three scandals, revealed in a span of three and a half years, collectively drove public confidence in the Executive Branch to a nadir from which it has never fully recovered.

²⁵⁵ Wendy Ginsberg and Michael Greene, *Federal Inspectors General: History, Characteristics, and Recent Congressional Action*, CRS Report No. R43814 (Washington, D.C.: Congressional Research Service, 2014), 1.

²⁵⁶ R.W. Apple, "25 Years Later; Lessons From the Pentagon Papers," *The New York Times* (June 23, 1996), accessed April 7, 2016, <http://www.nytimes.com/1996/06/23/weekinreview/25-years-later-lessons-from-the-pentagon-papers.html>.

²⁵⁷ Britt L. Snider, *The Agency and the Hill: CIA's Relationship with Congress, 1946-2004* (Berkshire: Books Express P, 2008), 33.

In response to these diverse instances of Executive Branch excess, many federal agencies established internally-appointed IGs to provide oversight.²⁵⁸ However, Congress recognized the potential conflict of interest that might arise with internally-appointed IGs. In an effort to promote independence and more uniform responsibilities for IGs, Congress passed the Inspector General Act of 1978, which now governs most federal IGs.²⁵⁹ The purpose of the Act was twofold. First, Congress sought to define a basic set of responsibilities for IGs. Under the Act, Offices of the Inspector General (OIGs) are independent of the agency to which they are assigned. They “conduct and supervise audits,” “prevent and detect fraud and abuse,” “promote economy, efficiency, and effectiveness,” and keep “Congress fully and currently informed about problems” within the agency.²⁶⁰ Second, Congress wanted independent IGs to hold the Executive Branch accountable. To this end, OIGs under the Act have a fixed budget that is separate from the agencies where they are housed, have access to all of an agency’s records, must submit semiannual reports to Congress summarizing their investigations, and have to submit reports of particularly egregious violations to Congress within seven days of issuing the report. Congress also sought to ensure that IGs were selected on the basis of competence and not politics. Consequently, many IGs under the original 1978 Act were presidentially-appointed and Senate-confirmed. The number of IGs appointed in this way has steadily grown since the passage of the Act.²⁶¹

The Act created IGs for only 14 specified agencies.²⁶² The law has been amended over the past several decades so that, as of 2014, its provisions apply to 63 IGs, 30 of whom are nominated by the President and confirmed by the Senate.²⁶³ There are also nine other IGs established by statute. Of these, two, including the CIA’s IG, are nominated by the President with the advice and consent of the Senate.²⁶⁴ Due to the heterogeneous evolution of federal IGs, the history and laws that govern OIGs vary, particularly within the IC.

Inspectors General in the Intelligence Community

Despite Congress’ desire to hold the Executive Branch accountable for the abuses of the 1960s and 1970s, the Act did not initially apply to intelligence agencies. In particular, the Department of Defense (DOD), the CIA, and the Department of Justice (DOJ) all actively opposed any statutory IGs under the Act due to concerns about secrecy and national security.²⁶⁵ To address concerns of intelligence overreach, President Gerald Ford issued Executive Order 11905 in 1976, which included language ensuring that all intelligence agency IGs submitted quarterly reports to

²⁵⁸ Ginsberg and Greene, *Federal Inspectors General*, 1.

²⁵⁹ *Ibid.*

²⁶⁰ The Inspector General Act of 1978, Pub. L. 95-452, 92 Stat. 1101 (1978).

²⁶¹ Paul Light, *Monitoring Government: Inspectors General and the Search for Accountability* (Washington, D.C.: The Brookings Institution, 1993), 23-25.

²⁶² Ginsberg and Greene, *Federal Inspectors General*, 14.

²⁶³ *Ibid.*, 17.

²⁶⁴ Frederick Kaiser, *Statutory Office of Inspector General*, (CRS Report No. R98379)(Washington, D.C.: Congressional Research Service, 2008), 6.

²⁶⁵ Shirin Sinnar, “Protecting Rights from Within? Inspectors General and National Security Oversight,” *Stanford L. Rev.* 65 (2013): 1033, accessed March 30, 2016, http://www.stanfordlawreview.org/sites/default/files/Sinnar_65_Stan._L._Rev._1027.pdf.

the newly-created IOB.²⁶⁶ While some IC agencies had IGs before this Executive Order, all were required to appoint one thereafter. By this order, intelligence agency IGs' responsibilities expanded to include investigating the legality of intelligence activities.²⁶⁷

Over time, pressure mounted to create statutory IGs for IC agencies. The parent departments of intelligence agencies all now have statutory IGs who are presidentially-appointed and Senate-confirmed; however, the trajectories of IC IGs differed. While IGs for the State Department and the Department of Energy (DOE) had a straightforward evolution with expectations consistent with other federal IGs, the history and responsibilities of the IGs of the other departments and agencies that compose the IC vary in considerable and important ways.

Departments of Energy and State

For some intelligence agencies, the process of creating statutory IGs was straightforward. In 1977, for instance, Congress passed a law that created the DOE, which includes the Office of Intelligence and Counterintelligence, an IC agency, and established a statutory IG for the new department.²⁶⁸ The following year, Congress passed the Act, which superseded the previous law and redefined the roles and responsibilities of the DOE IG to be consistent with other federal IGs.²⁶⁹

The State Department also established an IG with little controversy. Unlike the DOE, the State Department had been in existence long before the passage of the Act. However, in 1980, Congress passed the Foreign Service Act, which created the modern Foreign Service, as well as the State Department as it exists today.²⁷⁰ As a part of this statute, Congress created an IG for State with the same responsibilities and expectations of other IGs under the Act.

Department of Defense

The DOD followed a more circuitous path to a statutory IG than the State Department or the DOE. The military was not exempt from accusations of abuse in the 1960s and 1970s. In a 1970 *Washington Monthly* article, a former Army intelligence officer alleged that the Army had kept records on membership of all political groups in the country. To temper rising criticism, then-Secretary of Defense Donald Rumsfeld established a non-statutory IG in 1976, pursuant to EO 11905.²⁷¹ Unlike statutory IGs, whose primary activities focused on financial audits and investigations of waste and fraud, the DOD IG was asked to also focus on constitutional abuses and potentially "questionable" activities.²⁷²

²⁶⁶ George Lotz, "The United States Department of Defense Intelligence Oversight Programme: Balancing National Security and Constitutional Rights," *Democratic Control of Intelligence Services: Containing Rogue Elephants*, (Burlington, V.T.: Ashgate Publishing Company, 2007), 114; and Gerald Ford, Executive Order 11905-United States Foreign Intelligence Activities, 41 Fed. Reg. 7703 (1976).

²⁶⁷ Gerald Ford, Executive Order 11905.

²⁶⁸ Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (1977).

²⁶⁹ The Inspector General Act of 1978, Pub. L. 95-452, 92 Stat. 1101 (1978).

²⁷⁰ Foreign Service Act of 1980, Pub. L. 96-465, 94 Stat. 2071 (1980).

²⁷¹ Lotz, "The United States Department of Defense Intelligence Oversight Programme," 118.

²⁷² Gerald Ford, Executive Order 11905.

In 1982, Congress established a statutory IG for the DOD. The DOD's IG is subject to all of the same rules and responsibilities as other IGs under the Act, except the Secretary of Defense can block an IG investigation into sensitive matters so long as he gives a written explanation to Congress.²⁷³ Following the creation of a statutory IG, the DOD decided that the Department's IG would no longer be responsible for oversight of civil liberties violations.²⁷⁴ Instead, the DOD IG now behaves like other IGs, investigating and auditing financial abuses and potential legal violations. However, the DOD created the position of Assistant to the Secretary of Defense for Intelligence Oversight to take on the civil liberties and privacy oversight role previously assigned to the internally-appointed IG.²⁷⁵

The DOD IG plays an especially important role in intelligence oversight. Of the 16 agencies in the IC, nine are a part of the DOD, including the five intelligence services for each branch of the military, the NSA, the Defense Intelligence Agency (DIA), the National Geospatial-Intelligence Agency (NGA), and the National Reconnaissance Office (NRO). The DOD's IG has the authority and responsibility to investigate each of these agencies. However, with such a massive operation, the DOD also puts pressure on individual agencies to monitor themselves. Among DOD agencies in the IC, the DIA, NGA, NRO, and NSA all have their own IGs. Each exists by statute and is appointed by the respective agency head, except for the IG of the NSA, who is now nominated by the President with the advice and consent of the Senate.²⁷⁶

Departments of Treasury and Justice

By 1988, the DOJ and the Department of Treasury were the only two federal departments that did not have a statutory IG.²⁷⁷ Like other departments that include an IC agency, both DOJ and Treasury protested against statutory IGs, largely on the basis of protecting sensitive information, much like the DOD had before them. Both agencies also worried that an independent IG would interfere with their internal investigations.²⁷⁸

It became more difficult for the DOJ and Treasury to argue against a statutory IG on the basis of secrecy after the DOD, for which national security secrecy is much more central, acceded to a statutory IG. Furthermore, Congress conducted a review of the DOJ and Treasury in 1986 and found numerous problems with internal investigations in both departments. Congress' review found that the DOJ's internal investigation units were highly decentralized and fragmented, lacked independence, and did not always communicate their findings to their superiors.²⁷⁹ The Department of Treasury had a similarly decentralized investigations procedure and, though it had an agency-appointed IG, the incumbent had very limited access to Treasury's programs.²⁸⁰ Based

²⁷³ Sinnar, "Protecting Rights from Within?," 1035.

²⁷⁴ Lotz, "The United States Department of Defense Intelligence Oversight Programme," 118.

²⁷⁵ *Ibid.*, 119.

²⁷⁶ Director of National Intelligence, "IC Inspectors General Forum," accessed December 4, 2015, <http://www.dni.gov/index.php/about-this-site/contact-the-ig/ic-inspectors-general-forum>; and Intelligence Authorization Act for Fiscal Year 2014, Pub. L. 113-126, 128 Stat. 1390 (2014).

²⁷⁷ Milton J. Socolar, *Inspector General Act Amendments of 1988*, House Committee on Government Operations, Subcommittee on Legislation and National Security (Washington, D.C.: U.S. Congress, 1998), 1.

²⁷⁸ *Ibid.*, 5-6.

²⁷⁹ *Ibid.*, 4.

²⁸⁰ *Ibid.*, 5.

on the these shortcomings in internal investigations, and given that all other federal agencies had integrated statutory IGs without any problems with secrecy and security, Congress closed the loophole and created a statutory IG for both the DOJ and Treasury in an amendment to the Act in 1988.²⁸¹

The expectations of DOJ and Treasury IGs are consistent with all other IGs under the IG Act, except that the Attorney General may block an IG investigation into the DOJ if it threatens national security, as long as he informs Congress of his actions; as of 2013, however, the DOJ had blocked an investigation on only one occasion.²⁸² More recently, the USA PATRIOT Act expanded the DOJ IG's responsibilities to include investigating claims of civil liberties violations.²⁸³

Central Intelligence Agency

Before 1990, the CIA IG existed at the discretion of the DCI. The DCI appointed the agency's IG and could remove him for any reason. The potential for conflict of interest and abuse was apparent. CIA officers openly expressed their distrust of non-statutory IGs, who were usually appointed based on their place in the CIA's fraternity and would go to great lengths to protect other members of that fraternity.²⁸⁴ Still, the President and the DCI repeatedly resisted congressional attempts to create a statutory IG for the CIA on the grounds that it would harm the CIA's ability to keep secrets and, consequently, damage national security.²⁸⁵

Following the Iran-Contra scandal, Congress proposed a bill establishing a statutory IG at CIA. President Ronald Reagan and DCI William Webster immediately resisted the measure. Congress decided not to act after Webster promised to demonstrate that a non-statutory IG could be an effective internal check. However, he was slow to act and Congress quickly lost faith in Webster's ability to follow through with his promise. Congress eventually passed the bill, which was signed into law by President George H.W. Bush in 1989.²⁸⁶

The CIA's IG differs from other IGs covered by the Act. Like most other IGs, the official's independence is secured by the fact that the IG is nominated by the President and confirmed by the Senate. However, it is different from other IGs in that the Director of the CIA (DCIA) supervises the IG, creating room for both cooperation and conflict. They cooperate because the IG must first report problems to the DCIA, who has the power to resolve the issue and punish potential offenders, unlike the IG. However, there may also be conflict since the DCIA has the power to block IG investigations for national security reasons, though the DCIA must inform the intelligence oversight committees in Congress when he does.²⁸⁷

²⁸¹ Kaiser, *Statutory Office of Inspector General*, 4.

²⁸² Sinner, "Protecting Rights from Within?," 1035.

²⁸³ *Ibid.*, 1036.

²⁸⁴ Afsheen John Radsan and Ryan M. Check, "One Lantern in the Darkest Night - The CIA's Inspector General," *Journal of National Security Law & Policy*, 4 (2010): 253, accessed March 24, 2016, <http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1201&context=facsch>.

²⁸⁵ Sinner, "Protecting Rights from Within?," 1033.

²⁸⁶ Radsan and Check, "One Lantern in the Darkest Night," 253-25.

²⁸⁷ *Ibid.*, 257.

IGs Since 9/11

The Act was originally meant to serve as a check on waste, fraud, and abuse in the Executive Branch. However, the role of IGs, particularly in the IC, has expanded over time. Since 9/11, Congress has expected IGs in the IC to investigate potential human rights abuses and civil liberties violations. Overall, the results have been mixed. IGs have demonstrated initiative, independence, and a willingness to seek out the truth, even when their actions were unpopular. However, not all IC IGs have spent equal time in investigating potential abuses. And even those IGs who have been actively engaged in the oversight process have been reluctant to recommend punishment or hold specific individuals accountable in their reports.

In the aftermath of 9/11, Congress passed the USA PATRIOT Act, and to check the expansion of Executive power that the statute authorized, the PATRIOT Act included language requiring the DOJ IG to explicitly review complaints of civil rights abuses.²⁸⁸ In 2002, Congress established the Department of Homeland Security (DHS) and established an IG there pursuant to the Act.²⁸⁹ Two years later, Congress amended the law and mandated that the DHS IG also investigate claims of civil rights abuses.²⁹⁰

In 2004, Congress passed the IRTPA, which established the ODNI. The ODNI serves as the statutory head of the IC and organizes its activity. Originally, the IG of the ODNI was internally-appointed. However, Congress established a statutory IG of the IC within ODNI in 2010, tasked with investigating potential abuses across the IC and subject to the same requirements as other IGs under the Act.²⁹¹

As noted, the IGs of the CIA and the DOD were created partly in response to allegations of widespread civil rights abuses. Though these IGs do not have an explicit mandate to explore these abuses, the CIA IG has undertaken such investigations, while the DOD has created a separate position to investigate potential civil rights abuses. Congress' explicit direction for the DOJ and DHS after 9/11 was an acknowledgment that Congress had come to expect IC IGs to investigate allegations of civil rights abuses.

Outstanding Concerns

The public has, in fact, come to associate IC IGs more with their investigations of potential privacy and civil liberties abuses than with their original mandate. However, statutory IGs under the Act are charged primarily with investigating allegations of financial fraud or illegality in the agencies they oversee. Semiannual reports to Congress largely confirm that this is what IGs principally examine, including the IC IGs. This should not be surprising since only two IGs are specifically charged with investigating civil liberties-related concerns: the DHS IG under the Act and the DOJ IG under the PATRIOT Act.

²⁸⁸ Sinner, "Protecting Rights from Within?," 1036.

²⁸⁹ Kaiser, *Statutory Office of Inspector General*, 4.

²⁹⁰ Sinner, "Protecting Rights from Within?," 1037.

²⁹¹ Intelligence Authorization Act for Fiscal Year 2010, Pub. L. 111-259, 124 Stat. 2654 (2010): 2710.

This inconsistency raises the question of whether IGs should have a role in protecting the privacy and civil liberties of Americans. Former CIA IG Britt Snider explained that he spent much of his time as IG investigating waste, fraud, and abuse, but he spent the about half of his time on discretionary investigations, including exploring the effectiveness and efficiency of the agency's structures.²⁹² Time spent focusing on civil liberties violations, then, is time spent away from these other core tasks. And, given that there is both a PCLOB and that most IC agencies now have a separate office to investigate potential civil liberties violations, the IGs' work in this area may be redundant.²⁹³

On the other hand, many IC IGs were created in response to allegations of civil rights abuses, suggesting that Congress and the public intend for IGs to check their agencies in this regard. IGs are also granted investigative power by statute to more thoroughly handle complaints of civil rights abuse than any agency's privacy and civil liberties office. Furthermore, within an agency, an OIG is better situated and has more resources to address these issues than the PCLOB.

Any assessment of IGs, though, must recognize the strengths and limitations of IG oversight. Marcel Lettre, Under Secretary of Defense for Intelligence, commended the IC IGs for their thorough investigations.²⁹⁴ However, he remarked that Congress cannot rely on them for regular intelligence oversight because their investigations are often too slow due to this thoroughness.²⁹⁵ Congress should not use the IGs as a crutch or as a primary tool for IC oversight. Instead, IGs should continue investigating potential intelligence abuses. Recommendations of IG reform should focus on improving IG effectiveness in this respect.

We consider three elements in the debate around IG oversight. First, we discuss the extent to which IG reports are effective in both their assessment and in their ability to issue corrective recommendations. Second, we assess the degree to which IGs exhibit independence, focusing primarily on the DOJ IG's ongoing public battle with the DOJ. Finally, we conclude with a brief discussion of whether it is possible to fairly evaluate IGs role in intelligence oversight.

Effectiveness in Oversight Role

Since 9/11, IC IGs have demonstrated a willingness to thoroughly investigate the agencies in which they operate. The CIA's IG took a particularly strong stand in investigating CIA activities. Following 9/11, IG John Helgerson conducted an investigation into CIA failures leading up to the attacks. Helgerson, then newly appointed, was critical especially of CIA's upper management, including then-DCI George Tenet and the then-director of CIA's Counterterrorism Center, Cofer Black.²⁹⁶ Helgerson's reputation as an independent IG continued to grow even after this report when he engaged in a thorough investigation of the CIA's detention and interrogation programs. His methods sometimes alienated staff, but he was determined to

²⁹² Britt Snider, interview by Steve Brackin and Courtney Weldon, Washington, D.C., March 1, 2016.

²⁹³ Sinner, "Protecting Rights from Within?," 1079.

²⁹⁴ Marcel Lettre, interview by Meena Awasthi, Steve Brackin, Anna Waterfield, and Courtney Weldon, Washington, D.C., February 29, 2016.

²⁹⁵ Ibid.

²⁹⁶ Radsan and Check, "One Lantern in the Darkest Night," 281.

develop reports he felt were both complete and fair.²⁹⁷ Though the CIA IG's report on interrogation took care to balance criticism by highlighting the steps the CIA took to ensure the legality of their actions, the conclusion of the report was both critical and impactful. The report is strongest in its criticisms of CIA management, such as in its failure to provide training and support to officers engaged in interrogation.²⁹⁸

The DOJ IG initiated similarly aggressive investigations. After 9/11, the DOJ IG investigated the DOJ for detaining mostly Muslim immigrants on suspicion of terrorist ties. Then-IG Glenn Fine was extremely critical of not only FBI conduct, but of FBI policies. He looked beyond legal questions of whether FBI agents behaved within the guidelines of the law and asked whether the policies of the FBI were ethical.²⁹⁹ Furthermore, under Fine, DOJ IG reports were remarkably pointed. For example, the IG's report on its investigation of the FBI's use of National Security Letters (NSLs) is extremely blunt in its use of language. The report points out that the FBI argued that most of its violations with respect to NSLs were "administrative errors."³⁰⁰ The IG report challenged the FBI's defense as undermining "their seriousness and fosters a perception that compliance with FBI policies...is annoying paperwork."³⁰¹

Stanford Law School Professor Shirin Sinnar commended the strength of these reports, but he pointed out that these reports limited their criticisms to failings of policy, management, and behavior. IGs have rarely named specific, high-level officials for failures they report. As a result, few individuals have been held accountable for abuses uncovered in IG investigations.³⁰² Furthermore, they have generally stopped short of recommending concrete action that Congress can take to correct problems the IGs uncover. Congress relies on IGs to help identify workable solutions, but it has historically been difficult for IGs to propose and implement corrective, institutionalized solutions to problems.³⁰³

Independence

One of the best predictors of IG effectiveness is the extent to which an IG is an independent force within an agency—one that acts apolitically and with limited restrictions. Demonstrated independence has the added benefit of increasing employee trust in the IG, as suggested by the aforementioned CIA employee. Employees who trust their IG will be more likely to report misconduct, further bolstering the effectiveness of IGs.³⁰⁴ As explained, IGs have been remarkably independent in conducting investigations in the aftermath of 9/11. However, government watchdogs worry that IGs are under attack and at risk of losing their independence

²⁹⁷ Ibid., 268.

²⁹⁸ Central Intelligence Agency, Office of the Inspector General, *Counterterrorism Detention and Interrogation Activities (September 2001–October 2003)*, May 7, 2004, 102, accessed April 7, 2016, http://nsarchive.gwu.edu/torture_archive/20040507.pdf.

²⁹⁹ Sinnar, "Protecting Rights from Within?," 1043.

³⁰⁰ U.S. Department of Justice, Office of the Inspector General, *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006*, March 2008, 100, accessed March 24, 2016, <https://oig.justice.gov/special/s0803b/final.pdf>.

³⁰¹ Ibid.

³⁰² Sinnar, "Protecting Rights from Within?," 1077.

³⁰³ Ibid.

³⁰⁴ For those interested in the relationship between IGs and whistleblowers, please see Chapter 10 of this report.

due to Executive Branch obstruction. In August 2014, 47 of the 72 federal IGs signed a letter to the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Oversight and Government Reform expressing concern that Executive Branch agencies were preventing IGs from accessing certain documents in the course of their investigations.³⁰⁵ One month later, DOJ IG Michael Horowitz testified in front of the House Committee on the Judiciary, explaining that, “since 2010 and 2011, the FBI and some other Department components have not read...the IG Act as giving my office access to all records in their possession and therefore have refused our requests for various types of Department records. As a result, a number of our reviews have been significantly impeded.”³⁰⁶

On July 20, 2015, the DOJ’s Office of Legal Counsel (OLC) issued an opinion that information that falls under the Federal Wiretap Act, the Omnibus Crime Control and Safe Streets Act of 1968, and the Fair Credit Reporting Act cannot be disclosed even to IGs.³⁰⁷ The DOJ’s OLC argues that both the wording of the Act and that law’s legislative history have led the OLC to determine that Congress does not intend the IG Act to supersede the disclosure limitations in these statutes.

Critics have contested the OLC’s opinion from both a legal and normative standpoint. Section 6(a)(1) of the Act states that IGs are “to have access to all records...with respect to which that Inspector General has responsibilities under this Act.”³⁰⁸ Hans von Spakovsky and John-Michael Seibler, lawyers at the Heritage Foundation, argue that the wording of the law does not leave room for exception.³⁰⁹ They further contend that the context surrounding the law makes it clear that IGs were meant to have maximum access in order to preserve their independence. For instance, they point out that Representative John Conyers, who voted for the original Act, supported the notion that IGs should have uninhibited access.³¹⁰

Those who oppose the DOJ’s position also worry that the opinion would undermine the independence of not only the DOJ’s IG, but of IGs at all federal agencies. Two weeks after the DOJ OLC issued this opinion, Horowitz—this time backed by all 72 IGs—again wrote to the two congressional oversight committees and made this worry explicit. He argued that the OLC

³⁰⁵ Josh Hicks, “Dozens of inspectors general say federal agencies hindering oversight,” *The Washington Post* (August 6, 2014), accessed April 4, 2016, <https://www.washingtonpost.com/news/federal-eye/wp/2014/08/06/dozens-of-inspectors-general-say-federal-agencies-hindering-oversight/>.

³⁰⁶ Michael E. Horowitz, *Access to Justice?: Does DOJ’s Office of the Inspector General Have Access to Information Needed to Conduct Proper Oversight?* House Committee on Judiciary (Washington, D.C.: U.S. Congress, 2014), 2.

³⁰⁷ Department of Justice, General Office of Legal Counsel, *The Department of Justice Inspector General’s Access to Information Protected by the Federal Wiretap Act, Rule 6(e) of the Federal Rules of Criminal Procedure, and Section 626 of the Fair Credit Reporting Act* (July 20, 2015), accessed April 4, 2016, <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2015/07/23/2015-07-20-doj-oig-access.pdf>.

³⁰⁸ The Inspector General Act of 1978, Pub. L. 95-452, 92 Stat. 1101 (1978): 9.

³⁰⁹ Hans Von Spakovsky and John-Michael Seibler, “The Obama Administration’s Defiance of Inspectors General – A Faulty Opinion from the Justice Department,” *The Heritage Foundation: Legal Memorandum* 169 (2015): 1, accessed March 31, 2016, <http://www.heritage.org/research/reports/2015/12/the-obama-administrations-defiance-of-inspectors-general-a-faulty-opinion-from-the-justice-department>.

³¹⁰ *Ibid.*, 3.

opinion “turn[s]... the IG Act on its head.”³¹¹ He expressed the view that other agencies will withhold records on the basis of non-disclosure agreements, purporting that at least three other agencies have done so already. Horowitz concluded that the OLC opinion is “inconsistent with the IG Act, at odds with the independence of Inspectors General, and risk insulating agencies from independent scrutiny...”³¹²

Most critics believe that the problem can only be solved with congressional action. Von Spakovsky and Seibler argue that Congress should amend the law to ensure that “access to ‘all’ records means all records.”³¹³ Congress has already begun to address this issue. Section 218 of the 2015 Appropriations Act reinforced the IG Act, reaffirming that the DOJ IG should have access to all records, unless they are subject to an exception under the Act, in which case the original law mandates agencies issue a finding to Congress explaining why documents were withheld.³¹⁴

Furthermore, IGs, including the IC IG housed at ODNI, are working with Congress to craft a bill that would strengthen IGs and close the loophole that the DOJ’s OLC has exploited. In an interview, Jeanette McMillian, General Counsel for the IC IG, discussed the importance of a legislative fix.³¹⁵ She has been directly involved with developing balanced legislative proposals that will allow IGs access to the information. IGs cannot do their jobs without having access to the information they need, she stated. So long as the agencies control access to information, the IGs face a significant challenge to providing effective oversight.

In the same interview, Dan Meyer, the Executive Director of Intelligence Community Whistleblowing and Source Protection (ICW&SP), reiterated the importance of the expanded powers IGs would be granted under the working bills, titled the Empowerment Act³¹⁶, but he cautioned that IGs will have to develop a culture worthy of these expanded powers. “They don’t have to be Eliot Ness,” he said. In other words, IGs need to recognize the very real concerns that are associated with these new powers, and develop appropriate safeguards accordingly.³¹⁷

The Empowerment Act offers one possible solution to the concerns raised by McMillian and Meyer. This bill would effectively close the loophole the DOJ OLC relied on in its controversial 2014 opinion and goes a step further by giving IGs subpoena power. The onus, then, will be on IGs to develop systematic or cultural constraints to the exercise of the subpoena power. The House bill offers one such solution. Under the House version of the bill, a panel of three IGs, drawn from the Council of the Inspectors General on Integrity and Efficiency would hear a

³¹¹ Michael E. Horowitz, *The Council of the Inspectors General on Integrity and Efficiency Statement to Congress*, House Committee on Oversight and Government Reform and Senate Committee on Homeland Security and Government Affairs (Washington, D.C.: U.S. Congress, 2015), 2.

³¹² *Ibid.*, 3.

³¹³ Hans Von Spakovsky and John-Michael Seibler, “The Obama Administration’s Defiance of Inspectors General.”

³¹⁴ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. 113-235, 128 Stat. 2130 (2014): 2200.

³¹⁵ Jeanette McMillian, telephone interview by Raheem Chaudhry and Courtney Weldon, April 14 2016.

³¹⁶ Versions of the Empowerment Act bill have been placed on the calendars in both the House and the Senate. See Inspector General Empowerment Act of 2015, HR 2395, 114th Congress, 1st sess.

³¹⁷ Dan Meyer, telephone interview by Raheem Chaudhry and Courtney Weldon, April 14, 2016.

request for a subpoena approval from an agency IG and determine whether or not to approve it.³¹⁸

Assessment

IGs can play a vital role in helping the IC earn public confidence. Former Air Force Secretary and Director of the NRO Thomas Reed emphasized the importance of public opinion for the IC.³¹⁹ He believes that low public confidence creates a system where the IC, instead of focusing on productive work, aims simply to not “screw up.” Reed believes that apolitical IGs can signal to the public that the intelligence agencies “know what they’re doing and they’re playing by the rules.”³²⁰

However, using IGs to build confidence in the IC is difficult since non-governmental actors, including NGOs, the public, and the media, have little basis on which to evaluate IG performance and impact. Currently, the public’s knowledge of IC IG activities with respect to privacy and civil liberties investigations is limited to IGs’ semiannual reports to Congress and to the selective declassification of high-profile reports.

The semiannual reports are limited in the information they share. The DOD IG’s most recent report, for instance, reveals that it had only one investigation related to civil liberties concerns.³²¹ Its 134-page report says nothing else about civil liberties or that single investigation. Few other IG reports offer any substantive information to the public. For instance, the CIA IG’s report is not even publicly released. The DHS IG’s semiannual report is publicly available, but it does not mention investigations dealing with privacy or civil liberties, though the DHS is charged with monitoring such potential violations.³²²

While it is easy to criticize this lack of information, finding a workable remedy is more difficult. On one hand, critics of closed government argue for increased transparency. The non-profit Project on Government Oversight recommends all OIG reports should be made public as soon as possible with redactions where necessary.^{323,324} Recent developments illustrate the value of IC transparency. Recently, the NSA IG declassified its report detailing NSA’s activities under § 215 of the USA PATRIOT Act. This declassification allowed *The New York Times* to publish an article clarifying that the NSA’s activities were much narrower than often characterized by the

³¹⁸ Inspector General Empowerment Act of 2015, HR 2395, 114th Congress, 1st sess.

³¹⁹ Tom Reed, interview by Meena Awasthi, Imaad Khan, and Anna Waterfield, Austin, Texas, November 19, 2015.

³²⁰ Ibid.

³²¹ U.S. Department of Defense, Office of the Inspector General, *Semiannual Report to the Congress: October 1, 2014 to March 31, 2015*, 37, accessed April 1, 2016, http://www.dodig.mil/pubs/sar/SAR_Mar_2015_Book.pdf.

³²² Department of Homeland Security, Office of the Inspector General, *Semiannual Report to the Congress: April 1, 2015 to September 30, 2015*, accessed April 1, 2016, <https://www.oig.dhs.gov/assets/SAR/OIG-SAR-Apr-Sep15.pdf>.

³²³ Project on Government Oversight, “Inspectors General: Accountability is a Balancing Act” (March 20, 2009,) accessed May 9, 2016, <http://www.pogo.org/our-work/reports/2009/go-igi-20090320.html>.

³²⁴ Sinner, “Protecting Rights from Within?,” 1083.

media and the public.³²⁵ In this instance, declassification allowed the media to tell a story that was consistent with the government's view of the telephony metadata collection program. However, it remains to be seen if this openness will improve the IC's image. Opponents of this approach worry that too much transparency by IGs may disincentivize agency cooperation with IGs. If agencies stopped cooperating with an IG, their job would be made more difficult and their reports less useful to policymakers and legislators.

The DOJ IG's semiannual report may help find middle ground. The DOJ IG's report includes a short section explaining that it has summarized its investigations of potential abuses of privacy and civil liberties to Congress, though it does not provide details of those investigations to the public. It also highlights two high-profile cases that deal with civil rights: the FBI's activities under § 215 and its use of the Pen Register and Trap-and-Trace authorities.³²⁶ The report also disaggregates investigations by agency and type of violation. For instance, the report gives a table highlighting the number of IG investigations of the FBI that fall in the following categories: ethics violations, fraud, off-duty violations, official misconduct, and personnel prohibition.³²⁷ While the DOJ IG's report lacks highly specific information, it is a step in the right direction and a potential model for other OIG reports

Conclusion

Inspectors General were originally established to monitor waste, fraud, and abuse in federal agencies to help improve government efficiency. They have evolved to become powerful internal checks on the Executive Branch. IC IGs have come to occupy a particularly important place in Executive Branch oversight, especially since 9/11. Since the 1970s, there has been growing recognition among intelligence agencies that IGs must also investigate potential civil liberties violations or human rights abuses. Congress codified this expectation of IC IGs following 9/11, and many IGs are now explicitly required to monitor complaints of civil rights abuses. Overall, their impact has been mixed. Many IC IGs do not focus on these types of complaints. However, the IGs that do have been remarkably independent and have shown a willingness to undertake thorough investigations, even in the face of resistance from the agencies they oversee.

While many of the IC IGs have done a commendable job of criticizing policy, management, and staff behavior, they have done little in recommending punishment for individuals or corrective measures to prevent future abuse. They also face increasing threats to their independence. The current battle between the DOJ and its IG is particularly worrisome, because it suggests that IG independence and effectiveness is a function of the administration's willingness to facilitate an IG's investigations.

Moving forward, it will be vital for the government to regain trust by demonstrating that IGs are effective and independent. To this end, IGs will have to issue more transparent, informative reports. IGs will also have to continue to work to build relationships with federal employees. The

³²⁵ Charlie Savage, "NSA Gets Less Web Data Than Believed, Report Suggests," *The New York Times*, February 16, 2016, accessed April 7, 2016, <http://www.nytimes.com/2016/02/17/us/report-says-networks-give-nsa-less-data-than-long-suspected.html>.

³²⁶ U.S. Department of Justice, *Semiannual Report to the Congress: April 1, 2015 to September 30, 2015*, 24.

³²⁷ *Ibid.*, 25.

IC IGs have made tremendous strides in the last several years by demonstrating their commitment to whistleblower protections and should continue in this vein. Overall, IC IGs have been a strong internal check on Executive Branch activities, but there is room for IGs to extend their influence to help create a more accountable IC and Executive Branch.

Recommendations

We recommend:

- Congress should pass the Empowerment Act to preserve the essential investigatory powers of IGs;
- All IC IGs should issue public reports at least semiannually that include statistics and other appropriate information on, for example, major investigations and audits and whistleblower complaints; and
- IG reports to Congress should include specific recommendations for corrective actions and the identities of senior officials described in reports.

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Chapter 5. Congressional Oversight of the Intelligence Community

by Eric Manpearl, Steven Brackin, and Chelssie Lopez

In our representative democracy, Congress serves as the agent of the American people. Congress's role in overseeing U.S. intelligence is especially important because the IC cannot share its secrets with the public. Thus, Congress serves as the people's proxy by ensuring our intelligence agencies are effective, law-abiding, and accountable.

The History of Congressional Oversight

The history of congressional oversight of the IC exemplifies the nation's efforts to reconcile its democratic values with the imperative of protecting the nation. This history demonstrates the complexity of the system of checks and balances between the branches of government and reinforces the notion that Congress's oversight of the Executive Branch is fundamentally a political exercise. Moreover, this history recounts shifts in the distribution of power within Congress itself, from an era dominated by powerful committee chairmen—privileged by virtue of seniority—to a period of more thorough oversight because of new institutional structures, explicit authorities, and well-resourced professional staffs.

Legislative Oversight Begins

On July 26, 1947, Congress established the nation's first peacetime intelligence enterprise led by a DCI.³²⁸ The National Security Act of 1947 (Act) was aimed at preventing another Pearl Harbor, and restructured America's military and foreign policy establishments.³²⁹ The Act established the NSC, the CIA—the nation's first peacetime intelligence agency—and the position of DCI.³³⁰

The CIA was charged with advising the NSC on intelligence activities related to national security; recommending efforts to coordinate foreign intelligence; correlating, evaluating, and disseminating intelligence within the government; centralizing intelligence-related services of other agencies; and “perform[ing] such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.”³³¹ Some lawmakers feared that they would be empowering a Gestapo-like security organization by establishing the CIA. This concern was mitigated by restricting CIA's authorized mission to

³²⁸ David M. Barrett, *The CIA and Congress: The Untold Story from Truman to Kennedy* (Lawrence, KS: University Press of Kansas, 2005), 24; and Loch K. Johnson, *America's Secret Power: The CIA in a Democratic Society* (New York: Oxford University Press, 1989), 12-13.

³²⁹ Barrett, *The CIA and Congress*, 39-40.

³³⁰ National Security Act of 1947, Pub. L. No. 80-253, § 102, 61 Stat. 495 (1947).

³³¹ National Security Act of 1947, §102; Johnson, *America's Secret Power*, 16-17; and Barrett, *The CIA and Congress*, 24.

foreign intelligence, and specifically forbidding the agency from having any “police, subpoena, law-enforcement powers, or internal-security functions.”³³²

The Senate Armed Services Committee (SASC) and the House Appropriations Committee, both active in the debate surrounding the Act, were the initial congressional oversight committees of the CIA.³³³ The House Armed Services Committee (HASC) later assumed an oversight function as well.³³⁴ The leadership of these committees was determined exclusively by party control and seniority during this era.³³⁵ Thus, the circle of individuals responsible for overseeing the CIA was actually quite small. Senator Richard Russell of Georgia illustrated this phenomenon. Russell, the chairman of the SASC from 1951-1953 and from 1955-1969, was also a member of the Senate Appropriations Committee.³³⁶ Perhaps as a result, oversight of the CIA from 1947-1953 was rather “laissez-faire.”³³⁷ Members’ attention was focused on the issues—and especially the budget—of the much larger Department of Defense. Thus, members devoted little time to intelligence matters and generally deferred to the DCI’s judgment.

However, several events precipitated a closer examination of the effectiveness of the CIA and spurred debate for oversight reform. Specifically, Congress considered oversight reforms following CIA failures to warn of massive rioting in Bogota, Columbia, in 1948, the Soviet atomic bomb test in 1949, and North Korea’s invasion of South Korea in 1950. In 1953, Senator Mike Mansfield proposed the creation of a Joint Committee on Intelligence modeled after the Joint Atomic Energy Committee to “create some sort of ‘watchdog’” to mitigate the “continued anxiety about the CIA and its widespread activities.”³³⁸ This committee would have consolidated the authorization and appropriations responsibilities into a single entity.³³⁹ Congress also commissioned the Clark Task Force to investigate the CIA’s operational activities. However, President Dwight Eisenhower preempted this investigation by initiating his own investigation through the Doolittle Commission.³⁴⁰

Although Senator Mansfield’s effort to create a Joint Intelligence Committee failed, he succeeded in initiating the first floor debate in Congress concerning CIA oversight.³⁴¹ President Eisenhower once again preempted congressional intervention in intelligence by establishing the President’s Board of Consultants on Foreign Intelligence Activities, a predecessor to today’s President’s Intelligence Advisory Board.³⁴² However, the Armed Services and Appropriations Committees of each chamber did establish subcommittees to oversee CIA authorizations and appropriations, respectively.³⁴³ The same members who had previously overseen the CIA largely

³³² National Security Act of 1947, § 102(d)(3).

³³³ Barrett, *The CIA and Congress*, 10.

³³⁴ L. Britt Snider, *The Agency and the Hill: CIA’s Relationship with Congress, 1946-2004* (Langley, VA: Central Intelligence Agency, 2008), 6.

³³⁵ Barrett, *The CIA and Congress*, 118-124.

³³⁶ Snider, *The Agency and the Hill*, 6.

³³⁷ *Ibid.*, 41.

³³⁸ Barrett, *The CIA and Congress*, 174.

³³⁹ *Ibid.*, 172-173.

³⁴⁰ Snider, *The Agency and the Hill*, 12.

³⁴¹ Barrett, *The CIA and Congress*, 230.

³⁴² Snider, *The Agency and the Hill*, 12.

³⁴³ Barrett, *The CIA and Congress*, 230.

populated the new subcommittees. This allowed then-DCI Alan Dulles to lead the CIA and IC according to the President's desires without significant congressional interference.³⁴⁴

Growing Pressure to Reform Intelligence Oversight

Pressure to change the intelligence oversight system continued to build from 1958-1966 because of perceived intelligence failures. Specifically, the IC did not warn of the Soviet's Sputnik launch or the coup in Iraq in 1958, an American U2 spy plane was shot down over the Soviet Union in 1960, and the CIA's Bay of Pigs covert operation failed. Senator Eugene McCarthy advocated for a Joint Intelligence Committee, although Senator Mansfield did not support the proposal this time. President John F. Kennedy repeated the Eisenhower Administration's pattern of preempting congressional actions and established the Taylor Commission to investigate the Bay of Pigs failure. He also re-established the PBCFIA and renamed it the PFIAB.³⁴⁵

Although efforts to establish a Joint Intelligence Committee once again failed, the view that **Congress' oversight of the IC was insufficient grew during this period. Congress did not** reorganize its committee structure, but did increase the size of the staffs on the CIA subcommittees—expanding each to four or five professionals by 1963.³⁴⁶ Furthermore, the Senate Foreign Relation Committee sent a resolution to the floor calling for the appointment of three of its members to the SASC CIA subcommittee in 1966 in an attempt to gain more influence.³⁴⁷ That attempt was stifled by Senator Russell as well as Executive Branch pressure to preserve the status quo.

The Church and Pike Committees: Reform of Congressional Oversight of the IC

A series of revelations in the 1970s ultimately led to significant congressional reforms. The Watergate scandal shook Americans' trust in government. Additionally, the impetus for reform expanded greatly following the revelations of contemplated CIA operations in Chile. The CIA had explored manipulating elections in Chile and supporting a coup against Chile's democratically elected president. This led to the passage of the Hughes-Ryan Amendment of 1974, which was Congress's first successful effort to constrain the IC since imposing a prohibition on domestic operations in the 1947 Act. The Hughes-Ryan Amendment required the President to approve all covert actions in a written "finding," and to share this with the intelligence subcommittees of the Armed Services, Foreign Affairs, and Appropriations Committees of the House and Senate within a reasonable time limit.³⁴⁸ The new law was intended to remove the President's ability to plausibly deny his role in ordering covert operations. It also expanded intelligence oversight to include the Foreign Affairs committees of Congress.

³⁴⁴ Ibid., 18.

³⁴⁵ John F. Kennedy, Executive Order 10938-Establishing the President's Foreign Intelligence Advisory Board, 26 Fed. Reg. 3951 (1961).

³⁴⁶ Snider, *The Agency and the Hill*, 26.

³⁴⁷ Ibid.

³⁴⁸ Foreign Assistance (Hughes-Ryan) Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795 (1974); Johnson, *America's Secret Power*, 22-23, 108, 207; and Snider, *The Agency and the Hill*, 32.

The revelations of the domestic abuses by the Nixon Administration and IC agencies ultimately spurred a fundamental change in the way Congress oversees the IC.³⁴⁹ Following the Watergate scandal, Congress created select, bipartisan committees to investigate the IC. While the Senate committee, led by Senator Frank Church, immediately set to investigating intelligence operations and accusations of abuse, the House committee led by Representative Otis Pike focused its investigations on the organizational effectiveness of the IC.³⁵⁰ The Church and Pike Committees discovered that the IC had engaged in surveillance of Americans and infringed upon the civil rights of anti-Vietnam War protestors. After hundreds of hearings and interviews, the Church Committee issued a six-volume report that included 97 recommendations. The most significant recommendation was to establish a permanent select intelligence oversight committee.³⁵¹

The Senate created the SSCI in May 1976, within weeks of the Church Committee's report. The new committee assumed jurisdiction over the Hughes-Ryan requirements, exclusive oversight of intelligence activities, and responsibility for authorizing annual intelligence appropriations.³⁵² The SSCI was composed of 15 members—eight from the majority party and seven from the minority party.³⁵³ Eight SSCI members were also assigned to serve on standing committees related to intelligence: two each on Appropriations, Armed Services, Foreign Relations, and Judiciary.³⁵⁴ The majority party selected the committee chair, while the minority party appointed the vice chairman.³⁵⁵ Moreover, the SSCI was supported by a “unified” staff that worked for the full committee, rather than serving members of a specific party as was the tradition in other standing committees. Each staff member was subject to security clearance requirements and was hired “in consultation with the Director of Central Intelligence.”³⁵⁶

The creation of a select intelligence oversight committee in the House was delayed because of the overly politicized manner in which the Pike Commission released its report. The HPSCI was finally established in summer 1977.³⁵⁷ In contrast to SSCI's bipartisan structure, the HPSCI was based on the proportion of party representation in the entire chamber, with the majority party controlling both the chair and vice chair.³⁵⁸ Also, in contrast to the Senate's “unified” staff model, separate majority and minority staffs served the HPSCI members.³⁵⁹

³⁴⁹ Snider, *The Agency and the Hill*, 27-50. For context and an overview of the “Family Jewels,” a document that summarized various sensitive CIA activities that had been undertaken in previous years, see Snider's description of the early 1970s.

³⁵⁰ Ibid., 53-54.

³⁵¹ Loch K. Johnson, *A Season of Inquiry: The Senate Intelligence Investigation* (Lexington, KY: University Press of Kentucky, 1985), 226.

³⁵² Snider, *The Agency and the Hill*, 51.

³⁵³ Ibid.

³⁵⁴ Ibid., 52.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Frank Smist, *Congress Oversees the United States Intelligence Community 1947-1989* (Knoxville: The University of Tennessee Press, 1990). For an in-depth history of the HPSCI, see Chapter 5, The Reemergence of Institutional Oversight in the House: The Boland Committee, 1977-84.

³⁵⁸ Ibid., 216-217.

³⁵⁹ Ibid., 231-233.

Implementation of the Church and Pike Committee recommendations marked the beginning of a new era in congressional oversight of the IC. While intelligence scholar Loch Johnson refers to the period between 1976 and 1986 as the “Era of Uneasy Partnership,” others, like former Deputy Directors of Central Intelligence John McLaughlin and Admiral Bobby Inman, recall this as the “Classic” period when serious, dedicated members of Congress—exemplified by Senators Inouye, Bayh, Goldwater, and Congressman Boland—led oversight in a responsible way.³⁶⁰ The intelligence committees, especially the SSCI, implemented the Church Committee’s institutional reforms and advocated for the executive agencies they oversaw during this period.³⁶¹ Congress also codified the roles of important IC agencies and clarified the Executive’s responsibility to share covert action findings with the Congress. The establishment of the FISC and the Foreign Intelligence Surveillance Court of Review (FISCR) carved out a role for judicial oversight of intelligence operations.³⁶² Thus, SSCI and HPSCI “developed an institutional memory” that enhanced future oversight during this period.³⁶³

The Iran-Contra Scandal Sparks Renewed Tension

Effective cooperation between the IC and the congressional oversight committees came to a halt in the mid-1980s. Following the Sandinista regime’s emergence in Nicaragua, the Reagan Administration feared El Salvador would also succumb to a communist revolution and that the Soviets were on the offensive in the region.³⁶⁴ The CIA provided arms to the Contras and supported those who mined Nicaragua’s harbors to reduce commercial shipping.³⁶⁵ Congress was infuriated by these actions and passed a series of legislative amendments, termed the Boland Amendments, that prohibited funding “for the purpose of overthrowing the government of Nicaragua.”³⁶⁶ Officials on the NSC staff, however, believed they found a loophole in this legislation due to the fact that the NSC was not an intelligence agency, and non-government funding was not explicitly prohibited. The NSC and CIA facilitated the sale of weapons to the government in Iran and used the profits to support the Contras. Ultimately, these activities became public.

President Reagan created the Tower Commission to investigate these actions and Congress created select committees in the House and Senate to conduct an investigation, rather than have

³⁶⁰ Johnson, *America’s Secret Power*, 9; John McLaughlin, interview by Steven Brackin, Austin, Texas, November 19, 2015; and Admiral Robert “Bobby” Inman, interview by Eric Manpearl and Steven Brackin, Austin, Texas, February 18, 2016.

³⁶¹ Smist, *Congress Oversees the United States Intelligence Community*, 123-133.

³⁶² Ibid. The Intelligence Oversight Act of 1980 further refined the Hughes-Ryan Act by defining the relationship between the Executive and Legislative branches with respect to covert operations; The Foreign Intelligence Surveillance Act of 1978 established judicial review of certain intelligence operations for the first time.

³⁶³ Ibid., 126.

³⁶⁴ Robert Kagan, *A Twilight Struggle: American Power and Nicaragua 1977-1990* (New York: The Free Press, 1996), 209-212.

³⁶⁵ See generally Kagan, *A Twilight Struggle*.

³⁶⁶ James Van Wagenen, “A Review of Congressional Oversight: Critics and Defenders,” accessed March 5, 2016, <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/97unclass/wagenen.html>. On December 8, 1982, Congress passed the Boland Amendment which prohibited American assistance in training, equipping, or advising the anti-Communist rebel Contras in Nicaragua. Further amendments passed in 1983 and 1984 closed off loopholes in the Boland Amendments, which allowed for humanitarian aid and further limited U.S. government support for the Contras.

the SSCI and HPSCI examine the affair. The congressional investigation determined that the Reagan Administration had withheld information and deceived Congress and the public regarding its support for the Nicaraguan operations.³⁶⁷ The investigation also discovered that intelligence personnel were considering using the money from arms sales to Iran to fund other covert action programs. This would have allowed the IC to circumvent the congressional oversight process altogether.³⁶⁸ The Iran-Contra affair was the “most serious breakdown of the trust between the executive branch and Congress since the oversight committees were established.”³⁶⁹

These actions undermined Congress’ ability to oversee the IC. The Executive Branch had failed to keep Congress “fully and currently” informed of all intelligence activities as required by the Intelligence Oversight Act of 1980 and, in fact, had not reported these intelligence activities at all.³⁷⁰ The Iran-Contra scandal resulted in the IC being viewed as untrustworthy. The oversight committees responded by including a provision that required the President to notify the committees of all covert action findings within 48 hours in the 1991 Intelligence Authorization Bill.³⁷¹ President George H. W. Bush vetoed this bill, and the committees were forced to compromise and settle for covert action notifications in a “timely manner.”³⁷²

Despite the severe antagonism that developed from the Iran-Contra scandal, Congress continued to strive to improve the IC’s effectiveness as part of its oversight mission. After the fall of the Soviet Union, the chairmen of both intelligence oversight committees introduced bills to reorganize the IC. After extensive public hearings and negotiations with the George H. W. Bush Administration, the committees attached The Intelligence Organization Act of 1992 to the fiscal year 1992 Intelligence Authorization Act.³⁷³ While the new legislation largely reflected the status quo, it represented the first successful effort by Congress to enact organizational legislation for the IC since 1947.³⁷⁴ The Intelligence Organization Act of 1992 recognized the DCI as the statutory advisor to the NSC, established the National Intelligence Council (NIC) as the highest authority for developing and publishing intelligence analysis, granted the DCI responsibility for establishing intelligence-gathering priorities and coordinating all human intelligence (HUMINT) collection, gave the DCI approval authority for the budgets of all intelligence agencies, and defined the composition of the IC for the first time.

³⁶⁷ Lawrence E. Walsh, “Final Report of the Independent Counsel for Iran/Contra Matters” (August 4, 1993), accessed March 18, 2016, <http://fas.org/irp/offdocs/walsh/index.html>.

³⁶⁸ Van Wagenen, “A Review of Congressional Oversight.”

³⁶⁹ Ibid.

³⁷⁰ See David Everett Colton, “Speaking Truth to Power: Intelligence Oversight in an Imperfect World,” *University of Pennsylvania Law Review*, no. 137 (1988): 571. The Intelligence Act of 1980 required the Executive to keep Congress “fully and currently” informed of all intelligence activities. It was considered an acceptable framework for intelligence oversight, proving fairly effective. The controversial exception was the 1984 mining operation in Nicaraguan waters. The 1984 negotiated settlement required that the Director report any significant anticipated intelligence activity, including ongoing programs.

³⁷¹ Van Wagenen, “A Review of Congressional Oversight.”

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ Ibid.

Congress's Response to 9/11

The September 11, 2001 terrorist attacks raised concerns about the performance of U.S. intelligence. Congress formed the 9/11 Commission to provide a full account of the events surrounding the attacks.³⁷⁵ In order to accomplish this goal, the 9/11 Commission analyzed the effectiveness of the intelligence agencies, congressional oversight, and resource allocation to **identify “lessons learned” and to create “an America that is safer, stronger, and wiser.”**³⁷⁶ After interviewing numerous members of Congress and congressional staff, the Commission found that **“dissatisfaction with congressional oversight remain[ed] widespread.”**³⁷⁷ The final report noted that the future challenges facing the IC were **“daunting,” and recommended developing** new technology that would allow the U.S. to obtain good intelligence to win and prevent wars.³⁷⁸ The 9/11 Commission concluded, *inter alia*, that many aspects of congressional oversight of the IC were inadequate and **“dysfunctional.”**³⁷⁹ The Commissioners wrote in their final report:

[u]nder the terms of existing rules and resolutions the House and Senate intelligence committees lack the power, influence, and sustained capability to meet this challenge. While few members of Congress have the broad knowledge of intelligence activities or the know-how about the technologies employed, all members need to feel assured that good oversight is happening. When their unfamiliarity with the subject is combined with the need to preserve security, a mandate emerges for substantial change. Tinkering with the existing structure is not sufficient.³⁸⁰

The Commission believed that reforms to the IC would fail unless congressional oversight improved.³⁸¹ The report advocated for the creation of a small group of congressmen to conduct oversight with a committee staff that “should be nonpartisan and work for the entire committee and not for the individual members.”³⁸² The Commission recommended two alternatives to the current oversight system: Congress could create a joint committee for intelligence using the Joint Atomic Energy Committee as its model, or Congress could create a single intelligence committee that had combined authorizing and appropriating powers in each chamber.³⁸³

In response to the 9/11 Commission recommendations, the House formed the House Appropriations Select Intelligence Oversight Panel to oversee the authorization and

³⁷⁵ See National Commission on Terrorist Attacks, “The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States” (New York: W.W. Norton & Company, 2004).

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*, 419.

³⁷⁸ *Ibid.*, 420.

³⁷⁹ Eric Rosenbach and Aki J. Peritz, “**Congressional Oversight of the Intelligence Community**,” in *Confrontation or Collaboration? Congress and the Intelligence Community* (Belfer Center for Science and International Affairs, Harvard Kennedy School, July 2009), accessed March 15, 2016, http://Belfercenter.ksg.harvard.edu/publication/19146/congressional_oversight_of_the_intelligence_community.html.

³⁸⁰ National Commission on Terrorist Attacks, “The 9/11 Commission Report,” 420.

³⁸¹ *Ibid.* The 9/11 Commission noted that other suggested reforms for a National Counterterrorism Center and a National Intelligence Director would not work if congressional oversight did not change and function more properly, stating **“Unity of effort in executive management can be lost if it is fractured by divided congressional oversight.”**

³⁸² *Ibid.*

³⁸³ *Ibid.*

appropriation of funding for intelligence activities.³⁸⁴ This panel included members drawn from the HPSCI and the Defense Subcommittee of the House Appropriations Committee. However, this panel was ultimately disbanded.³⁸⁵ The Senate did not take action to implement the 9/11 Commission's recommendations to alleviate the shortcomings in congressional oversight of intelligence activities.

Furthermore, the investigation found that the IC had struggled to collect and analyze transnational terrorism throughout the 1990s. The Commission found that there was “no comprehensive estimate of the enemy, either to build consensus or clarify differences.”³⁸⁶ In intelligence collection, “there was not a comprehensive review of what the Community knew [and] what it did not know, followed by the development of a community-wide plan to close those gaps.”³⁸⁷ Finally, the Commission pointed to the lack of incentives to cooperate and share information. This left the Commission staff to question who was in charge of intelligence.³⁸⁸

The final 9/11 Commission Report proposed extensive changes to the IC, including the creation of a National Intelligence Director.³⁸⁹ President George W. Bush signed a series of executive orders following the release of the 9/11 Commission report to strengthen and reform the IC as much as possible through executive action. Ultimately, Congress passed the IRTPA, which was signed into law by President Bush on December 17, 2004.

The IRTPA: Reorganizing the Intelligence Community

Congress believed “the attacks of 9/11 had ushered in a new era in U.S. national security,” and that they must act in a significant manner following the successive 9/11 and Iraq WMD intelligence failures. Congress had lost faith in the IC.³⁹⁰ Senators Susan Collins and Joseph Lieberman, who lead the Senate Homeland Security and Government Affairs Committee, led the Senate's reform effort.³⁹¹ The two senators had a history of working well together, and Senate Majority Leader Bill Frist believed they could work on intelligence reform in a bipartisan manner.³⁹² Thus, neither SSCI nor SASC was assigned to draft the bill to reform the IC, although this was clearly within their jurisdiction.

Senators Collins and Lieberman crafted a bill that closely adhered to the 9/11 Commission's recommendations. Senators Arlen Specter, Richard Shelby, and Pat Roberts of SSCI argued the DNI should have operational control over the IC.³⁹³ Senators John Warner and Carl Levin of SASC believed the DNI was overly intrusive on DOD, and did not want the DNI to have any

³⁸⁴ Rosenbach and Peritz, *Confrontation or Collaboration*.

³⁸⁵ Ibid.

³⁸⁶ National Commission on Terrorist Attacks, “9/11 Commission Staff Statement No. 11: The Performance of the Intelligence Community” (2004), 12.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ National Commission on Terrorist Attacks, “9/11 Commission Report,” 399.

³⁹⁰ Michael Allen, *Blinking Red: Crisis and Compromise in American Intelligence After 9/11* (Virginia: Nebraska Press, 2013), 62.

³⁹¹ Ibid., 50.

³⁹² Ibid.

³⁹³ Ibid., 86.

authority over DOD's intelligence assets.³⁹⁴ These SASC members opposed reforms because they believed the reforms reduced the powers of the Secretary of Defense even though the 9/11 Commission had not identified DOD shortcomings.³⁹⁵ The proposals from the SSCI and SASC members did not gain traction, though, and the Collins and Lieberman bill ultimately passed the Senate.³⁹⁶

In the House, the HPSCI and HASC, along with staff from the Defense Subcommittee of the House Appropriations Committee, led the legislative reform effort.³⁹⁷ The House faced a very difficult fight to move legislation forward. Some members opposed the DNI's creation because U.S. troops were in the midst of fighting two wars, and they did not believe Congress should pass legislation that could endanger soldiers.³⁹⁸ The House did not pass the Senate's bill, but did pass their own bill, which did not have as robust DNI authorities as the Senate's version.³⁹⁹

The Senate and House entered into an extended period of power politics during conference negotiations, both within Congress and during negotiations with the White House. Finally, Congress reached a compromise and President George W. Bush signed the IRTPA into law on December 17, 2004. The IRTPA was the culmination of much discourse in Congress and American society about the IC's shortcomings following 9/11, and represented the most dramatic changes to the IC since the 1947 Act.⁴⁰⁰ The IRTPA aimed to streamline the unwieldy American intelligence apparatus and create a more integrated, collaborative enterprise: a true intelligence *community*.⁴⁰¹

The IRTPA is divided into eight titles, representing the breadth of issues it addresses.⁴⁰² The IRTPA established the position of the DNI, the National Counterterrorism Center as a multiagency center integrating all intelligence pertaining to terrorism, and the PCLOB. It also expanded the FBI's powers, allowing it to obtain wiretaps and conduct secret searches on individual terrorist suspects with no connection to a foreign power under a so-called "lone wolf" provision.⁴⁰³ The IRTPA legislated the 9/11 Commission's recommendations to better integrate languages and surveillance specialists into the FBI intelligence program and to more effectively utilize analysts.⁴⁰⁴ Additionally, the IRTPA changed the "material support" statute of the Anti-

³⁹⁴ Ibid., 86-87.

³⁹⁵ Ibid., 63-64.

³⁹⁶ Ibid., 86-90.

³⁹⁷ Ibid., 95.

³⁹⁸ Allen, *Blinking Red*, 64.

³⁹⁹ Ibid., 95-96.

⁴⁰⁰ Michael Jacobson, "The Intelligence Reform and Terrorism Prevention Act: Addressing Controversies, Expanding Powers" (December 17, 2004), accessed April 22, 2016, <http://www.washingtoninstitute.org/policy-analysis/view/the-intelligence-reform-and-terrorism-prevention-act-addressing-controversi>.

⁴⁰¹ Richard J. Harknett and James A. Stever, "The Struggle to Reform Intelligence after 9/11," *Public Administration Review* 51, iss. 5 (Sept./Oct. 2011): 700-706.

⁴⁰² Intelligence Reform and Terrorism Prevention Act of 2004, PL 108-458, 118 Stat. 3684 (2004).

⁴⁰³ Ibid.

⁴⁰⁴ Jacobson, "The Intelligence Reform and Terrorism Prevention Act."

terrorism and Effective Death Penalty Act of 1996 to make it a crime to provide material support or resources that a donor knows will be used in connection with a terrorist act.⁴⁰⁵

While the IRTPA's impact so far is a matter of some debate, particularly regarding the role of the DNI, the need for intelligence reform post-9/11 was an area of consensus among policymakers, legislators, and the public. Whether that reform starts and ends with IRTPA, or IRTPA is simply a first step, remains to be seen.

Terrorist Surveillance Program

In 2005, *The New York Times* revealed that the Bush Administration had authorized the NSA to collect electronic communications between people inside and outside the U.S. without a FISC order under the Terrorist Surveillance Program (TSP).⁴⁰⁶ The article also accused the Bush Administration of undermining Americans' civil liberties.⁴⁰⁷ Attorney General Alberto Gonzales maintained that President Bush was legally authorized to direct the TSP because the program was designed to "to intercept international communications of persons reasonably believed to be members or agents of al Qaeda or an affiliated terrorist organization, a limitation which further strongly supports the reasonableness of the searches."⁴⁰⁸

However, the administration faced backlash in Congress by members who did not believe presidential authority existed to authorize such a program.⁴⁰⁹ Members of Congress were also upset that the program had only been briefed to the "Gang of Eight," which includes the Speaker of the House, House Minority Leader, Senate Majority and Minority Leaders, and the leaders of HPSCI and SSCI. Members felt this diminished Congress' ability to adequately perform its oversight duty.⁴¹⁰

In response, the Department of Justice relented and announced that electronic surveillance occurring under the TSP would be conducted subject to FISC approval from 2007 onwards.⁴¹¹ Congress continued to debate the program, though, and passed the Protect America Act of 2007 (PAA) to amend FISA. The PAA authorized the TSP in statute, by ensuring that a court order was not required for surveillance of a person reasonably believed to be outside the U.S.⁴¹² It also allowed the DNI and Attorney General to authorize surveillance, rather than the FISC.⁴¹³ The

⁴⁰⁵ Ibid.

⁴⁰⁶ James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *The New York Times* (December 16, 2005), A1, accessed March 18, 2016, <http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

⁴⁰⁷ Ibid.

⁴⁰⁸ U.S. Department of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," January 19, 2006, 41.

⁴⁰⁹ Protect America Act of 2007, Pub. L. No. 110-55, § 105A, 121 Stat. 552 (2007).

⁴¹⁰ Marshall Curtis Erwin, "Sensitive Covert Action Notifications: Oversight Options for Congress" (April 10, 2013), accessed March 18, 2016, <https://www.fas.org/sgp/crs/intel/R40691.pdf>.

⁴¹¹ Ibid.

⁴¹² Peter Baker, "President Acknowledges Approving Secretive Eavesdropping," *The Washington Post* (December 18, 2005), accessed March 19, 2016, <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/17/AR2005121700456.html>.

⁴¹³ Protect America Act of 2007, Pub. L. No. 110-55, § 105B, 121 Stat. 552 (2007).

PAA was just a stopgap measure, and these provisions were reauthorized by the FISA Amendments Act of 2008.⁴¹⁴

The SSCI's Investigation of CIA's Rendition, Detention, and Interrogation Program

In the aftermath of 9/11, the CIA carried out a series of controversial policies which were viewed by President Bush as necessary to keep the country safe.⁴¹⁵ However, upon taking office, President Obama signed Executive Order 13491 to end the detention and interrogation (but not rendition) programs.⁴¹⁶ The SSCI voted to review the CIA's detention and interrogation program in 2009 "to shape detention and interrogation policies in the future."⁴¹⁷ After Attorney General Eric Holder opened an investigation into the legality of the CIA interrogation program, CIA Director Panetta determined "he would not compel current CIA employees to submit to interviews by the SSCI."⁴¹⁸ This led the SSCI Republican minority to withdraw from the investigation because they did not believe a fair analysis could be conducted without interviewing CIA employees; however, the SSCI Democratic majority pressed ahead. This created a highly partisan atmosphere.

The SSCI Democrats, led by Senator Dianne Feinstein, finally released an unclassified summary of their study in 2012. The summary thoroughly rebuked the CIA's enhanced interrogation program. It claimed that the interrogation methods used were not needed to gain intelligence, or at least, that evidence was inconclusive that they were needed.⁴¹⁹ The report also criticized the CIA's failure to keep good records and to accurately communicate the living conditions and treatment of detainees.⁴²⁰ The report charged, "CIA personnel decided to initiate a program of indefinite secret detention and the use of brutal interrogation techniques in violation of U.S. law, treaty obligations, and our values."⁴²¹ Additionally, the report found that the CIA "actively avoided or impeded congressional oversight of the program," noting that on numerous occasions the CIA delayed briefing SSCI leadership or was unresponsive to requests for additional information.⁴²²

⁴¹⁴ Foreign Intelligence Surveillance Act of 1978 Amendment Acts of 2008, Pub. L. No. 110-261, § 702, 122 Stat. 2436 (2008).

⁴¹⁵ Mark Mazzetti, *The Way of the Knife: the CIA, a Secret Army, and a War at the Ends of the Earth* (New York: The Penguin Press, 2013), 282.

⁴¹⁶ John Brennan, "CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program" (June 27, 2013), accessed March 25, 2016, http://www.cia.gov/library/reports/CIA_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf.

⁴¹⁷ Michael Morell, *The Great War of Our Time: The CIA's Fight Against Terrorism from Al Qaeda to ISIS* (New York: Twelve, 2015), 254.

⁴¹⁸ *Ibid.*, 257.

⁴¹⁹ U.S. Senate, Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program: Executive Summary* (2014), 179; and Stephen Collinson and Evan Perez, "Senate report: CIA misled public on torture" (December 9, 2014), accessed March 30, 2016, <http://www.cnn.com/2014/12/09/politics/cia-torture-report/>.

⁴²⁰ U.S. Senate, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 428-429; and Collinson and Perez, "Senate report: CIA misled public on torture."

⁴²¹ U.S. Senate, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, 2.

⁴²² *Ibid.*, 5.

The CIA challenged the report's "damning condemnation" of its interrogation program.⁴²³ Although CIA Director John Brennan said he disagreed with the enhanced interrogation techniques (EITs) that were used and did not contest the report's disapproval of the program, he maintained that the study jumped to conclusions regarding the CIA's level of transparency about its operations and the usefulness of the EIT program.⁴²⁴ Former CIA leaders have argued the report's analysis "was seriously flawed and that the [CIA] had indeed generated a treasure trove of intelligence."⁴²⁵

The disagreement between the CIA and Senator Feinstein was exacerbated by accusations by both sides that "employees or committee staff members—or both—abused their access to [a] shared [computer] network to gain an upper hand" during the investigation.⁴²⁶ Overall, this study exemplified the tensions that can occur between the IC and Congress in the course of conducting oversight. It also illustrated the dangers of partisanship in national security debates.

Snowden's Unauthorized Disclosures

In June 2013, Edward Snowden, a former NSA contractor, disclosed information regarding foreign intelligence collection activity by the NSA, among other classified materials. Section 215 of the USA PATRIOT Act and Section 702 of the FISA Amendments Act of 2008, which authorizes the collection of foreign intelligence concerning non-U.S. persons located outside the U.S., proved to be two of the most controversial programs disclosed by Snowden.⁴²⁷ This incited an intense debate in Congress.

Some members claimed they were never briefed on these programs despite the Obama Administration's assertions that they were. Senator Jeff Merkley said, "It's not something that's briefed outside the Intelligence Committee . . . I had to get special permission to find out about the program."⁴²⁸ Likewise, in regards to Section 215, some members claimed they voted for the USA PATRIOT Act, but were never informed about what the legislation actually entailed. Others, argued that the NSA's program went beyond the statutory limitations. Representative Jim Sensenbrenner, one of the authors of the USA PATRIOT Act, said that he was "extremely disturbed by what appears to be an overbroad interpretation of the Act."⁴²⁹ Representative

⁴²³Brennan, "CIA Comments on the Senate Select Committee on Intelligence Report on the Rendition, Detention, and Interrogation Program."

⁴²⁴ Ibid.

⁴²⁵ Morrell, *The Great War of Our Time*, 263.

⁴²⁶ Greg Miller, Ed O'Keefe, and Adam Goldman, "Feinstein: CIA Search Senate Intelligence Committee Computers," *The Washington Post* (March 11, 2014), accessed March 31, 2016, https://www.washingtonpost.com/world/national-security/feinstein-cia-searched-intelligence-committee-computers/2014/03/11/982cbc2c-a923-11e3-8599-ce7295b6851c_story.html.

⁴²⁷ USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 215, 115 Stat. 272 (2001); Foreign Intelligence Surveillance Act of 1978 Amendment Acts of 2008, Pub. L. No. 110–261, § 702, 122 Stat. 2436 (2008) (codified at 50 U.S.C. § 1881a) (2012).

⁴²⁸ Glenn Kessler, "Obama's claim that 'every member of Congress' was briefed on telephone surveillance," *The Washington Post* (June 11, 2013), accessed March 31, 2016, https://www.washingtonpost.com/blogs/fact-checker/post/obamas-claim-that-every-member-of-congress-was-briefed-on-telephone-surveillance/2013/06/10/fd03ea8e-d21f-11e2-8cbe-1bcbee06f8f8_blog.html.

⁴²⁹ Ellen Nakashima, Jerry Markon, and Ed O'Keefe, "Lawmakers defend and criticize NSA program to collect phone logs," *The Washington Post* (June 6, 2013), accessed March 31, 2016,

Sensenbrenner stated, “These reports are deeply concerning and raise questions about whether our constitutional rights are secure.”⁴³⁰ Additionally, Senator Patrick Leahy, former Chair of the Senate Judiciary Committee, believed “Congress did not enact FISA to give [the government] dragnet surveillance powers to sweep in the data of countless innocent Americans,” and worked to produce legislation to end the Section 215 program.⁴³¹

Other members defended the programs. Senators Dianne Feinstein and Saxby Chambliss, then the Chair and Vice Chair of the SSCI, argued that not only was the program lawful, but also that “[t]he executive branch’s use of this authority ha[d] been briefed extensively to the Senate and House Intelligence and Judiciary Committees, and detailed information ha[d] been made available to all members of Congress prior to each congressional reauthorization of this law.”⁴³² Representatives Mike Rogers and Dutch Ruppersberger, the Chair and Ranking Member of HPSCI, also came out in support of the program and explained that HPSCI consistently reviewed the program.⁴³³ Chairman Rogers argued that “[w]ithin the last few years, this program was used to stop a terrorist attack in the United States. We know that. It’s important. It fills in a little seam that we have.”⁴³⁴ Additionally, Senator Sheldon Whitehouse, a member of the SSCI and Senate Judiciary Committee, recognized the extensive oversight and regulations the NSA is subject to during a speech at the NSA.⁴³⁵ Senator Whitehouse astutely recognized that the congressional debate regarding Section 215 was rooted in a profound shift in American society: “Americans have become more skeptical of government intelligence gathering, while at the same time they willingly accept that corporations learn virtually every detail of their lives.”⁴³⁶

The disclosures shaped the debate regarding the reauthorization of these programs, and intelligence activities more broadly. Section 215 expired in June 2015, which required Congress to address the controversial program.⁴³⁷ Congress’s initial effort to reform the program during the 113th Congress ended in failure. However, the 114th Congress passed the USA FREEDOM Act in June 2015. This law banned bulk collection and instead granted the government authority, upon a FISC order, to demand call records from a private firm based on a specific selection

https://www.washingtonpost.com/world/national-security/administration-lawmakers-defend-nsa-program-to-collect-phone-records/2013/06/06/2a56d966-ceb9-11e2-8f6b-67f40e176f03_story.html.

⁴³⁰ Ibid.

⁴³¹ Ellen Nakashima, “Sen. Patrick Leahy calls for end to NSA bulk phone records program,” *The Washington Post* (September 24, 2013), accessed April 2, 2016, https://www.washingtonpost.com/world/national-security/sen-patrick-leahy-calls-for-end-to-nsa-bulk-phone-records-program/2013/09/24/85a21f66-252a-11e3-b3e9-d97fb087acd6_story.html.

⁴³² Dianne Feinstein and Saxby Chambliss, “Feinstein, Chambliss Statement on NSA Phone Records Program” (June 6, 2013), accessed April 3, 2016, <http://www.intelligence.senate.gov/press/feinstein-chambliss-statement-nsa-phone-records-program-0>.

⁴³³ Mike Rogers and Dutch Ruppersberger, “Joint Statement by House Intelligence Chairman Mike Rogers and Ranking Member C.A. Dutch Ruppersberger” (June 6, 2013), accessed April 3, 2016, <http://intelligence.house.gov/press-release/joint-statement-house-intelligence-chairman-mike-rogers-and-ranking-member-ca-dutch>.

⁴³⁴ Ellen Nakashima, Jerry Markon, and Ed O’Keefe, “Lawmakers defend and criticize NSA program to collect phone logs.”

⁴³⁵ Sheldon Whitehouse, “Why Americans Hate Government Surveillance but Tolerate Corporate Data Aggregators” (Lawfare Blog, June 2, 2015), accessed April 3, 2016, <https://www.lawfareblog.com/why-americans-hate-government-surveillance-tolerate-corporate-data-aggregators>.

⁴³⁶ Ibid.

⁴³⁷ PATRIOT Sunsets Extension Act of 2011, Pub L. No. 112-14, 25 Stat. 216 (2011).

term.⁴³⁸ Telecommunications companies are only required to maintain call records for 18 months, though.⁴³⁹ This raises the possibility that the legislation diminished some intelligence effectiveness because the government may not be able to obtain the metadata when it needs the information. The USA FREEDOM Act also reformed the FISC by requiring the designation of at least five *amici curiae* to assist the court with novel or significant legal issues.⁴⁴⁰ Additionally, the Act increased transparency of the FISC by requiring the DNI to perform a declassification review of significant opinions and make the redacted forms publicly available.⁴⁴¹

The congressional debate regarding surveillance did not end with the USA FREEDOM Act. Section 702 will sunset in December 2017, which means Congress must address this program as well. This process has been further complicated by the European Court of Justice's decision in *Schrems*, which struck down the "Safe Harbor Agreement" that governed digital information between the European Union (EU) and the U.S.⁴⁴² This decision, and the new information-sharing arrangement under the "EU-U.S. Privacy Shield," have major economic implications for American businesses. Congress will have to consider economic factors like this when analyzing Section 702.

The Use of Armed Unmanned Aerial Vehicles

The U.S.'s use of armed unmanned aerial vehicles (UAVs or drones) became more prevalent after 9/11 as America continues to battle transnational terrorist groups. Although the majority of the intelligence behind the U.S. drone program remains secret, open-source information has shed light on certain aspects of the program. The growing reliance on armed drones illustrates two important features of the relationship between IC actions and Congress.⁴⁴³

First, armed drones serve as an example of Congress's ability to effectively perform its oversight role. Drones are extremely effective, and Congress has mostly supported the drone program. Part of this stems from the relationship SSCI and HPSCI have with the CIA regarding the drone program. Members from the committees have stated that they receive regular updates from the CIA with respect to the drone program, which has helped create bipartisan support of the program. Senator Feinstein remarked:

The Senate Intelligence Committee . . . has devoted significant time and attention to the drone program. We receive notification with key details shortly after every strike, and we

⁴³⁸ USA FREEDOM Act of 2015, Pub L. No. 114–23, § 103, 129 Stat. 268 (2015). A specific selection term "is a term that specifically identifies a person, account, address, or personal device, or any other specific identifier." *Ibid.* § 107(k)(4).

⁴³⁹ Retention of Telephone Toll Records, 47 C.F.R. § 42.6 (2014).

⁴⁴⁰ USA FREEDOM Act of 2015, Pub L. No. 114–23, § 401, 129 Stat. 268 (2015).

⁴⁴¹ *Ibid.*, § 402.

⁴⁴² Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner* 2015 E.C.R. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=169195&doclang=en>.

⁴⁴³ New American Foundation, "Drone Wars: Pakistan Analysis," accessed April 20, 2016, <http://securitydata.newamerica.net/drones/pakistan-analysis.html>. When President Bush left office, he had reportedly signed off on 48 drone strikes in Pakistan. In comparison, President Obama has reportedly signed off on more than 348 strikes in Pakistan alone. The majority of U.S. drone strikes have occurred in the tribal regions of Pakistan and Afghanistan, but the U.S. has also operated drones in Iraq, Syria, Libya, Somalia, and Yemen.

hold regular briefings and hearings on these operations. Committee staff has held 28 monthly in-depth oversight meetings to review strike records and question every aspect of the program including legality, effectiveness, precision, foreign policy implications and the care taken to minimize noncombatant casualties.⁴⁴⁴

Congress's support of the drone program "stands in sharp contrast to the criticism among lawmakers of the now defunct CIA program to capture and interrogate ... suspects in secret prisons."⁴⁴⁵ Congressional leaders like Senator Feinstein have assured the public that Congress remains an active player in overseeing the drone program. However, the use of armed drones has sparked criticism in Congress at times. In fact, Senator Rand Paul filibustered John Brennan's nomination to lead the CIA over concerns about whether an American could be targeted by an armed drone and the due process that American should be afforded.⁴⁴⁶

Second, armed drones have produced a dynamic congressional debate regarding Title 10⁴⁴⁷ and Title 50,⁴⁴⁸ and the potential shift of drone operations from CIA to DOD. Although the White House has advocated the switch from CIA to DOD for over two years in the interests of transparency, congressional debate about the switch was revived following the report "that a CIA drone strike in January [2015] accidentally killed an American held hostage by al Qaeda."⁴⁴⁹ Proponents of the switch, such as Senator John McCain, Chairman of the SASC, claim that a strictly DOD drone program will be more transparent and more efficient. However, SSCI leaders are apparently opposed to the transfer of the program.⁴⁵⁰ Those who favor maintaining the status quo argue that the HASC and the SASC will be less equipped to effectively oversee the drone program than the HPSCI and SSCI. They also note that many DOD programs continue to remain secret, even to the HASC and SASC.⁴⁵¹ Central to this debate is the CIA's effectiveness in carrying out drone operations. Numerous congressional leaders, including Senator Feinstein, and IC officials claim that the CIA's effectiveness at operating drones has been far superior to that of DOD. The proponents of keeping drone operations in the CIA's control claim that if the U.S. values effectiveness, drone operations need to remain with the CIA.

⁴⁴⁴ Dianne Feinstein, "Letters: Sen. Feinstein on drone strikes," *Los Angeles Times* (May 17, 2012), accessed March 30, 2016, <http://articles.latimes.com/2012/may/17/opinion/la-le-0517-thursday-feinstein-drones-20120517>.

⁴⁴⁵ Mark Mazzetti and Matt Apuzzo, "Deep Support in Washington for C.I.A.'s Drone Missions," *The New York Times* (April 25, 2015), accessed March 30, 2016, http://www.nytimes.com/2015/04/26/us/politics/deep-support-in-washington-for-cias-drone-missions.html?_r=0.

⁴⁴⁶ Ed O'Keefe and Aaron Blake, "Rand Paul conducts filibuster in opposition to John Brennan, Obama's drone policy," *The Washington Post* (March 7, 2013), March 30, 2016, https://www.washingtonpost.com/politics/rand-paul-conducts-filibuster-in-opposition-to-john-brennan-obamas-drone-policy/2013/03/06/1367b1b4-868c-11e2-9d71-f0feafdd1394_story.html.

⁴⁴⁷ Title 10 of the U.S. Code provides the statutory authority under which the armed forces operates.

⁴⁴⁸ Title 50 of the U.S. Code provided the statutory authority under which the IC operates.

⁴⁴⁹ Chris Woods, "Moving the Drone Program from the CIA to the Pentagon Won't Improve Transparency," *Foreign Policy* (May 8, 2015), accessed March 30, 2016, <http://foreignpolicy.com/2015/05/08/moving-the-drone-program-from-the-cia-to-the-pentagon-wont-improve-transparency-yemen-pakistan-jsoc/>.

⁴⁵⁰ Karen DeYoung, "Debate is renewed on lethal drones operations," *The Washington Post* (May 5, 2015), accessed March 30, 2016, https://www.washingtonpost.com/world/national-security/debate-is-renewed-on-control-of-lethal-drone-operations/2015/05/05/f096629c-f28c-11e4-bcc4-e8141e5eb0c9_story.html.

⁴⁵¹ Ibid.

Current Perspectives and Analysis

Analyzing the Structure of Congressional Oversight

There are two distinct perspectives on how Congress should be structured to oversee the IC. One perspective favors a single joint committee, or at a minimum, consolidating the appropriation and authorization responsibilities in the HPSCI and SSCI. The other perspective accepts the vision of the Church Committee, and generally supports the current structure with each chamber maintaining an authorizing committee and separate appropriations committee.

Those who support a Joint Intelligence Committee claim the current congressional oversight system is inadequate and ineffective, and that unified congressional oversight would be more effective.⁴⁵² Amy Zegart, a Senior Fellow at the Hoover Institution, argues that a Joint Intelligence Committee is necessary to correct the congressional dysfunction that was cited by the 9/11 Commission.⁴⁵³ Dr. Zegart believes that the protected status of the appropriations committees weakens the influence of the authorizing committees.⁴⁵⁴ A Joint Intelligence Committee would break this paradigm because it would unify congressional oversight, which its advocates argue would produce more effective congressional oversight. Significantly, former HPSCI Chairman, DCI, and Director of the CIA Porter Goss argued that a joint committee would improve the competency and professionalism of congressional oversight.⁴⁵⁵ He acknowledged, however, that sorting out the politics of such a committee structure would be complicated and questioned whether the unavoidable disruption would be worth the cost.⁴⁵⁶

Interviews with legislative professionals reveal ambivalence and skepticism regarding the proposal to establish a Joint Intelligence Committee. Instead, these experts expressed confidence in the current oversight structure and the manner in which it functions. Britt Snider and Gregory Treverton, both former Church Committee and SSCI staffers, expressed support for the current congressional oversight structure, as does Professor Loch Johnson in his prolific writing on the subject.⁴⁵⁷ They all believe the current oversight structure maximizes checks and balances between the branches of government, as well as within Congress.⁴⁵⁸ Snider stated he “thought it was useful to have the appropriations committees serving as a check on the actions taken by the authorizing committees, i.e. the intelligence committees.”⁴⁵⁹

Furthermore, Congressman Peter King, Dr. Robert Kadlec (SSCI Majority Deputy Staff Director and former Homeland Security Council official), and Dr. Michael Vickers (former

⁴⁵² Amy B. Zegart, “The Domestic Politics of Irrational Intelligence Oversight,” *Political Science Quarterly* 126, iss. 1 (2011): 1-25. Zegart’s views in the context of a Joint Intelligence Committee are included to provide a descriptive account of the root causes of congressional oversight inadequacies, not as a prescriptive assessment.

⁴⁵³ *Ibid.*, 2.

⁴⁵⁴ *Ibid.*

⁴⁵⁵ Porter Goss, interview by Steven T. Brackin and Eric Manpearl, Austin, Texas, September 16, 2015.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ Loch K. Johnson, “Balancing Liberty and Security,” in *Intelligence and the National Security Strategist*, eds. Roger George and Robert Kline (Lanham, MD: Rowman & Littlefield Publishers, 2006), 65-83; Britt Snider, interview by Steven Brackin and Courtney Weldon, Washington, D.C., March 1, 2016; Treverton interview.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ Snider interview.

Undersecretary of Defense for Intelligence and CIA officer) all agreed that having two separate intelligence committees ensured that divergent views were considered and broadened the base of congressional support for intelligence activities.⁴⁶⁰ Dr. Vickers underscored the importance of collaboration across committees, particularly the intelligence and armed services committees, and feared coordination would suffer if a joint committee were created.⁴⁶¹ Britt Snider was concerned that “oversight might suffer if the authorizing and appropriating functions were lodged in a single committee because there would no longer be competing voices or positions within the Congress. Having separate committees in both Houses responsible for authorizing and appropriating the funding of intelligence, ensures a more balanced result over the long term.”⁴⁶²

Additionally, the Senate and House are independent chambers with distinct personalities and cultures. Although the chambers come together in conference committees to compromise on legislation, a Joint Intelligence Committee would force compromise much earlier in the legislative process. In contrast, the current system allows for the respective bodies to work on different areas, and then reach a compromise at the end in conference.⁴⁶³ The Joint Intelligence Committee would create a more homogenized approach and the independence of the Senate and House would be lost.⁴⁶⁴ Also, tension at the end of the legislative process often forces compromise between the two chambers, and this pressure would not be present if the push for compromise came at the beginning of the process with a joint committee.⁴⁶⁵ Thus, a Joint Intelligence Committee could actually impair Congress’s ability to conduct effective oversight.

Divergent views and broad support are critical to effective oversight as well. A joint committee would limit the number of people actually conducting oversight because the one committee would replace the two currently in place. Snider and Kadlec were concerned by the possibility that the relationship between the IC and a singular Joint Intelligence Committee could become frayed and there would be no other committee to perform the necessary congressional oversight functions while the trust was being rebuilt.⁴⁶⁶ This would be detrimental to an oversight process that is heavily dependent on trust and relationships. They argued the current structure mitigates this risk. If the relationship between the IC and one of the oversight committees deteriorates significantly, the committee in the other chamber can still work with the IC to ensure that oversight is conducted while the relationship with the first committee is repaired.⁴⁶⁷ Experts with

⁴⁶⁰ Robert Kadlec, interview by Eric Manpearl and Chelssie Lopez, Washington, D.C., January 15, 2016; Michael Vickers, interview by Steven T. Brackin and Eric Manpearl, Austin, Texas, November 20, 2015; and Peter King, interview by Steven T. Brackin, Austin, Texas, November 9, 2015.

⁴⁶¹ Vickers interview. Dr. Vickers communicated the importance of functional relationships among committee members in order to find solutions to unforeseen issues of coordination required to ensure the effectiveness and proper oversight of the entire U.S. Intelligence Community.

⁴⁶² Snider interview; and Smist, *Congress Oversees the United States Intelligence Community*, 116-119.

⁴⁶³ Kadlec interview; John Moseman, interview by Anna Waterfield and Danielle Oxford, Washington, D.C., January 16, 2016.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Kadlec interview; and Snider interview.

⁴⁶⁷ *Ibid.*; and L. Elaine Halchin and Frederick M. Kaiser, *Congressional Oversight of Intelligence: Current Structure and Alternatives*, CRS Report to Congress (Washington, D.C.: Congressional Research Service, 2012).

past SSCI and HPSCI service did not believe that a Joint Intelligence Committee should be established, or at the very least did not believe it was politically realistic.⁴⁶⁸

Balancing Oversight with IC Effectiveness

There is a widespread concern that oversight will become excessively bureaucratic and have a negative impact on the effectiveness of the IC. Former DCI Goss and Congressman Peter King both expressed strong concern that overly strict oversight may discourage creativity and risk-taking within the IC.⁴⁶⁹ Both believed that HPSCI and SSCI oversight should focus on authorizing and resourcing effective, legal programs and operations.⁴⁷⁰ Joan Dempsey, a former Assistant DCI and Executive Director of the PFIAB, also expressed concern that the IC often draws the wrong lessons from its experiences with various oversight bodies—particularly highly politicized incidents amplified by the media.⁴⁷¹

Responding to the demands of intelligence oversight bodies imposes a cost on the IC. The IC is arguably bogged down by congressional reporting requirements of questionable current relevance. These congressionally directed actions are legitimate when first legislated, but become less relevant over time and are rarely repealed. Valuable time and resources are taken up producing documents that are no longer beneficial to committee members conducting oversight. This inhibits the IC's ability to effectively perform its mission without aiding congressional oversight. This time and effort would be better served furthering the mission of the IC and working on issues that are of actual current concern to congressional overseers. Dr. Treverton recounted an experience where a single question asked by the SSCI staffer triggered the creation of a sizable “task force” within the relevant agency.⁴⁷²

There is potential to streamline reporting requirements by increasing communication and information-sharing across the array of oversight entities. Several experts supported the idea of a study to examine the relationship between the growth of the intelligence oversight enterprise and the corresponding growth of IC administrative and other staff needed to service oversight demands.⁴⁷³

⁴⁶⁸ Simply put, Secretary Bill Richardson, a former HPSCI Member, expressed his skepticism of a Joint Intelligence Committee as unlikely due to the reality of “turf battles between Congressional committees.” Honorable William “Bill” Richardson, interview by Steven Brackin, Eric Manpearl, and Anna Waterfield, Austin, Texas, October 15, 2015; Kadlec interview (Kadlec did not believe a Joint Intelligence Committee should be established); Moseman interview; Eric Greenwald, interview by Eric Manpearl, Austin, Texas, February 5, 2016 (Greenwald did not believe a Joint Intelligence Committee was politically realistic); Jay Hulings, interview by Eric Manpearl, Austin, Texas, February 5, 2016 (Hulings did not believe a Joint Intelligence Committee was politically realistic); and Geof Kahn, interview by Steven Brackin and Meenakshi Awasthi, Washington, D.C., February 29, 2016.

⁴⁶⁹ Goss interview; and King interview.

⁴⁷⁰ Ibid.

⁴⁷¹ Joan Dempsey, “Executive Branch Supervision and Oversight of U.S. Intelligence Panel Discussion,” Intelligence in American Society Conference, University of Texas at Austin, March 30, 2016.

⁴⁷² Treverton interview.

⁴⁷³ Ibid.; Snider interview; and Slick interview. A longitudinal study correlating the growth of IC staff (perhaps using lawyers as a proxy) with the growth in the number of IC oversight entities and their respective staffs should be conducted. Additionally, the number of man-hours or full-time equivalents (FTEs) committed annually to servicing oversight requirements should be incorporated into the study.

Relationships and Trust

There is an overwhelming sense that effective congressional oversight of intelligence requires trusting relationships between counterparts in the Legislative and Executive Branches. Trust is central to the legitimacy of the IC because it is an inherently secret group of institutions. Functioning relationships and mutual trust cannot be imposed; instead, they must be cultivated.

Excessive partisanship destroys trust. Politicization diminishes trust between the IC and Congress and leads to a lack of public confidence in government's ability to meet its responsibilities, including in national security. Ideally, national security debates should not be politicized. One senior Senate staffer indicated it was the committee chairman's job to decrease politicization as much as possible.⁴⁷⁴ Steve Hadley, a former National Security Advisor, concluded that trust between the IC and Congress starts with the leaders of the committees.⁴⁷⁵ Thus, the chairmen of the SSCI and HPSCI set the tone for the relationship between their committees and the IC. Expert interviews confirmed that congressional oversight of intelligence has functioned most effectively when the leadership of the committees were members with strong bipartisan reputations.⁴⁷⁶ Thus, it is important for Senate and House leaders to take this into consideration when selecting chairmen for the respective oversight committees.

As noted, the heads of the IC are required to “keep the congressional intelligence committees fully and currently informed” of important intelligence activities, and any covert action “finding” must be notified to the committees as soon as possible.⁴⁷⁷ If, however, the President determines that it is essential to limit access to a covert action finding in order to “meet extraordinary circumstances affecting vital interests of the United States,” the President may limit such notification to the “Gang of Eight.”⁴⁷⁸ In order to do so, the President must provide a statement setting out the reasons for limiting notification to the Gang of Eight and notify these leaders about any significant changes in a previously approved covert action.⁴⁷⁹

Congressional notifications have on occasion in the past been limited to the “Gang of Four”—the chairmen and ranking members of the two congressional intelligence committees. Although this is not based in statute, it is “employed when the intelligence community believes a particular intelligence activity to be of such sensitivity that a restricted notification is warranted in order to reduce the risk of disclosure, inadvertent or otherwise.”⁴⁸⁰ Notwithstanding extant statutory provisions regarding notice of covert actions, some legal scholars argue that the President retains

⁴⁷⁴ Kadlec interview.

⁴⁷⁵ Steve Hadley, interview by Kristine Henry, Sydney Taylor, and Raheem Chaudhry, Washington, D.C., December 15, 2015. Mr. Hadley conveyed an anecdote from the Pike Committee regarding the contrasting dynamics between open and closed hearings, specifically an incident concerning Congressman Pike and Dan Christman.

⁴⁷⁶ Inman interview.

⁴⁷⁷ National Security Act as amended, §503 [50 U.S.C. 413b] (b) and (c); and Intelligence Authorization Act for FY1991, P.L. 102-88, Title VI, §602 (a) (2), 50 U.S.C. 413b (a).

⁴⁷⁸ Erwin, “Sensitive Covert Action Notifications,” 1.

⁴⁷⁹ *Ibid.*

⁴⁸⁰ Marshall Curtis Erwin, “Gang of Four, Congressional Intelligence Notifications,” CRS Report No. R40698 (Washington DC: Congressional Research Service, 2013), 1, accessed March 18, 2016, <https://www.fas.org/sgp/crs/intel/R40698.pdf>.

constitutional authority to “withhold notice of covert actions from the committees for as long as he deems necessary.”⁴⁸¹

This notification process is not without its critics. Specifically, some members of Congress believe that the limited notification process is over-utilized and that limited access to information does not allow Congress to conduct effective oversight. A number of experts echoed the sentiment that the Executive’s overreliance on limited notification to Congress undermines trust between Congress and the IC. Britt Snider expressed concern that the use of limited notice had been expanded to sensitive collection programs as evidenced by the TSP revelations, despite the law’s intent that only covert action findings could be limited in this fashion.⁴⁸² Former DCI Goss, also a former HPSCI chairman, explained that the Gang of Eight procedures challenged his ability to maintain an environment of trust and cohesion among HPSCI members.⁴⁸³ Other experts also expressed concern about limiting information to the Gang of Eight, because they believe it not only impacted trust between the Congress and the Executive, but also undermined effective oversight.⁴⁸⁴

Ensuring Effective Oversight

Members must be knowledgeable on a variety of national security issues to ensure the intelligence committees can conduct effective oversight. The standing orders and rules of each chamber as well as the legislation establishing the intelligence committees seek to address this by instituting rules regarding committee assignments.⁴⁸⁵ Having members who serve on the Armed Services, Foreign Affairs, Judiciary, Homeland Security, and Appropriations committees also serve on the intelligence committees increases the likelihood that members will be conversant in national security issues. The members with overlapping committee assignments are able to bring different perspectives to the intelligence committee based on the work and issues they are analyzing in their other committees. Also, as intelligence, armed forces, and homeland security activities become more integrated, it is increasingly important for the Intelligence, Armed Services, and Homeland Security committees to have strong relationships in both chambers. HPSCI staff confirmed the value of overlapping committee assignments.⁴⁸⁶ Overlap in committee assignments enables members to educate their colleagues about prominent issues, the threat environment, capabilities, and activities being examined by the other committees. Also, overlap in committee assignments allows relationships to be built across committees, which reduces tensions and diminishes the potential for turf wars between committees, which are detrimental to conducting effective oversight.

Effective oversight requires great investment from members, too. Members must educate themselves about an arcane and nuanced field. This requires time and effort to ensure they are

⁴⁸¹ Erwin, “Sensitive Covert Action Notifications,” 3.

⁴⁸² Snider interview.

⁴⁸³ Goss interview.

⁴⁸⁴ Moseman interview; Michael Allen, interview by Anna Waterfield and Danielle Oxford, Washington, D.C., January 14, 2016.

⁴⁸⁵ Judy Schneider, *Senate Select Committee on Intelligence: Term Limits and Assignment Limitations*, Report for Congress (Washington, D.C.: Congressional Research Center, 2004), 3.

⁴⁸⁶ Kahn interview.

able to understand the matters presented to them by the IC. Many experts acknowledged that time constraints are a major impediment to conducting effective oversight.⁴⁸⁷ Giving members of the intelligence committees fewer committee assignments would enable them to devote more time to becoming knowledgeable about intelligence, and provide more time and opportunity to cultivate relationships of trust with IC officials, thereby improving their ability to fulfill their oversight duties.

While the HPSCI and SSCI are currently valued committee assignments, they have gone through periods—even in the post 9/11 era—when they were not. With these potential issues in view, it may from time to time be prudent to create incentives for members who agree to serve on the intelligence committees. Members of Congress and congressional staffers offered that the leadership could give intelligence committee members a stronger voice in conference, offer members sought-after non-intelligence committee assignments, decrease the fundraising burden of members, and give members increased television time as ways to incentivize service on the intelligence committees.⁴⁸⁸

Few oversight members currently have intelligence or national security experience. Therefore, members do not come to the committee with an understanding of the subject matter that they are charged to oversee. This is a rather unique feature of the intelligence committees because members' previous work experience may be relevant to numerous other committees. While the Senate eliminated term limits on the SSCI, the HPSCI still maintains eight-year term limits.⁴⁸⁹ Thus, the HPSCI suffers from turnover, and the most knowledgeable members are forced to leave the committee despite the fact that it takes a long time to develop the expertise necessary to conduct effective oversight.⁴⁹⁰

One counter-argument to extending or removing term limits, expressed by an official from a non-governmental organization, is that members can by virtue of long service become captured by the IC.⁴⁹¹ However, we found little evidence that the congressional oversight committees have been captured by the IC, especially after the Iran-Contra affair.⁴⁹² Instead, Congress has been increasingly interested in knowing about intelligence activities, and has at times actively sought to constrain the IC through legislation, such as banning bulk collection in the USA FREEDOM Act, and tried to increase those intelligence activities that Congress believed were beneficial.

Another counter-argument is that having permanent committee members leads to the recycling of stale ideas and can allow highly partisan members to stay on the committees.⁴⁹³ New members, on the other hand, can challenge the status quo, which is often beneficial, and can replace the

⁴⁸⁷ Greenwald interview; Hulings interview; and King interview.

⁴⁸⁸ Ibid.; and Richardson interview.

⁴⁸⁹ Judy Schneider, *Senate Select Committee on Intelligence*.

⁴⁹⁰ Allen interview.

⁴⁹¹ Patrice McDermott, interview by Kristine Henry, Sydney Taylor, and Raheem Chaudhry, Washington, D.C., December 16, 2015.

⁴⁹² Treverton interview. In his comments regarding a Joint Intelligence Committee, Dr. Treverton reflected on the concern of the Church Committee that a Joint Committee would be more susceptible to cooptation by the IC, a concern he no longer shares personally.

⁴⁹³ Moseman interview.

members who view oversight as a partisan exercise.⁴⁹⁴ New members can help to ensure new ideas and perspectives are brought to the fore while increasing or removing term limits would guarantee the committees had the expertise necessary for conducting effective intelligence oversight.

Improving Public Perception of Congressional Oversight

Public perception is an important aspect of congressional oversight. Several experts noted that closed (or classified) hearings resulted in better questions being asked by members because there was no incentive for members to “play to the cameras.” Others believe that increasing the frequency of public hearings could have a positive effect by improving public perception of the oversight process.⁴⁹⁵ In a representative democracy, Congress serves as the agent of the American people, and the people must have confidence that their representatives are able to adequately conduct oversight of the IC, because the IC cannot share its secrets with the entire public. Public hearings can help to demonstrate that oversight is indeed taking place in a meaningful manner. Most oversight hearings would continue to be closed to facilitate the exchange of classified information.

Recommendations

We recommend:

- All congressionally directed actions that require written reports by IC agencies should include a three-year sunset provision, with the requirement subject to renewal if the same information is required in future years;
- Senate and House leaders should prioritize bipartisanship in appointing leaders and members to serve on the intelligence oversight committees;
- Congress should institutionalize the practice of assigning members to the intelligence oversight committees who also serve on the Armed Services, Foreign Affairs, Appropriations, Judiciary, *and* Homeland Security committees;
- SSCI and HPSCI members should be assigned to fewer other committees to accommodate the workload associated with rigorous intelligence oversight;
- HPSCI should either increase or remove its term limits for members;
- SSCI and HPSCI should hold more open hearings to increase public awareness of congressional oversight of intelligence activities; and
- Congress should direct a study of the growth over time of IC staff and other resources committed to servicing oversight requirements imposed by the Congress and relevant Executive Branch bodies.

⁴⁹⁴ Ibid.

⁴⁹⁵ Hadley interview; Steve Aftergood, interview by Kristine Henry, Sydney Taylor, and Raheem Chaudhry, Washington, D.C., December 15, 2015.

Chapter 6.

Judicial Oversight of the Intelligence Community

by Eric Manpearl and Raheem Chaudhry

Introduction

The Judicial Branch has a limited, but important role in the oversight of the U.S. IC. The judiciary is independent from both the Executive and Legislative Branches, and has consistently sought to maintain this independence.⁴⁹⁶ While the judiciary's power is limited to "cases" and "controversies," the role of judges as neutral and independent decision-makers enables the Judicial Branch to play a vital role in overseeing, and at times constraining or empowering, intelligence activities.⁴⁹⁷ After analyzing the historical and current implications of the Judicial Branch related to the IC from two general perspectives—surveillance and non-surveillance—several recommendations are offered to help improve this aspect of the oversight process.

Surveillance and the Judicial Branch

Courts' analysis of surveillance has had a significant impact on intelligence activities. While most surveillance occurs overseas, the Judicial Branch becomes involved when surveillance occurs in the U.S. or involves U.S. persons protected by the Constitution. The role of the Judicial Branch in surveillance oversight has become robust and consequential.

Prior to the Foreign Intelligence Surveillance Act of 1978

The Supreme Court originally held that wiretapping was not a "search" under the Fourth Amendment because there was not a search or seizure of tangible material or actual physical intrusion into one's personal property in the *Olmstead* case in 1928.⁴⁹⁸ However, the court overruled *Olmstead* in *Katz* in 1967, rejecting that a "search" only occurs from physical intrusion.⁴⁹⁹ The court determined the Fourth Amendment "protects people, not places," and created a test based on whether there was a reasonable expectation of privacy.⁵⁰⁰ However, *Katz* did not determine whether this same analysis would apply to situations involving national security, which would include intelligence surveillance.⁵⁰¹ This issue was partially considered in *Keith* in 1972, where the court held that prior judicial approval was required to satisfy the Fourth Amendment for intelligence collection involving domestic security surveillance; however, the court did not consider the scope of the President's surveillance power with respect

⁴⁹⁶ See for example *Mistretta v. U.S.*, 488 U.S. 361, 385 (1989), discussing the importance of maintaining the limited grant of power of the judiciary over cases and controversies to "ensure the independence of the Judicial Branch by precluding debilitating entanglements between the Judiciary and the two political Branches."

⁴⁹⁷ U.S. Const. art. III § 2, cl. 1.

⁴⁹⁸ *Olmstead v. U.S.*, 277 U.S. 438, 466 (1928).

⁴⁹⁹ *Katz v. U.S.*, 389 U.S. 347, 352–53 (1967).

⁵⁰⁰ *Ibid.*, 351, 361.

⁵⁰¹ *Ibid.*, 358, n. 23.

to the activities of foreign powers or their agents.⁵⁰² Thus, the President continued to enjoy broad constitutional authority to conduct foreign intelligence surveillance without complying with the same Fourth Amendment requirements that had been established for domestic surveillance.⁵⁰³

FISA Creates the Foreign Intelligence Surveillance Court and Foreign Intelligence Surveillance Court of Review

In the 1970s, revelations of abuses by the Nixon Administration and IC, which included domestic surveillance of anti-Vietnam War protestors, spurred public uproar.⁵⁰⁴ This led to the enactment of the Foreign Intelligence Surveillance Act of 1978 (FISA), which restricted the government's ability to conduct electronic surveillance in the U.S.⁵⁰⁵ The law represented a compromise between those who believed a warrant should always be required for surveillance, even for foreign intelligence surveillance, and those who did not believe a warrant should ever be required. Ultimately, Congress determined a “judicial warrant should be required whenever the [F]ourth [A]mendment rights of Americans might be involved.”⁵⁰⁶ This resulted in the creation of two new—and very unique—Article III courts, the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review.

The FISC comprised seven district court judges selected from seven of the judicial circuits by the Chief Justice of the Supreme Court to serve for a maximum of seven years.⁵⁰⁷ This selection process differed from that of traditional Article III judges, which is by presidential appointment with the advice and consent of the Senate. The FISC was granted jurisdiction to hear applications and grant orders to approve electronic surveillance anywhere in the U.S., and the proceedings were *ex parte*, with only the government appearing before the court.⁵⁰⁸ Such a special court was deemed necessary so that it could deal with classified information. Traditional Article III courts lacked the necessary information storage facilities and security clearances to conduct such sensitive oversight.⁵⁰⁹

FISA also created a court of review, the FISCOR, to review the denial of an application. The FISCOR comprises three district court or courts of appeals judges, also selected by the Chief

⁵⁰² *U.S. v. U.S. Dist. Court for E. Dist. of Mich.*, S. Div. (“Keith”), 407 U.S. 297, 320–24 (1972).

⁵⁰³ *U.S. v. Truong*, 629 F.2d 908, 912–14 (4th Cir. 1980) (holding the President has the inherent power to conduct electronic surveillance for foreign intelligence purposes without a court order).

⁵⁰⁴ Select Comm. to Study Governmental Operations with respect to Intelligence Activities, Intelligence Activities and the Rights of Americans, S. Rep. No. 94–755, Book II (1976); and Seymour Hersh, “Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years,” *The New York Times*, December 22, 1974.

⁵⁰⁵ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, 92 Stat. 1783 (1978).

⁵⁰⁶ H.R. Rep. No 95–1283, pt. 2, at 68 (1978).

⁵⁰⁷ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, § 103(a), 92 Stat. 1783 (1978).

⁵⁰⁸ *Ibid.*, § 105.

⁵⁰⁹ Richard A. Clarke, Michael J. Morrell, Geoffrey R. Stone, Cass R. Sunstein, and Peter Swire, “Liberty and Security in a Changing World: Report and Recommendations of the President’s Review Group on Intelligence and Communications Technologies” (Washington D.C., 2013), 66.

Justice. If the FISC determines the application was properly denied, the government can petition the Supreme Court for a *writ of certiorari*.⁵¹⁰

FISA required that the government obtain approval from the FISC to conduct electronic surveillance for foreign intelligence purposes inside the U.S., which created the first judicial oversight of foreign intelligence investigations. To approve an application, the FISC had to find probable cause that the “target of the electronic surveillance is a foreign power or an agent of a foreign power.”⁵¹¹ The FISC was also required to approve the government’s minimization procedures, a set of rules that dictated how a government agency would limit the accessibility, retention, and dissemination of inadvertently acquired material concerning U.S. persons who were not the target of the surveillance.⁵¹² However, FISA did include an emergency provision to allow surveillance to occur before obtaining FISC approval in special circumstances.⁵¹³

The law did not grant the FISC any oversight role regarding foreign intelligence activities outside of the U.S., even if a U.S. citizen was the target.⁵¹⁴ Though judicial supervision was limited in this respect, the creation of the FISC provided an important safeguard to the abuses that had occurred in the past. The statute explicitly prohibited a U.S. person from being targeted “solely upon the basis of activities protected by the first amendment,” and the FISC was now in place to enforce this prohibition.⁵¹⁵

Congress minimally expanded FISA before the attacks on September 11, 2001. In 1995, FISA was extended to encompass physical searches to obtain foreign intelligence information in the U.S.⁵¹⁶ In 1998, FISA was extended to “pen register” and “trap-and-trace” orders. Upon receipt of a court order, this extension enabled the government to obtain a list of the phone numbers and e-mail addresses of a target’s contacts and to permit limited access to certain business records.⁵¹⁷

The “Wall” Between the IC and Law Enforcement Prior to 9/11

The law was consistently interpreted by the Executive Branch to require the primary purpose of the surveillance or searches to be foreign intelligence collection rather than law enforcement. This was based on FISA’s requirement that the “purpose” of the surveillance was to acquire foreign intelligence information.⁵¹⁸ Courts contributed to this understanding in opinions where the constitutionality of FISA was challenged when the government introduced evidence collected pursuant to FISA orders in criminal prosecutions. Courts held that the primary purpose of the

⁵¹⁰ The Supreme Court has discretion whether to hear a case.

⁵¹¹ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, § 104(a)(4)(A), 92 Stat. 1783 (1978).

⁵¹² *Ibid.*, §§ 101(h), 104(a)(5). A U.S. Person is defined as “a citizen of the United States, an alien lawfully admitted for permanent residence . . . an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power.” *Ibid.*, § 101(i).

⁵¹³ *Ibid.*, § 105(e).

⁵¹⁴ Clarke, “Liberty and Security in a Changing World,” 66.

⁵¹⁵ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95–511, § 105(3)(a), 92 Stat. 1783 (1978).

⁵¹⁶ Intelligence Authorization Act for Fiscal Year 1995, Pub. L. 103–359, §§ 302-304, 108 Stat. 3423 (1994).

⁵¹⁷ Intelligence Authorization Act for Fiscal Year 1999, Pub. L. 105-272, § 602, 112 Stat. 2396, 2410 (1998).

⁵¹⁸ *Ibid.*, § 104(a)(7)(B).

surveillance needed to be the collection of foreign intelligence information.⁵¹⁹ Thus, the “primary purpose” test was developed, and the government determined it was necessary to rigidly separate foreign intelligence and criminal investigations.⁵²⁰

This significantly contributed to the development of the so-called “wall” between the intelligence and law enforcement communities, which inhibited information-sharing. The FBI ceased sharing intelligence information with criminal investigators, and “relevant information from the National Security Agency (NSA) and the CIA often failed to make its way to criminal investigators.”⁵²¹ The “wall” was a major obstacle that contributed to missing opportunities to possibly anticipate the September 11, 2001, terrorist attacks.⁵²²

FISA, the FISC, and the FISCR in the Post 9/11 Era

Following the September 11, 2001, terrorist attacks, Congress enacted the USA PATRIOT Act, which amended FISA in part. One such amendment included increasing the number of judges on the FISC to 11.⁵²³ The attacks demonstrated the importance of information-sharing between the IC and law enforcement agencies. Thus, the USA PATRIOT Act amended FISA to require only that the government demonstrate that the collection of foreign intelligence served a “significant purpose,” rather than “the purpose,” of the investigation.⁵²⁴

Following this change, Attorney General John Ashcroft issued a memorandum, which declared that the USA PATRIOT Act “authorizes intelligence officers who are using FISA to ‘consult’ with federal law enforcement officers to ‘coordinate efforts to investigate or protect against’ foreign threats to national security.”⁵²⁵ Ashcroft interpreted the statute to allow the government to use FISA, even when the primary purpose of the investigation was for law enforcement, as long as a significant purpose was for foreign intelligence.⁵²⁶ However, the FISC rejected this interpretation.⁵²⁷

This led to the first-ever appeal from the FISC, and the FISCR reversed the decision in the *In re Sealed Case*. The FISCR determined that after passage of the USA PATRIOT Act, the government did not need to demonstrate that its primary purpose in conducting electronic surveillance was foreign intelligence. The FISCR stated, “[i]ndeed, it is virtually impossible to

⁵¹⁹ See for example *Truong*, 629 F.2d at 912–14; and *U.S. v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984).

⁵²⁰ James G. McAdams III, “Foreign Intelligence Surveillance Act (FISA): An Overview,” Federal Law Enforcement Training Center (Washington D.C., 2007), 5-6.

⁵²¹ National Commission on Terrorist Attacks Upon the United States, “The 9/11 Commission Report,” 79.

⁵²² *Ibid.*

⁵²³ USA PATRIOT Act of 2001, Pub. L. No. 107–56, § 208, 115 Stat. 272 (2001).

⁵²⁴ *Ibid.*, § 218.

⁵²⁵ Attorney General John Ashcroft, “Memorandum on Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI” (March 6, 2002), accessed March 18, 2016, <http://fas.org/irp/agency/doj/fisa/ag030602.html>.

⁵²⁶ *Ibid.*

⁵²⁷ *In re All Matters Submitted to Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 620-24 (FISA Ct. 2002) abrogated by *In re Sealed Case*, 310 F.3d 717 (FISA Ct. Rev. 2002).

read the 1978 FISA to exclude from its purpose the prosecution of foreign intelligence crimes.”⁵²⁸ Thus, the statutory underpinning of the “wall” was finally removed.

In 2005, *The New York Times* revealed that President George W. Bush had authorized the NSA to collect electronic communications between people inside and outside the U.S. without a FISC order under the Terrorist Surveillance Program.⁵²⁹ In 2006, the Eastern District of Michigan ruled the program was unconstitutional and entered a permanent injunction to terminate the TSP.⁵³⁰ However, the Sixth Circuit stayed the injunction pending the NSA’s appeal, and ultimately reversed this decision in 2007.⁵³¹ Furthermore, Attorney General Alberto Gonzales informed Congress that, in January 2007, the FISC authorized the government “to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of Al-Qaeda or an associated terrorist organization.”⁵³² Thus, the DOJ announced that electronic surveillance occurring under the TSP would be conducted subject to FISC approval from that point forward.⁵³³

In August of that year, Congress passed the Protect America Act of 2007 (PAA). This statute authorized the TSP in law and ensured that electronic surveillance did not encompass surveillance of a person reasonably believed to be outside the U.S.⁵³⁴ Therefore, the FISC no longer had jurisdiction over electronic surveillance in this realm. The power to authorize such surveillance shifted from the FISC to the Director of National Intelligence (DNI) and Attorney General. The FISC’s only role in this area was to ensure that the DNI and Attorney General’s procedures for determining that foreign intelligence activities were targeted on persons reasonably believed to be outside the U.S. were not “clearly erroneous.”⁵³⁵

The PAA was just a stopgap measure, though, and expired in February 2008. Congress then passed the FISA Amendments Act of 2008 (FAA) in July of that year. Similar to the PAA, the FAA authorized the TSP by allowing the government to target non-U.S. persons reasonably believed to be outside the U.S. to collect foreign intelligence information without probable cause if the target was a foreign power or an agent of a foreign power, and without a FISC order.⁵³⁶ The FISC was authorized to approve the DNI and Attorney General’s targeting procedures, minimization rules, and certifications.⁵³⁷

⁵²⁸ *In re Sealed Case*, 310 F.3d 717, 722–36 (FISA Ct. Rev. 2002).

⁵²⁹ Risen and Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts.”

⁵³⁰ *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 438 F. Supp. 2d 754, 782 (E.D. Mich. 2006) vacated, 493 F.3d 644 (6th Cir. 2007).

⁵³¹ See generally *Am. Civil Liberties Union v. Nat’l Sec. Agency*, 493 F.3d 644 (6th Cir. 2007).

⁵³² Attorney General Alberto Gonzalez, “Letter to Senator Patrick Leahy and Senator Arlen Specter” (Department of Justice January 17, 2007), 1, accessed March 19, 2016, http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf.

⁵³³ *Ibid.*

⁵³⁴ Protect America Act of 2007, Pub. L. No. 110–55, § 105A, 121 Stat. 552 (2007).

⁵³⁵ *Ibid.*, § 105C(c).

⁵³⁶ Foreign Intelligence Surveillance Act of 1978 Amendment Acts of 2008, Pub. L. No. 110–261, § 702, 122 Stat. 2436 (2008).

⁵³⁷ *Ibid.* Targeting procedures were to ensure only non-U.S. persons reasonably believed to be outside the U.S. were targeted.

In addition, the FISC was granted the authority to determine and enforce compliance, and the court actively engaged in that role.⁵³⁸ In several instances the FISC restricted the government's access to information because of noncompliance. In March 2009, FISC Judge Reggie Walton found the government had unintentionally failed to comply with the minimization procedures of Section 215 of the USA PATRIOT Act.⁵³⁹ He also discovered that intelligence analysts had been inadequately trained, which resulted in identifiers⁵⁴⁰ being used to query the metadata⁵⁴¹ without first satisfying the reasonable, articulable suspicion standard.⁵⁴² Judge Walton restricted the government's access to the data collected under Section 215, and only permitted the government to access the data upon receiving a FISC order authorizing a query on a case-by-case basis until the government corrected the noncompliance issues, which occurred in September 2009.⁵⁴³ In October 2011, the FISC determined the minimization procedures under Section 702 of the FISA Amendments Act of 2008⁵⁴⁴ did not satisfy either FISA or the Fourth Amendment because of inadvertent acquisitions.⁵⁴⁵ FISC Judge John Bates refused to approve the NSA's continuing acquisitions, and the government was forced to substantially revise its procedures before Judge Bates approved future acquisition.⁵⁴⁶

Following Edward Snowden's unauthorized disclosures of classified information in 2013 regarding foreign intelligence collection by the NSA, the FISC came under greater public scrutiny. Between 1979 and 2013, the government submitted 35,333 applications to the FISC for surveillance and searches under FISA, and the court rejected only 12, which reflected a 99.97% rate of approval.⁵⁴⁷ This led critics to see the FISC as a "rubber stamp." It is important to note that the government receives approval for other *ex parte* proceedings, such as those for Title III wiretaps, almost 100% of the time as well.⁵⁴⁸ Further, Judge Walton wrote that "many applications are altered prior to final submission or even withheld from final submission entirely, often after an indication that a judge would not approve them," and these are not included in the reported statistics.⁵⁴⁹ During the application process, the judges and the court's legal staff may discuss a proposed application with the government, request additional information, convey concerns regarding the legal sufficiency of the application, and hold hearings on the

⁵³⁸ Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 103, 92 Stat. 1783 (1978).

⁵³⁹ *In re Prod. of Tangible Things from Redacted*, No. BR 08-13, 2009 WL 9150913, at *2-10 (FISA Ct. Mar. 2, 2009).

⁵⁴⁰ Identifiers, such as phone numbers and other identifying features, are used to query databases.

⁵⁴¹ The metadata collected consisted of the phone numbers involved in calls, dates of calls, and lengths of calls; the records did not contain the content of calls, identities of parties involved, or precise locations of parties involved.

⁵⁴² *In re Prod. of Tangible Things*, 2009 WL 9150913, at *2-10.

⁵⁴³ See *In re F.B.I.*, No. BR 09-13, 2009 WL 9150914 (FISA Ct. Sept. 3, 2009).

⁵⁴⁴ Section 702 of the FISA Amendments Act of 2008 facilitates the collection of foreign intelligence concerning non-U.S. Persons located outside the U.S. 50 U.S.C. § 1881a (2012).

⁵⁴⁵ *Redacted*, 2011 WL 10945618, at *16-28 (FISA Ct. Oct. 3, 2011).

⁵⁴⁶ *Ibid.*

⁵⁴⁷ Electronic Privacy Information Center, "Foreign Intelligence Surveillance Act Court Order 1979-2014" (November 21, 2015), accessed May 5, 2016, https://epic.org/privacy/wiretap/stats/fisa_stats.html.

⁵⁴⁸ Administrative Office of the United States Courts, "Wiretap Report 2014" (December 31, 2014), accessed December 4, 2014, <http://www.uscourts.gov/statistics-reports/wiretap-report-2014>.

⁵⁴⁹ FISC Judge Reggie B. Walton, "Letter to Senator Patrick J. Leahy" (Foreign Intelligence Surveillance Court, July 29, 2013), 3, accessed May 1, 2016, <https://fas.org/irp/news/2013/07/fisc-leahy.pdf>.

applications.⁵⁵⁰ The FISC found that “24.4% of matters submitted ultimately involved substantive changes to the information provided by the government or to the authorities granted as a result of Court inquiry or action.”⁵⁵¹

Thus, interpreting the reported approval rate of applications on its own can be misleading. This statistic only reflects determinations on the final applications submitted to the FISC and acted on by the court, rather than the continuous process in which the FISC engages that often results in substantive changes. The applications that are ultimately submitted to the court tend to have already been sufficiently vetted in response to the FISC’s concerns such that the government is confident that these applications will be approved. The FISC’s expression of its concerns regarding the legal sufficiency of applications throughout the process taken together with the court’s demonstrated willingness to restrict the government’s access to information as illustrated by Judge Walton’s 2009 and Judge Bates’s 2011 opinions show the FISC is not in fact a rubber stamp.

President Obama responded to public discontent following the disclosures by directing a series of reforms to the NSA’s surveillance programs and working with Congress to make other changes. In January 2014, President Obama directed that queries of the Section 215 database that originally only had to be approved by NSA officials would henceforth need to be approved by the FISC, except in emergencies.⁵⁵²

The legality of the Section 215 program was nonetheless challenged. Although the Southern District of New York ruled the Section 215 program was constitutional and lawful in *Clapper*,⁵⁵³ the Second Circuit ruled it was not authorized by FISA, but declined to issue an injunction.⁵⁵⁴ These same questions were considered in the *Klayman* case by the District Court for D.C., which ruled that the Section 215 program violated the Fourth Amendment.⁵⁵⁵ However, the D.C. Circuit vacated that ruling and remanded the case based on standing because of doubt the plaintiff’s metadata was collected.⁵⁵⁶

In the midst of these court challenges, Congress enacted the USA FREEDOM Act of 2015. This statute replaced the Section 215 program and granted the government authority, upon a FISC

⁵⁵⁰ *Ibid.*, 4-7.

⁵⁵¹ FISC Judge Reggie B. Walton, “Letter to Senator Charles E. Grassley,” *Foreign Intelligence Surveillance Court*, October 11, 2013, 1, <http://www.fisc.uscourts.gov/sites/default/files/Correspondence%20Grassley-2.pdf>.

⁵⁵² “Transcript of President Obama’s January 17, 2014 Speech on NSA Reforms,” *The Washington Post* (January 17, 2014), accessed May 5, 2016, https://www.washingtonpost.com/politics/full-text-of-president-obamas-jan-17-speech-on-nsa-reforms/2014/01/17/fa33590a-7f8c-11e3-9556-4a4bf7bc8d84_story.html. The NSA conducted the bulk collection of telephony metadata under Section 215, which enabled the government to require the production of documents and other tangible things relevant to an authorized national security investigation upon receiving proper authorization.

⁵⁵³ *Am. Civil Liberties Union v. Clapper*, 959 F. Supp. 2d 724, 742–57 (S.D.N.Y. 2013) *aff’d in part, vacated in part, remanded*, 785 F.3d 787 (2d Cir. 2015).

⁵⁵⁴ *Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 810–21, 825–26 (2d Cir. 2015).

⁵⁵⁵ *Klayman v. Obama*, 957 F. Supp. 2d 1, 24–44 (D.D.C. 2013) *vacated and remanded*, 800 F.3d 559 (D.C. Cir. 2015).

⁵⁵⁶ *Obama v. Klayman*, 800 F.3d 559, 562–63 (D.C. Cir. 2015).

order, to demand call records based on a specific selection term.⁵⁵⁷ The statute also explicitly allowed the FISC to “impose additional, particularized minimization procedures” to safeguard against overbroad collection.⁵⁵⁸ The FISC, too, was reformed by the law in response to criticism of the FISC’s *ex parte* proceedings and lack of transparency.⁵⁵⁹ The FISC was required to designate at least five *amici curiae* to assist the court when an application presents a novel or significant issue.⁵⁶⁰ In addition, the statute increased transparency of the FISC by requiring the DNI to perform a declassification review of significant opinions and make the redacted forms publicly available.⁵⁶¹

Current FISC Reform Proposals

Although the FISC was reformed by the USA FREEDOM Act, the court continues to be the subject of reform proposals. Many of these proposals focus on whether a special advocate should be included in FISC proceedings and on the designation process of FISC and FISCR judges.⁵⁶²

Special Advocate

In the last several years, perhaps the most consistent recommendation for judicial oversight reform of intelligence has been the proposal to include a special advocate in FISC proceedings.⁵⁶³ This proposal is advanced in part because it is more consistent with popular notions of how Article III courts should function. However, the Title III process in which law enforcement agencies request warrants, which is analogous to the FISC process, is not adversarial. Nonetheless, there is a widespread view that adversarial proceedings are beneficial to the decision-making process.⁵⁶⁴

Based on the arguments that a special advocate would introduce adversarial processes to the FISC, and that adversarial processes would be beneficial as an oversight mechanism, Congress created an *amicus curiae*, or friend of the court, in Section 401 of the USA FREEDOM Act. Under this provision, FISC judges appointed five individuals as *amici curiae* on the basis of their legal or technical expertise and qualifications related to intelligence collection or civil liberties

⁵⁵⁷ USA FREEDOM Act of 2015, Pub L. No. 114–23, § 103, 129 Stat. 268 (2015). A specific selection term “is a term that specifically identifies a person, account, address, or personal device, or any other specific identifier.” *Ibid.* § 107(k)(4). The passage of this statute means the legal challenges to § 215 will no longer move forward. The FISC ruled the NSA could temporarily resume the § 215 program until the ban on bulk collection took effect under the USA FREEDOM Act. See *In re Application of the FBI*, Nos. BR 15-75, Misc. 15-01 (FISA Ct. June 29, 2015).

⁵⁵⁸ USA FREEDOM Act of 2015, Pub L. No. 114–23, § 104(a)(3), 129 Stat. 268 (2015).

⁵⁵⁹ Some have also advocated for court oversight of National Security Letters (NSLs).

⁵⁶⁰ USA FREEDOM Act of 2015, Pub L. No. 114–23, § 401, 129 Stat. 268 (2015).

⁵⁶¹ *Ibid.*, § 402.

⁵⁶² A special advocate would be a security-cleared lawyer that would argue against the government before the FISC in certain cases.

⁵⁶³ Stephen Vladeck, “The FISA Court and Article III,” *Washington and Lee Law Review* 72, no. 3 (2015), 1176.

⁵⁶⁴ Director John Bates, “Letter to Senator Patrick J. Leahy.” Even former FISA Judge John Bates, who in a letter to Senator Patrick Leahy challenging the efficacy of a special advocate in the FISC, recognized the basic notion that “genuinely adversarial processes, such as criminal or civil trials, provide an excellent means of testing a party’s factual contentions.” *Ibid.*, 3. Judge Bates instead challenged the proposal for a special advocate because they would not create a truly adversarial process.

protections.⁵⁶⁵ The court may call on an *amicus* for any order that “presents a novel or significant interpretation of the law.”⁵⁶⁶ The *amici* are charged with providing arguments regarding privacy and civil liberties, intelligence collection, or communications technology that are relevant to the case at hand.⁵⁶⁷

The USA FREEDOM Act has not been in place long enough to evaluate the effectiveness of these reforms. However, some doubt that the *amici* will substantively alter the FISC’s proceeding. These critics maintain that a special advocate is needed because they believe the FISC proceedings should be truly adversarial in nature. Amie Stepanovich, the U.S. Policy Manager at Access Now, argued that there needs to be an advocate “to argue on behalf of the people who [are] going to be made subject to surveillance,” and that the advocate “should have the ability to intervene on their own without being directed by the court.”⁵⁶⁸ The Constitution Project, a think tank, has argued that a special advocate “must have an unconditional right to participate in at least some cases” and “should be empowered to represent U.S. Persons who are subject to the surveillance orders at issue.”⁵⁶⁹ Additionally, they believe all cases featuring the special advocate “should be ‘certified’ to the FISC to ensure meaningful appellate review.”⁵⁷⁰ Currently, the *amici* do not have these authorities.

While the Court must appoint an *amicus* in cases where there are novel or significant legal issues, a judge may issue a finding that it is not “appropriate” to appoint an *amicus*.⁵⁷¹ This decision cannot be challenged and the finding would most likely be classified, which has led some to argue the decision to appoint an *amicus* is effectively at the judge’s sole discretion.⁵⁷²

Before the passage of the USA FREEDOM Act, the FISC was not prohibited from appointing an *amicus* where it deemed necessary.⁵⁷³ Critics conclude that, since judges have already had this authority, but rarely exercised it, the USA FREEDOM Act reforms will simply maintain the status quo.⁵⁷⁴ Yet, this ignores how the USA FREEDOM Act changes the default behavior of judges. Before this statute’s implementation, a judge had to make the decision to appoint an *amicus* given the details of the application under review. The burden of action favored non-appointment. Now, FISC judges must appoint an *amicus* in the case of novel issues, unless they issue a finding not to, demonstrating the burden of action now favors the appointment of an *amicus*.

⁵⁶⁵ USA FREEDOM Act of 2015, Pub L. No. 114–23, § 401, 129 Stat. 268 (2015).

⁵⁶⁶ *Ibid.*

⁵⁶⁷ *Ibid.*

⁵⁶⁸ Amie Stepanovich, interview by Raheem Chaudhry, Kristine Henry, and Sydney Taylor, Washington, D.C., December 16, 2015.

⁵⁶⁹ The Constitution Project, “Letter to Representative John Boehner et al” (May 20, 2014), 4, accessed May 5, 2016, <http://www.constitutionproject.org/wp-content/uploads/2014/05/TCP-Letter-to-House-members-on-FISA-Special-Advocate.pdf>.

⁵⁷⁰ *Ibid.*

⁵⁷¹ USA FREEDOM Act of 2015, Pub L. No. 114–23, § 401, 129 Stat. 268 (2015).

⁵⁷² The Constitution Project, “Letter to Representative John Boehner et al,” 4.

⁵⁷³ Stephen Vladeck, “The Case for a FISA ‘Special Advocate,’” *Texas A&M Law Review* 2 (2015): 1.

⁵⁷⁴ The Constitution Project, “Letter to Representative John Boehner et al,” 3-4.

One drawback of including a special advocate who litigates on behalf of potential surveillance targets is that a recognized virtue of the FISC has been its expediency, which is vital in the context of intelligence decision-making.⁵⁷⁵ Former FISC Judge John Bates has noted that the time to approve an application would greatly increase were the FISC to give a special advocate adequate time to review an application and present a case.⁵⁷⁶ To remedy this, Professor Stephen Vladeck suggests that the FISC could issue an order and a special advocate could later file a motion to review, while the approved intelligence activity continues.⁵⁷⁷

Both positions could create a set of perverse incentives. The FISC could have an incentive to issue orders more readily, trusting the special advocate to appeal. Since collection programs would continue while under appeal, IC officials could be incentivized to submit applications that blur the legal line, especially in instances where the IC needs information quickly. Alternatively, the institution of a special advocate could discourage the government from utilizing the FISC process as frequently because of the extra time burden that a special advocate would create. This could inhibit the government from proposing aggressive, highly sensitive programs, which would diminish the IC's effectiveness. Amending the USA FREEDOM Act to create a stronger special advocate would thus be particularly risky, especially since a variety of experts believe that the inclusion of *amici* is already a positive step. Members of the NGO community, which have been critical of the government's approach to privacy and civil liberties concerns, tend to give the *amici* a vote of confidence. Alan Butler of the Electronic Privacy Information Center (EPIC), for instance, argued that the inclusion of "independent *amicus* . . . has had a significant positive impact on the court's consideration of some complex issues."⁵⁷⁸

The Designation of FISC and FISCR Judges

The USA FREEDOM Act did not reform how FISC and FISCR judges are designated despite criticism that the FISC has been overloaded with judges that are Republican appointees and former prosecutors. Through 2014, "Republican-appointees ha[d] been in the majority on 32 of the 34 different iterations of FISC membership created by chief justices' designation," and "designees with prosecutorial experience ha[d] been majorities on 28 of the 34 FISC iterations."⁵⁷⁹ This led to the concern that the FISC may appear ideologically slanted, which would be damaging to the court's legitimacy in the public's eyes. Another criticism of the

⁵⁷⁵ The institution of a special advocate would also raise constitutional questions, especially whether a special advocate would have Article III standing to appeal a FISC decision, but this issue is beyond the scope of this report. See generally Andrew Nolan, Richard M. Thompson II, and Vivian S. Chu, "Introducing a Public Advocate into the Foreign Intelligence Surveillance Act's Courts: Select Legal Issues" (Washington D.C.: Congressional Research Service, 2013), accessed May 5, 2016, <https://www.justsecurity.org/wp-content/uploads/2013/10/CRS-Report-FISC-Public-Advocate-Oct.-25-2013.pdf> (raising constitutional questions about the institution of a special advocate to the FISC).

⁵⁷⁶ Director John Bates, "Letter to Senator Patrick J. Leahy. "

⁵⁷⁷ Stephen Vladeck, "Making FISC More Adversarial: A Brief Response to Orin Kerr" (Lawfare Blog, July 8, 2013), accessed May 5, 2016, <https://www.lawfareblog.com/making-fisc-more-adversarial-brief-response-orin-kerr>.

⁵⁷⁸ Alan Butler, interview by Raheem Chaudhry, Kristine Henry, and Sydney Taylor, Washington, D.C., December 15, 2015.

⁵⁷⁹ Russell Wheeler, "The Changing Composition of The Foreign Intelligence Surveillance Court and What If Anything to do About It" (Lawfare Research Paper Series 2, 2014), 3, 13, accessed May 5, 2016, <https://www.lawfareblog.com/russell-wheeler-changing-composition-foreign-intelligence-surveillance-court-and-what-if-anything-do>.

manner in which FISC judges are currently designated, which incorporates the concern that the court is too heavily dominated by appointees of a single political party, is that too much power has become vested in the Chief Justice, whose authority is unreviewable. There are several reform proposals that are targeted at addressing these issues.⁵⁸⁰

One proposed reform would make the Chief Justice's nominations subject to Senate confirmation. Another would vest the President with the authority to nominate judges, rather than the Chief Justice, with the advice and consent of the Senate.⁵⁸¹ Those who advocate for these reforms argue that a decision as important as a FISC appointment should not be left exclusively to one individual. They also view the Senate as a valuable check, since its members represent the American people.

However, these proposals do not adequately address the criticism that designees thus far have been dominated by one political party and are not impartial; in fact, this criticism would likely be sharper if Presidents were granted authority to nominate judges. A President with a same-party Senate could fill the entire court if the President and Senate were so inclined. Granting the President nomination authority would create an additional impediment to impartiality because the administration is typically the sole litigant in the FISC due to the court's narrow jurisdiction. Unfortunately, the current judicial confirmation process for Article III judges does not function efficiently and has become highly partisan.⁵⁸² Having FISC nominees take part in this process would likely politicize the court in the public's eyes to an even greater extent. Confirmation hearings could be used to obtain promises from nominees regarding how they would rule on applications. In addition, this process could lead to delays in filling FISC vacancies.

Another set of reform proposals would divest at least some power from the Chief Justice, yet maintain the authority to designate judges exclusively inside the Judicial Branch. The Chief Justice likely already consults with the respective chief circuit judges to learn more about the district judges being considered for FISC designation because the chief circuit judges would

⁵⁸⁰ There are numerous other reform proposals beyond the ones discussed in this section. One other reform proposal to mitigate the dominance of appointees of one political party would be for Congress to specify that no more than six FISC designees could be appointees of presidents from the same political party. *Ibid.*, 15-16. Another reform proposal that would involve Congress would be to reserve eight FISC positions for designation by the majority and minority leadership in the Senate and House. FISA Court Oversight Underscoring Responsibility and Transparency Act (FISA COURT Act), H.R. 3195, 113th Cong. (2013); FISA Court Accountability Act, H.R. 2586, 113th Cong. (2013). The final reform proposal is for the FISC to be expanded to 13 judges and for each circuit to be represented on the court. Under this regime, the chief circuit judge would submit a name to the Chief Justice upon a FISC vacancy in that circuit, and if the Chief Justice rejected the recommendation, the chief circuit judge would submit two additional names, one of whom the Chief Justice would be forced to accept. FISA Judge Selection Reform Act of 2013 S. 1460, 113th Cong. (2013-2014). The reform proposals presented in this footnote have not gained as much attention as the ones we more thoroughly examine in this section. Also, we believe that the downsides of the reform proposals presented in this footnote outweigh the benefits, and we would not recommend that any of these be adopted.

⁵⁸¹ H.R. 2761, 113th Cong. (2013).

⁵⁸² Thomas Mann and Norman Ornstein, "It's Even Worse Than it Looks: How the American Constitutional System Collided with the New Politics of Extremism" (New York: Basic Books, 2012), 91-98 (senators have increasingly used the filibuster to diminish the presidents' ability to fill judicial positions).

have better insight into the reputations and dockets of their colleagues.⁵⁸³ Such consultation could be made mandatory, and a recommendation report from the respective chief circuit judges to the Chief Justice could be statutorily required. This documentation may improve public confidence by demonstrating the opinions of multiple Article III judges are taken into account when selecting a FISC designee.

Also, each Supreme Court Justice could designate judges from the circuits that they serve as Circuit Justices.⁵⁸⁴ Expanding this power to all Supreme Court Justices would mitigate concerns that the immense power of designating FISC judges has been concentrated in just one person. This would likely diversify the makeup of the court and mitigate overloading the court with judges who are appointees of one political party. Justices would likely consult with the respective chief circuit judges—this could even be statutorily required—under this regime as well.

The Judicial Branch Beyond Surveillance

The Rise of Judicial Intervention by Traditional Article III Courts

The intelligence abuses of the 1970s not only spurred congressional action, but also encouraged the judiciary to take a more active role in intelligence controversies generally. This was a departure from the judiciary's traditional avoidance of intelligence issues because they are almost always related to foreign affairs, which the judiciary views as a political question.⁵⁸⁵ Also, the increasing number of statutes passed regarding intelligence increased opportunities for intelligence-related litigation.⁵⁸⁶

While intelligence-related cases touch on many areas of law besides surveillance law, courts' analysis of the government's detention of individuals during armed conflicts has perhaps had the largest impact on intelligence activities. For example, in *Hamdi*, the Supreme Court held that enemy combatants could be detained, but that a U.S. citizen held as an enemy combatant has due process rights to challenge his enemy combatant status before a neutral decision-maker.⁵⁸⁷ While detention cases do not necessarily provide oversight of the IC, the holdings shape U.S. policy, which affects intelligence activities.

The courts have also played an active role in determining what information should be accessible to the public. The Executive Branch has undertaken a wide range of controversial activities since the 9/11 terrorist attacks. The DOJ's Office of Legal Counsel has written opinions that serve as the legal basis permitting many of these activities over the last two decades.⁵⁸⁸ Due to the

⁵⁸³ Wheeler, "The Changing Composition of The Foreign Intelligence Surveillance Court And What If Anything To Do About It," 16.

⁵⁸⁴ Clarke, "Liberty and Security in a Changing World," 207-208.

⁵⁸⁵ See generally *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948); *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

⁵⁸⁶ Fred F. Manget, "Another System of Oversight: Intelligence and The Rise of Judicial Intervention," *Studies in Intelligence* 39 (1996): 46.

⁵⁸⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

⁵⁸⁸ Nancy Kassop, "Executive Branch Legal Analysis for National Security Policy: Who Controls Access to Legal Memos?" *Presidential Studies Quarterly* 44, no. 2 (2014): 328

controversial nature of some of these activities, there has been increased public demand for insight into OLC's legal interpretations. Non-governmental actors have often used Freedom of Information Act (FOIA) requests to try to gain insight into Executive Branch decision-making.⁵⁸⁹ However, FOIA allows for several exceptions under which the government is allowed to withhold information, including any information that would potentially harm national security.⁵⁹⁰

When the Executive Branch withholds information, courts are often asked to determine whether the Executive Branch has done so appropriately. However, courts do not have the time or resources to effectively review all of the documents that are subject to FOIA requests. Consequently, federal courts have determined that federal agencies must submit summaries of their withheld documents, along with justifications for their exemptions.⁵⁹¹ In *Soucie v. David*, the court found that *in camera*⁵⁹² inspection of withheld documents was not necessary if the court found an agency's description of the documents, as well as the reasoning for withholding those documents, satisfactory.⁵⁹³ Critics argue that courts have been overly deferential to the government's positions.

Following some of the controversial post-9/11 policies, the Executive Branch has become more transparent in regards to legal opinions. Former OLC attorneys have argued that transparency preserves Congressional and public faith in OLC and protects OLC's independence.⁵⁹⁴ These individuals also argued that greater public scrutiny of OLC documents will help strengthen future legal opinions.⁵⁹⁵ However, there is a danger of too much transparency. A President may be less likely to seek OLC's opinion on controversial matters if the opinion will be subject to enhanced public scrutiny.⁵⁹⁶ Likewise, the President's office could also have informal discussions with the OLC about its legal opinions and a formal opinion would only be given when its reasoning suited the President's interest. This could greatly skew OLC opinions in favor of the President's preferences.⁵⁹⁷

Impediments to Courts Addressing Complaints

Although the Judicial Branch serves to provide oversight and court decisions can shape future intelligence decisions, there are many impediments to courts addressing complaints. For cases to move forward through the judicial process, complaints must satisfy standing requirements,

⁵⁸⁹ Congress passed FOIA in 1966 to enable the public to gain access to government information. Freedom of Information Act, Pub L. No. 89-487, 5 U.S.C. 552 (1966).

⁵⁹⁰ Robert Deyling, "Judicial Deference and De Novo Review in Litigation over National Security Information under the Freedom of Information Act," *Villanova Law Review* 37 (1992): 70.

⁵⁹¹ *Ibid.*, 72-73.

⁵⁹² *In camera* inspection is when a court proceeding occurs in private chambers.

⁵⁹³ *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

⁵⁹⁴ Eric Messinger, "Transparency and the Office of Legal Counsel," *New York University Journal of Legislation and Public Policy* 17 (2014): 257.

⁵⁹⁵ *Ibid.*

⁵⁹⁶ *Ibid.*, 294.

⁵⁹⁷ *Ibid.*, 293-294.

establish the case does not violate the political question doctrine, and often withstand an assertion of the state secrets privilege.⁵⁹⁸

Standing

The Supreme Court has described how standing comprises three elements: the plaintiff must have had a legally protected interest invaded, there must be a causal connection between the injury and the conduct the complaint is about, and it must be likely a favorable decision will remedy the injury.⁵⁹⁹ These standing requirements make it especially difficult for individuals to challenge alleged wrongful surveillance because these intelligence activities are conducted in secret. For example, the D.C. Circuit vacated and remanded the lower court in *Klayman* based on a lack of standing because there was no evidence the plaintiff's metadata was actually collected.⁶⁰⁰

Political Question Doctrine

The political question doctrine derives from the separation of powers, and excludes judicial review of policy questions best suited for the political branches of government. National security and foreign policy matters, which include intelligence activities, are often deemed unsuitable for judicial scrutiny because judges generally lack competence in this area.⁶⁰¹ In 2010, Anwar Al-Awlaki's father sought an injunction to prohibit the U.S. from intentionally killing his son unless Al-Awlaki presented an imminent threat and there were "no means other than lethal force that could reasonably be employed to neutralize the threat."⁶⁰² However, the court determined the political question doctrine—along with lack of standing—barred it from deciding on the plaintiff's claims.⁶⁰³ The doctrine leaves the judiciary quite deferential to the other branches.

States Secret Privilege

Another barrier to judicial review is the state secrets privilege, which was first recognized by the Supreme Court in *Reynolds* in 1953.⁶⁰⁴ The privilege enables the government to decline to produce evidence that would result in the disclosure of secret information relevant to national security.⁶⁰⁵ For example, in *El-Masri*, a lawsuit brought by a German citizen who was allegedly mistakenly rendered to Afghanistan by the U.S. for interrogation, the Eastern District of Virginia dismissed the complaint because of this privilege.⁶⁰⁶ The court reasoned, "the entire aim of the

⁵⁹⁸ Philip Alston, "The CIA and Targeted Killings Beyond Border," *Harvard National Security Journal* 2 (2011): 392.

⁵⁹⁹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

⁶⁰⁰ *Obama v. Klayman*, 562–63.

⁶⁰¹ See generally *Baker v. Carr*, 369 U.S. 186 (1962).

⁶⁰² *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010).

⁶⁰³ *Ibid.*, 44-52.

⁶⁰⁴ *United States v. Reynolds*, 345 U.S. 1, 10–11 (1953).

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 539 (E.D. Va. 2006) *aff'd sub nom.* *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007).

suit is to prove the existence of state secrets.”⁶⁰⁷ Thus, the privilege can drastically limit national security litigation involving intelligence activities.

Critics claim the privilege does not serve a legitimate purpose, but only shields improper or unlawful government actions from public scrutiny.⁶⁰⁸ In fact, the Air Force’s investigative report at issue in *Reynolds* did not contain information about the classified equipment aboard the flight, which crashed.⁶⁰⁹ The judge could have discovered this information in an *in camera, ex parte* review of the report; however, the district judge was not permitted to do so. Therefore, the court was unable to assess whether the report discussed the classified equipment in a way that could not be redacted. However, courts typically analyze documents to look beyond the mere assertion of the privilege to determine whether to grant the privilege today.⁶¹⁰

Some claim the privilege has been used more frequently or used to conceal information in different ways than previously.⁶¹¹ Only six published opinions considered assertions of the privilege between 1954 and 1972, 65 published opinions considered assertions of the privilege between 1973 and 2001, and 18 published opinions considered assertions of the privilege between 2001 and 2006.⁶¹² Although statistics of the use of the privilege are hard to obtain, the assertion of the privilege appears to be becoming more prevalent over time. However, the Bush and Obama Administrations have not used the privilege in fundamentally novel ways. The government has historically sought dismissal or summary judgment based on the privilege since at least the 1970s.⁶¹³

Moreover, the state secrets privilege continues to be used in cases involving information regarding technical programs and capabilities, the internal operations of agencies and departments, and intelligence activities aimed at combating adversaries. In 2009, the Obama Administration sought to improve public confidence and accountability in the invocation of the privilege by developing procedures, which explicitly stated the DOJ would not defend the use of the privilege to “(i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security.”⁶¹⁴

⁶⁰⁷ *Ibid.*

⁶⁰⁸ Elizabeth Goitein and Frederick A.O. Schwarz, Jr., “Congress Must Stop Abuses of Secrets Privilege” (Brennan Center for Justice, December 14, 2009), accessed May 5, 2016, <https://www.brennancenter.org/analysis/congress-must-stop-abuses-secrets-privilege>.

⁶⁰⁹ *Reynolds*, 345 U.S. 1, 10–11 (1953).

⁶¹⁰ See for example *Parhat v. Gates*, 532 F.3d 834, 836 (D.C. Cir. 2008) (requiring the government to demonstrate that sensitive information requires protection).

⁶¹¹ Scott Shane, “Invoking Secrets Privilege Becomes a More Popular Legal Tactic,” *The New York Times* (June 4, 2006), 32.

⁶¹² Robert Chesney, “State Secrets and the Limits of National Security Litigation,” *George Washington Law Review* 75 (2007), 1249, 1298 chart 1.

⁶¹³ *Ibid.*, 1307.

⁶¹⁴ Attorney General Eric Holder, “Memorandum for Heads of Executive Departments and Agencies; Memorandum for the Heads of Department Components (September 23, 2009), 2, accessed May 1, 2016, <https://www.justice.gov/sites/default/files/opa/legacy/2009/09/23/state-secret-privileges.pdf>.

The privilege creates a tension between the importance of ensuring litigants are able to pursue their claims and the vital national security interest of not disclosing sensitive information. Courts can dismiss complaints or deprive litigants of information necessary to their claim because of the privilege. On the other hand, judges cannot all be expected to have the national security knowledge and background necessary to make decisions regarding the implications of disclosures.⁶¹⁵ This raises the risk that a judge may not properly recognize a legitimate national security threat from the disclosure of a secret.

Current State Secrets Privilege Reform Proposal. The most appealing reform proposal would be for Congress to authorize judges to transfer cases to a classified judicial forum, instead of dismissing the claim outright because of the privilege.⁶¹⁶ The cases would be transferred to a newly created court, modeled after the FISC, to hear the proceedings *in camera* in permanently sealed bench trials. When the plaintiff already possesses the sensitive information, the plaintiff would be permitted to be involved. However, when the plaintiff does not possess the information, the judge could select an advocate from a pre-approved list to represent the plaintiff's interests.⁶¹⁷ This reform would create a better balance between the need for secrecy and justice in national security cases.

Conclusion

Although routine judicial oversight of IC activities remains relatively limited and there are significant impediments to claims involving intelligence being litigated in domestic courts, the impact of judicial rulings and opinions on intelligence activity has grown over time. This trend has become more pronounced with respect to aggressive counterterrorism programs undertaken by the IC in the wake of the 9/11 attacks. The Judicial Branch brings independence, neutrality, and high levels of public trust to intelligence oversight. Intelligence agencies and political leaders will increasingly be required to account for the possibility that the lawfulness of their actions will ultimately be required to survive scrutiny by U.S. domestic courts.

Recommendations

We recommend:

- Each Supreme Court Justice should designate judges to serve on the FISC from the circuits for which they serve as the Circuit Justice;
- Congress should monitor the use of *amici* by the FISC, but not establish a special advocate for the court at this time; and
- Congress should authorize judges to transfer cases to a newly created classified judicial forum, modeled after the FISC, instead of dismissing claims based on the state secrets privilege. The new court would hear proceedings *in camera* in permanently sealed bench trials.

⁶¹⁵ Baker interview.

⁶¹⁶ Robert Chesney, "State Secrets and the Limits of National Security Litigation," 1313-1314.

⁶¹⁷ *Ibid.*

Chapter 7.

The Impact of Foreign Security Services, International Governmental Organizations, and International Law: Moving Toward Multilateral Intelligence Oversight

by Matthew Farrar and Danielle Oxford

In March 2003, Khalid Sheikh Mohammed's evasion from authorities finally came to an end. As a result of cooperation between the CIA and Pakistan's Inter-Services Intelligence (ISI), the mastermind of the 9/11 attacks was apprehended in the Pakistani city of Rawalpindi. Although Mohammed's exact route out of Pakistan is still classified, media reports indicate that after his capture, Mohammed was quickly shuttled out of Pakistan and taken to the small Polish village of Stare Kiejkuty for interrogation.⁶¹⁸ Although this was not the first time Stare Keijkuty had hosted foreign intelligence operatives, its role in Mohammed's story drastically changed its place in the global community.⁶¹⁹ This Polish village has come to be defined by its ties to Mohammed and the now-infamous CIA detention site that was located there.

Khalid Sheikh Mohammed's capture, detention, interrogation, and transfer is just one of many incidents that shaped America's relationships with international legal and other institutions. Although oversight of security and intelligence activities is traditionally considered in the domestic realm, American relationships with international institutions—including foreign governments, international law, and international governmental organizations (IGOs)—have played a larger role in constraining how the IC performed its mission since 9/11. Improving international, regional, and bilateral intelligence-sharing and coordination has become imperative in the current security environment; however, in response to unprecedented threats, the IC has sometimes resorted to methods that attracted negative scrutiny from global civil society.⁶²⁰

Ultimately, national oversight bodies will remain the preeminent forces in overseeing and regulating intelligence activities due to their permanent mandate, sovereign powers, and political legitimacy; when domestic oversight bodies fail, foreign governments, international organizations, and international law may offer pluralistic oversight structures to ensure that the IC is still accountable.⁶²¹ Not only do foreign governments and IGOs investigate and issue opinions on intelligence activities, but treaties, conventions, and norms impose real political restrictions on the IC. For example, many foreign security services, the United Nations (UN), the

⁶¹⁸ Loch K. Johnson, *National Security Intelligence* (United Kingdom: Polity Press, 2012), 180.

⁶¹⁹ Adam Goldman, "The hidden history of the CIA's prison in Poland," *The Washington Post* (January 23, 2014), accessed April, 24, 2016, https://www.washingtonpost.com/world/national-security/the-hidden-history-of-the-cias-prison-in-poland/2014/01/23/b77f6ea2-7c6f-11e3-95c6-0a7aa80874bc_story.html. Note: Poland finally acknowledged existence of Black Site in 2014; and Ostberliner Newsblog (January 6, 2015), accessed April 20, 2016, http://www.ostblog.de/2006/01/die_polnische_unschuld_ist_una.php. Note: The Nazis used Stare Kiejkuty during World War II.

⁶²⁰ Janine McGruddy, "Multilateral Intelligence Collaboration and International Oversight," *Journal of Strategic Studies* 6, no. 3 (Fall 2013): 214-220.

⁶²¹ Hans Born, Ian Leigh, and Aidan Wills, eds., *International Intelligence Cooperation and Accountability, Studies in Intelligence* (New York: Routledge, 2011), 220.

International Criminal Police Organization (Interpol), the European Union, and the European Court of Justice (ECJ) have all sought to exercise oversight and demanded increased transparency of the U.S. IC.

Foreign Security Services

Foreign Security Services: The Importance of Keeping the Veil On

The U.S. maintains relationships with hundreds of foreign security services worldwide. The majority of these relationships remain shrouded in secrecy, and for good reason. When specific U.S. relationships with foreign partners do become public—usually through critical media exposure—the deep reliance of the U.S. IC on foreign security services is easy to discern. It is often this strong connection that makes a story “the story.”

When the story of Khalid Sheikh Mohammed’s capture, detention, and interrogation became public, it caught the attention of audiences worldwide. Much of the attention arose due to the high profile of the case. But the reason it remained a top story was because it exposed sensitive CIA activities and the extensive collaboration and reliance between foreign partners and the U.S. IC. The relationships that the media highlighted were important forces of U.S. policy, and their disclosure led to notable constraints on future U.S. intelligence activities. In March 2015, CIA Director John Brennan touched on the importance of keeping these relationships secret, and highlighted the problems caused when they are made public: “Naturally these are sensitive relationships built on mutual trust and confidentiality. Unauthorized disclosures in recent years by individuals who betrayed our country have created difficulties with these partner services that we have had to overcome.”⁶²²

U.S. relationships with foreign security services have become more visible in the wake of 9/11; the disclosure of CIA’s rendition, detention, and interrogation program; and the Snowden leaks. CIA Director Brennan emphasized the importance of these relationships during remarks at the Council on Foreign Relations in 2015: “These relationships are founded on discretion, so we don’t talk about them much. But they play an essential role in our efforts to collect relevant and impactful intelligence, provide insightful analysis, and to conduct effective covert action as directed by the president.”⁶²³ Brennan continued, “I cannot overstate the value of these relationships...to our national security...By sharing intelligence, analysis, and know-how with these partner services, we open windows on regions and issues that might otherwise be closed to us...There is no way we could be successful...on our own.”⁶²⁴

The relationships the U.S. IC fosters with foreign partners play a significant role in U.S. national security. The following case studies illustrate the different roles foreign security services play in supporting—and constraining—U.S. intelligence activities.

⁶²² Council on Foreign Relations, “U.S. Intelligence in a Transforming World: CIA’s Global Mission: Countering Shared Threats” (March 13, 2015), accessed April 20, 2016, <http://www.cfr.org/intelligence/us-intelligence-transforming-world/p36271>.

⁶²³ Ibid.

⁶²⁴ Ibid.

The Five Eyes: A New Level of Cooperation for the U.S. and the Commonwealth States

U.S. cooperation with foreign security services precedes passage of the National Security Act of 1947 and the creation of the modern U.S. IC. During the Second World War, the U.S. shared intelligence with some of its wartime allies. No wartime intelligence relationship was more important than the U.S.-U.K. relationship. It was this wartime collaboration that grew into the special intelligence relationship that currently exists between the two nations.

An integral part of the “special relationship” between the U.S. and the U.K. is the comprehensive international intelligence alliance involving the U.S., U.K., Australia, Canada, and New Zealand. This five-state alliance, also referred to as the Five Eyes, is the world’s most advanced and comprehensive network of alliances, all based on the U.K.-U.S. Agreement of 1946.⁶²⁵ This agreement, which was updated in 1955 to stipulate that the collaborating Commonwealth countries would be expanded to include to Canada, Australia, and New Zealand, is the preeminent example of formalized intelligence cooperation.⁶²⁶ The foundation of this intelligence alliance is full, unrestricted intelligence-sharing. Thus, each member benefits from the collective pool of intelligence. Since its inception, the Five Eyes alliance has developed new capabilities and expanded the connectivity between the members.

A major episode that tested Five Eyes’ cohesion, and subsequently constrained activities within the alliance, was the case of Maher Arar. Shortly after 9/11, Arar, a Syrian-born Canadian citizen, was denied entry at JFK Airport in New York by U.S. officials and returned to his state of nationality, Syria. He claimed to have been tortured in Syria for over a year.⁶²⁷ On November 8, 2003, *The Globe and Mail* released reports showing that Canadian intelligence from the Royal Canadian Mounted Police was passed to the U.S. under Five Eyes arrangements and led to his detention and deportation. This disclosure created tension between the Canadian and U.S. governments, as well as their security services.⁶²⁸ The repercussions from the Arar case, however, were not extreme; Canada did not stop collaborating with the Five Eyes. Nonetheless, the Arar case demonstrated that domestic politics within a member state could undermine the alliance as a whole by limiting the intelligence that Canada could share through the Five Eyes agreement. Canada’s process of sharing intelligence with the Five Eyes partners now requires that certain intelligence relating to Canadian citizens be removed at the front end. This ultimately diminishes, or at least slows, the Five Eye’s collection and analysis and makes the alliance less useful than originally intended.

Single incidents such as the Arar case are unlikely to destroy this firmly-grounded alliance, but each case that causes controversy can impact the quality of the partnership over time. No matter where these incidents originate, they force restriction on an alliance founded on unrestricted

⁶²⁵ British-U.S. Communication Intelligence (UKUSA) Agreement (1955), accessed 24 April, 2016, https://www.nsa.gov/public_info/_files/ukusa/new_ukusa_agree_10may55.pdf.

⁶²⁶ *Ibid.*, Amendment No. 4.

⁶²⁷ “Tortured by Mistake: The case of Maher Arar shows why the Bush administration’s secret detention program is wrong,” *The Washington Post* (September 20, 2006), accessed April 24, 2016, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/19/AR2006091901547.html>.

⁶²⁸ Jeff Sallot and Collin Freeze, “RCMP passed along Arar’s name, U.S. says,” *The Globe and Mail* (November 8, 2003), accessed April 20, 2016, <http://www.theglobeandmail.com/news/national/rcmp-passed-along-arars-name-us-says/article1168482/>.

intelligence-sharing. This ultimately inhibits the efficacy of a system that, at its core, is intended to make intelligence sharing faster and more efficient.

Big Brother in Germany

The Snowden leaks and the ensuing controversy over NSA collection in Germany resulted in a significant foreign constraint on U.S. intelligence activities. Given the well-known history of domestic agencies monitoring its citizens, German politicians know that the threshold for intelligence scandals is much lower there than in other nations. Once a scandal erupts, German domestic pressures quickly escalate, and a mobilized public demands action.

The Snowden leaks alleged that the NSA was listening in on Chancellor Angela Merkel's phone calls, and also that the NSA had provided intelligence-gathering capabilities to its German counterparts in exchange for the intelligence on European targets identified by NSA.⁶²⁹ As a result, domestic pressures within Germany forced Chancellor Merkel to take decisive action. As a direct response, she expelled the CIA's Berlin Station Chief in July 2014.⁶³⁰ As more leaks and allegations surfaced, Chancellor Merkel took further action. In May 2015 German intelligence "drastically reduced its cooperation with the U.S. National Security Agency...[as a] response to a growing fallout over their alleged joint surveillance of European officials and companies."⁶³¹

Although the relationship between Berlin and Washington is still strong, scandals like those caused by the Snowden leaks have taken a toll on the relationship between the U.S. IC and German intelligence. As a result, the operational effectiveness of the U.S. IC is weakened by the diminution of a significant international intelligence relationship. Constraints like those illustrated by the German case impact present capabilities, and they also shape future U.S.-German cooperation. These relationships are of vital importance in the current security environment. CIA Director Brennan attested to this fact in early 2015 by claiming, "No issue highlights the importance of our international partnerships more right now than the challenge of foreign fighters entering and leaving the conflict in Syria and Iraq."⁶³² When tools to address imminent threats are needed most, it helps when the political capital exists to tackle the issue cooperatively with overseas partners.

⁶²⁹ Alison Smale and David E. Sanger, "Another Spying Scandal in Germany Adds to Political Crisis for Merkel," *The New York Times* (May 21, 2015), accessed April 20, 2016, http://www.nytimes.com/2015/05/22/world/europe/intelligence-spying-germany-us.html?_r=0.

⁶³⁰ Alison Smale, Mark Mazzetti, and David E. Sanger, "Germany Demands Top U.S. Intelligence Officer Be Expelled," *The New York Times* (July 10, 2014), accessed April 20, 2016, <http://www.nytimes.com/2014/07/11/world/europe/germany-expels-top-us-intelligence-officer.html>.

⁶³¹ Kate Connolly, "German secret service BND reduces cooperation with NSA," *The Guardian*, May 7, 2015, accessed April 20, 2016, <http://www.theguardian.com/world/2015/may/07/german-secret-service-bnd-restricts-cooperation-nsa-us-online-surveillance-spy>.

⁶³² John Brennan, "U.S. Intelligence in a Transforming World: CIA's Global Mission: Countering Shared Threats" (Presentation, Council on Foreign Relations Events, Washington D.C., March 13, 2015), accessed April 20, 2016, <http://www.cfr.org/intelligence/us-intelligence-transforming-world/p36271>.

It's Complicated in Pakistan

The relationship between the U.S. IC and the Pakistani ISI has been defined by incredible highs and confounding lows. On the positive side of the ledger, Pakistan helped displace the Soviet Union from Afghanistan. The help the Pakistanis provided during the U.S.-led covert action to arm the mujahideen in Afghanistan was essential. Pakistan was the sanctuary from which the jihad against the Soviet 40th Army was launched. Without the help of the Pakistanis, the likelihood of success for the U.S.-backed insurgency would have been slim. On the other hand, Pakistan maintains relationships with groups diametrically opposed to U.S. interests. After U.S. interest in Afghanistan faded after the retreat of Soviet forces, the ISI continued to cultivate militant proxies in Afghanistan that would do Pakistan's bidding. This work included supporting the Afghan Taliban.⁶³³ The bilateral relationship between the U.S. and Pakistan is complex, nuanced, and constantly evolving.

After 9/11, the U.S. IC and armed forces relied heavily on Pakistan for staging operations. This close cooperation resulted in the capture of some of the most valuable Al-Qaeda terrorists, including Khalid Sheikh Mohammed.⁶³⁴ Islamabad's support for U.S. drone operations within Pakistan's borders was a component of this strategic intelligence relationship. While ISI condoned drone activity behind closed doors, Pakistani governmental officials publicly condemned U.S. activity that they claimed undermined their sovereignty. In response to the not-so-secret backroom deals that kept the U.S. drone program in Pakistan alive, former Pakistani Prime Minister Yousaf Raza Gilani quipped, "I don't care if they do it as long as they get the right people. We'll protest in the National Assembly and then ignore it."⁶³⁵

As the War on Terror evolved, U.S. intelligence operators began to utilize drones more extensively. This action was supported and agreed to by the Pakistanis, but domestic antagonism resulting from incidents of Pakistanis being killed by drone strikes caused government officials to take a harsher stance on these activities. For example, after a drone strike allegedly claimed the lives of numerous innocent Pakistanis, the ISI released the name of the CIA Station Chief in Islamabad, who was returned to Washington shortly thereafter for security reasons.⁶³⁶ In addition, Pakistan ordered the CIA to close down Shamsi Air Base in December 2011 after protests erupted over an airstrike that killed dozens of Pakistani soldiers.⁶³⁷ Shamsi, long a base for CIA drones, was an important U.S. intelligence asset. The COS disclosure and Shamsi closing are just two examples where difficulties in the relationship with Pakistan's security

⁶³³ Declan Walsh, "Whose side is Pakistan's ISI really on?" *The Guardian* (May 12, 2011), accessed April 24, 2016, <http://www.theguardian.com/world/2011/may/12/isi-bin-laden-death-pakistan-alqaida>.

⁶³⁴ Eric Rosenbach and Aki J. Peritz, "Intelligence and International Cooperation," in *Confrontation or Collaboration? Congress and the Intelligence Community* (Belfer Center for Science and International Affairs, Harvard Kennedy School, July 2009), 51-56, accessed March 15, 2016, http://belfercenter.ksg.harvard.edu/publication/19153/intelligence_and_international_cooperation.html.

⁶³⁵ Cable from Anne Patterson at Station Islamabad, *WikiLeaks* (August 23, 2008), accessed December 1, 2015, <https://cablegatesearch.wikileaks.org/cable.php?id=08ISLAMABAD2802&q=anne%20patterson>.

⁶³⁶ Declan Walsh, "CIA chief in Pakistan leaves after drone trial blows his cover," *The Guardian* (December 17, 2010), accessed April 24, 2015, <http://www.theguardian.com/world/2010/dec/17/cia-chief-pakistan-drone-cover>.

⁶³⁷ Salman Masood, "C.I.A. Leaves Base in Pakistan Used for Drone Strikes," *The New York Times* (December 11, 2011), accessed April 24, 2016, <http://www.nytimes.com/2011/12/12/world/asia/cia-leaves-pakistan-base-used-for-drone-strikes.html>.

service served to constrain the actions and effectiveness of U.S. intelligence in that region. As illustrated by both incidents, Pakistani domestic political pressures built up to a tipping point, which ultimately forced Pakistan's government to constrain U.S. activities.

The Five Eyes, the U.S.-Germany, and the U.S.-Pakistan cases provide glimpses into the complex web of relationships that the U.S. IC maintains with foreign security services. Moreover, they demonstrate the deep reliance the U.S. IC has on foreign security services and vice-versa. U.S. national security—and global security, more broadly—often depends on the quality of relationships between the U.S. IC and its foreign partners. When difficulties arise in these relationships, a foreign partner may react and impose constraints on cooperation that ultimately impact the effectiveness of the U.S. IC.

International Governmental Organizations and International Law

A Historical Perspective: The Development of the United Nations and the UDHR

In 1945, after the end of the Second World War, the world's leaders formed the UN and ratified the UN Charter, dedicating itself to the promotion of international peace and security, providing a venue for international cooperation on transnational problems, and “reaffirm[ing] faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small.”⁶³⁸ Although the UN Charter did not define the human rights and fundamental freedoms to which it referred, the UN Charter signaled the dawn of the international human rights legal regime. To advance the international human rights initiative and make it enforceable, the Charter provided for the establishment of an Economic and Social Council (ECOSOC) whose functions included making “recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedoms for all” and powers to “set up commissions...for the promotion of human rights, and such other commissions as may be required for the performance of its functions.”⁶³⁹ Thus, although, the UN Charter did not provide a binding legal basis for the development of international human rights law in 1945, it created a foundation for the Universal Declaration of Human Rights (UDHR) in 1948.⁶⁴⁰

Soon after the adoption of the UN Charter, ECOSOC established a Commission on Human Rights with the mandate to develop the framework for an international bill of rights that would clearly set out the specific content of the international human rights previously recognized under the Charter. The Commission appointed a Drafting Committee, chaired by Eleanor Roosevelt, which drafted the UDHR. The declaration was adopted unanimously by resolution of the General Assembly on December 10, 1948, and has served as a framework for subsequent international human rights treaties as well as a basis for international law.⁶⁴¹

⁶³⁸ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Chapter 1.

⁶³⁹ *Ibid.*, Article 62(2).

⁶⁴⁰ Mashood Baderin and Manisuli Ssenyonjo, “Development of International Human Rights Law Before and After the UDHR,” in *International Human Rights Law: Six Decades after the UDHR and Beyond* (United Kingdom: Ashgate Publishing, 2010), 3-27.

⁶⁴¹ *Ibid.*, 8.

Although the UDHR was not legally binding at the time of its adoption, it has come to be recognized as customary international law, and has been invoked by the ICJ and the ICC in adjudicating human rights complaints. Additionally, the adoption of the Covenant on Economic, Social and Cultural Rights as well as the Covenant on Civil and Political Rights has made the rights legally binding upon member states who were signatories—including the U.S.—and has resulted in conventions such as the Convention Against Torture and the Convention Against Forced Disappearances. More specifically, Article 3 of the UDHR grants all people with a “right to life, liberty, and security.”⁶⁴² In addition, Article 5 states “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,” and Article 12 proclaims “no one shall be subjected to arbitrary interference with his privacy...everyone has the right to the protection of the law against such interference or attacks.”⁶⁴³ Thus, significantly, the UDHR and its accompanying conventions define international human rights norms that are binding on all signatory states, and are simultaneously binding on the IC as an element of the U.S. government. The application of these strictures to the U.S. IC in connection with its post-9/11 activities has generated extensive international controversy and resulted in investigations that have significantly impacted IC activities and methods.

The UN and UDHR in Practice: The HRC and Special Rapporteurs

With the integration of human rights into its frameworks, the UN established the High Commissioner of Human Rights, who monitors human rights violations, and the Human Rights Council (HRC) that works to protect human rights across the globe. Special rapporteurs are also assigned to report on particular human rights abuses or to examine the human rights situation in specific countries under HRC mandate.⁶⁴⁴ Tools are, therefore, in place to investigate and expose human rights abuses to the international community. In recent years, investigations have often been directed at the U.S. IC and its counterterrorism activities.

The HRC publishes the Universal Periodic Review, which examines the human rights records of all UN member states, publishes specific findings, and calls for each to be remedied within a prescribed time period. In May 2015, as part of its Universal Periodic Review, the HRC published a harsh report, consisting of 348 recommendations. The report specifically addressed human rights violations allegedly perpetrated by the U.S. IC, including NSA surveillance, secret detention and interrogation, and drone strikes. The U.S. government has until September 2016 to respond to these allegations.⁶⁴⁵

Additionally, the HRC uses special rapporteur reports to investigate specific themes or instances of human rights abuses. Among these specialized experts, the most notable critics of IC activities

⁶⁴² UN General Assembly, *Universal Declaration of Human Rights*, Article 3 (1948).

⁶⁴³ *Ibid.*, Article 5; *Ibid.*, Article 12.

⁶⁴⁴ Special rapporteurs are individuals working on behalf of the UN within the scope of “Special Procedures” mechanisms, who bear a specific mandate from the UN HRC, either a country mandate or a thematic mandate. “Rappatuer” is a French-derived word for an investigator who reports to a deliberative body.

⁶⁴⁵ “UN Issues Scathing Assessment of US Human Rights Record,” *American Civil Liberties Union*, accessed December 8, 2015, <https://www.aclu.org/blog/speak-freely/un-issues-scathing-assessment-us-human-rights-record>; see also Human Rights Committee, “Concluding Observations on the Fourth Report of the United States of America,” *United Nations*, March 2014, accessed 24 April, 2016 <http://s3.documentcloud.org/documents/1097784/un-human-rights-final.pdf>.

have been the “Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism” and the “Special Rapporteur on torture and other cruel, inhumane, and degrading treatment.” In 2009 and 2014, the Special Rapporteur on torture and the United Nations Committee Against Torture expressed concern about the post-9/11 Enhanced Interrogation Technique (EIT) program and called for an investigation into its practices and participants.⁶⁴⁶ Since then, President Barack Obama issued an Executive Order generally barring anyone in U.S. custody or control while in armed conflict from being subjected to any interrogation technique or treatment other than that authorized under the Army Field Manual.⁶⁴⁷ The order, however, does not preclude law enforcement agencies from continuing to “use authorized, non-coercive techniques of interrogation that are designed to elicit voluntary statements and do not involve the use of force, threats, or promises.”⁶⁴⁸

Further, the Special Rapporteur on the promotion and protection of human rights has called for full accountability for, and prosecution of, Bush Administration officials and IC employees and contractors for what he described as a clear policy orchestrated at a high level, which allowed the U.S. to commit gross violations of international human rights law.⁶⁴⁹ Specifically, this Special Rapporteur found that “the government of President George W. Bush embarked upon a systematic campaign of internationally wrongful acts involving the secret detention, rendition and torture of terrorist suspects” in response to the September 11 attacks.⁶⁵⁰ In the report he published detailing these abuses, he stated that “President Bush authorized the CIA to operate a secret detention program which involved the establishment of clandestine detention facilities known as ‘black sites,’ ... authorized the CIA to carry out ‘extraordinary renditions’ ... [and] ... authorized a range of physical and mental abuse of terrorist suspects known as ‘enhanced interrogation’ ... [including] the use of ‘waterboarding’ on ‘high value detainees.’”⁶⁵¹

He claimed these activities were in direct violation of the Convention Against Torture (CAT), which had been ratified by Congress and adopted into Chapter 113(c) of the U.S. Criminal Code. In his opinion, the CAT’s standards were not upheld by the U.S. because the CAT prohibits torture, requiring signatory parties to take measures to end torture within their territorial

⁶⁴⁶ Ben Emmerson, “Framework Principles for Securing the Accountability of Public Officials for Gross Systematic Human Rights Violations Committed in the Context of State Counter-Terrorism Initiatives” (UN Human Rights Council, March 2013), accessed May 1, 2016, http://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a-hrc-22-52_en.pdf; and Charlie Savage, “U.N. Commission Presses U.S. on Torture,” *The New York Times* (November 13, 2014), accessed May 1, 2016, <http://www.nytimes.com/2014/11/14/world/europe/un-commission-presses-us-on-torture.html>.

⁶⁴⁷ The White House, Executive Order, “Ensuring Lawful Interrogations,” January 22, 2009, § 3(b), https://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

⁶⁴⁸ *Ibid.*, § 4.

⁶⁴⁹ “UN News - UN Expert Calls for Prosecution of CIA, US Officials for Crimes Committed during Interrogations” (UN News Service Section, December 9, 2014), accessed April 24, 2016, <http://www.un.org/apps/news/story.asp?NewsID=49560#.VmcQntCdr7V>.

⁶⁵⁰ Ben Emmerson, “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism-A/HRC/22/52” (UN Human Rights Council, March 2013), accessed May 1, 2016, http://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a-hrc-22-52_en.pdf.

⁶⁵¹ Emmerson, “Framework Principles for Securing the Accountability of Public Officials,” 5.

jurisdiction and to criminalize all acts of torture outside the U.S.⁶⁵² The Special Rapporteur called for “the individuals responsible for the criminal conspiracy...[to] be brought to justice, and...face criminal penalties commensurate with the gravity of their crimes.”⁶⁵³ Additionally, he found “those individuals found to have participated in secretly detaining persons and in any unlawful acts perpetrated during such detention, including their superiors if they have ordered, encouraged or consented to secret detentions, should be prosecuted without delay and, where found guilty, given sentences commensurate with the gravity of the acts perpetrated.”⁶⁵⁴

While the special rapporteurs have been increasingly critical of the U.S. government and its IC activities, Robert M. Chesney of The University of Texas School of Law explained that “special rapporteurs have less authority than the HRC—they are just conducting investigations per the Committee’s request. They are typically scholars or lawyers retained just for this purpose”⁶⁵⁵ In regard to the HRC, Chesney believes that “the important thing to understand [is that] the U.S. does not accept that the HRC has any kind of enforcement or law-making authority. It is not a body that has the power to interpret, in a binding way, what the ICCPR treaty even means” even though the HRC often behaves otherwise.⁶⁵⁶ For example, “the [HRC] interprets the treaty to apply where the Law of Armed Conflict Treaty applies, and that is not the U.S. government’s position. The U.S. position is that if the law of armed conflict applies even if the HRC is the legitimate enforcement mechanism.... Even more significant, the U.S. government position is that the ICCPR treaty only applies to the U.S. government when it is operating within the U.S., not abroad.”⁶⁵⁷

Even though the HRC and its special rapporteurs do not retain binding legal authority over the U.S. government and the IC, they do create political and diplomatic consequences for which U.S. must account in planning future actions. So, “does this mean the Human Rights Committee is irrelevant? Not at all. It is a focal point for diplomatic pressure expressed in human rights law terms and that cannot be entirely ignored. When it is not handled well by the U.S., it creates meaningful diplomatic friction. That is not the same as saying a judge ruling against use on a legal issue.”⁶⁵⁸ Thus, HRC and special rapporteur action, “increases diplomatic cost[s] for [the U.S.] and also fans flames of domestic political unhappiness in things the U.S. does. [Specifically], other countries take it much more seriously than the U.S. does.”⁶⁵⁹ This has real diplomatic and political consequences on the ability of the U.S. government to realize its foreign policy objectives and also on the IC to execute its missions.

⁶⁵² Michael John Garia, “U.N. Convention Against Torture: Overview and Application to Interrogation Techniques” (Washington, D.C.: Congressional Research Service, 2009), 1.

⁶⁵³ “UN Expert Calls for Prosecution of CIA, US Officials for Crimes Committed during Interrogations,” *United Nations News Service Section* (December 9, 2014), accessed April 24, 2016, <http://www.un.org/apps/news/story.asp?NewsID=49560>.

⁶⁵⁴ Ben Emmerson, “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.”

⁶⁵⁵ Robert Chesney, interview with Danielle Oxford, Austin, Texas, March 3, 2016.

⁶⁵⁶ *Ibid.*

⁶⁵⁷ *Ibid.*

⁶⁵⁸ *Ibid.*

⁶⁵⁹ *Ibid.*

International Law Implications for the IC and Interpol Enforcement:

Although the IC is legally constrained only by the U.S. Constitution and federal statutes, domestic law does not preclude consideration of treaty, customary international law, and international humanitarian law, meaning the IC must comply with the government's international legal obligations.⁶⁶⁰ While intelligence operations mostly occur abroad, beyond the physical jurisdiction of the U.S., human rights law is binding on states wherever a state exercises effective control or authority.⁶⁶¹ Likewise, individual responsibility for intelligence officers may derive from international human rights, criminal, and humanitarian law depending upon the context.⁶⁶² The ability to truly enforce these norms on IC professionals may seem dubious due to the fact that the U.S. is not a member of the International Criminal Court, does not submit to compulsory jurisdiction under the ICJ, the HRC solely offers criticisms and recommendations, and the U.S. generally will not extradite its own citizens for actions they received orders to perform; however, the holdings of international courts can significantly constrain IC activities due to international Interpol warrants and transnational criminal identification.

For example, in 2010, an Italian appeals court convicted and sentenced 23 American intelligence officers to up to nine years in prison for the abduction and subsequent interrogation of a Muslim cleric in Milan.⁶⁶³ All the Americans were tried in absentia and are now considered fugitives.⁶⁶⁴ Upon their conviction in Italy, their international warrants were submitted to Interpol.⁶⁶⁵ Although the U.S. government would not consent to their extradition, one of the convicted men, who had served as the ex-Chief of the CIA's Milan Base, was detained in Panama in July 2013 as a result of an Interpol notification when he tried to cross the border.⁶⁶⁶ Additionally, another convicted U.S. intelligence officer, Sabrina de Sousa, was taken into custody in October 2015 at the Lisbon airport and detained while she attempted to travel to Dubai.⁶⁶⁷ While discussing the impact of foreign courts on the IC, Chesney said:

Italian prosecutors decided the rendition operation was a kidnapping in violation of Italian criminal law, and they decided to prosecute. They prosecuted in absentia and got convictions over some. Now there are some people who cannot go to Europe, and it is dangerous for them to go abroad generally. That has a real effect. If you are a Chief of

⁶⁶⁰ Ana Maria Salinas de Frias, Katja LH Samuel, and Nigel D White, eds., *Counter-Terrorism: International Law and Practice* (London: Oxford University Press, 2012), 357.

⁶⁶¹ *Ibid.*

⁶⁶² *Ibid.*, 359.

⁶⁶³ Rachel Donadio, "Italy Convicts 23 Americans for C.I.A. Renditions," *The New York Times* (November 4, 2009), accessed April 24, 2016, <http://www.nytimes.com/2009/11/05/world/europe/05italy.html>.

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Ibid.*

⁶⁶⁶ "Ex-CIA Station Chief Arrested In Panama," *The Huffington Post* (July 18, 2013), accessed December 8, 2015, http://www.huffingtonpost.com/2013/07/18/robert-seldon-lady-arrested-panama_n_3618062.html.

⁶⁶⁷ Patricia Kowsmann and Manuela Mescio, "Ex- Cia Agent Detained in Portugal Over 2009 Kidnapping Conviction in Italy: Sabrina de Sousa Is Released by Lisbon Court While Awaiting Extradition Decision," *The Wall Street Journal* (October 8, 2015), <http://www.wsj.com/articles/ex-cia-agent-detained-in-portugal-over-2009-kidnapping-conviction-in-italy-1444324821>.

Station and you are reading what happened to these folks, it may chill your willingness to take certain chances.⁶⁶⁸

These prosecutions and convictions are a straightforward illustration of the political effects of foreign law enforced through multilateral mechanisms, as well as their direct consequences on convicted IC professionals' ability to travel. Most importantly, foreign judgments—such as those illustrated in this case—affect the legal analysis of the DOJ and the willingness of the IC to undertake similar operations in the future.

Thus, Interpol's ability to facilitate police cooperation among 186 member countries, including the United States, and enforce foreign judgments through executing warrants makes it a real IGO constraint on IC activities. "Interpol's Red Notices" can only be issued at the request of an Interpol member country and are distributed to all member countries.⁶⁶⁹ With warrants sent to all countries, it is possible that an extradition treaty to which the U.S. is not a party could become involved, thereby placing U.S. IC professionals in jeopardy. Thus, not only does the enforcement of foreign laws by mechanisms such as Interpol serve as a personal check on IC professionals in considering whether their actions are legal in the state where they are planned, but it also serves as a check on the actions of nations who do not want to see their employees convicted of crimes and suffer life-long consequences for their government service.

Current International Perspectives: A Shift Towards Privacy Accountability

IGOs have played a significant role in the debate about the right to privacy in recent years. Specifically, the international community expressed outrage when Edward Snowden revealed NSA's surveillance programs included the mass collection of data from citizens and governments worldwide. In response to these revelations, the UN High Commissioner for Human Rights issued a finding in June 2014 that stressed the importance of the development of the right to privacy, found that the U.S. and its allies tolerated a "disturbing lack of transparency" in their mass surveillance practices, and called for the review of national legislation and oversight mechanisms.⁶⁷⁰ In addition to this finding, the Special Rapporteur for human rights issued a report contradicting the claim that surveillance carried out by the British Government Communication Headquarters (GCHQ) and the NSA is proportionate to the existing terrorist threat, and endorsed the ability of those monitored to mount legal challenges for being subjected to bulk surveillance in conflict with human rights law.⁶⁷¹ Finally, the UN General Assembly adopted a resolution in November 2014 reaffirming the right to privacy in the digital age, condemning unlawful government mass surveillance and calling on member states to review their legislation and policies to ensure that they are in line with human rights law, signifying its

⁶⁶⁸ Chesney interview.

⁶⁶⁹ Department of Justice, "Provisional Arrests and International Extradition Requests- Red, Blue, or Green Notices," in *U.S. Attorney's Manual*, accessed 24 April, 2016, <http://www.justice.gov/usam/organization-and-functions-manual-3-provisional-arrests-and-international-extradition-requests>.

⁶⁷⁰ Office of the High Commissioner for Human Rights, "The Right to Privacy in the Digital Age" (June 2014), accessed May 5, 2016, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A.HRC.27.37_en.pdf.

⁶⁷¹ Owen Bowcott and Spencer Ackerman, "Mass Internet Surveillance Threatens International Law, UN Report Claims," *The Guardian* (October 15, 2014), accessed 24 April, 2016, <http://www.theguardian.com/world/2014/oct/15/internet-surveillance-report-edward-snowden-leaks>.

commitment to addressing the issue.⁶⁷² With these considerations, the question now remains whether and how the IC may be constrained by a universal norm of privacy extended to all people worldwide, and whether direct individual legal actions will be able to be maintained by those who claim this right has been violated by the U.S. IC.

Significantly, in October 2015, the ECJ sought to limit U.S. IC activity when it ruled that the unfettered access to data of European citizens greatly diminished Europeans' right to privacy.⁶⁷³ The ECJ struck down an international agreement that touched on NSA's PRISM program, which allowed countries to move digital information between the European Union and the United States. This action considerably impacted IC collection activities, as well as the business practices of major U.S. tech companies such as Google and Facebook that had cooperated with the PRISM programs.⁶⁷⁴ The ruling also deemed the "Safe Harbor Agreement" that governed information-sharing between the U.S. and Europe to be flawed because it allowed American government authorities to gain routine access to European citizens' online information. The court added that legislation permitting government authorities to have access on a generalized basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life.⁶⁷⁵ Professor Chesney explained:

As for the ECJ or the European data authority, none of these Europeans institutions can bind the U.S. directly. We are not a party to them; this is foreign law or European law, and none of it binds America directly. But our relationships with Europe are such that if these opinions make European governments stop doing certain things that are important to us, this is going to affect us.⁶⁷⁶

The Safe Harbor decision not only limited U.S. IC activities from the practical perspective that the IC could not collect the information it needed discreetly and efficiently, but also threatened long-term U.S. economic interests because as foreign markets seek ways to avoid U.S. surveillance, costs on U.S. technology companies in foreign markets will rise greatly.⁶⁷⁷ Likewise, in March 2014, the European Parliament voted to strengthen European privacy rights regarding data-sharing with companies outside the EU, and passed a resolution delaying a U.S. trade agreement over concerns about NSA surveillance, limiting U.S. future trade capabilities and therefore potentially impacting the U.S. economy.⁶⁷⁸ Chesney stated, "decisions such as Safe

⁶⁷² Alex Grigsby, "UN Committee Adopts Resolution on Right to Privacy in the Digital Age" (Council on Foreign Relations - Net Politics, December 1, 2014), accessed December 8, 2015, <http://blogs.cfr.org/cyber/2014/12/01/un-committee-adopts-resolution-on-right-to-privacy-in-the-digital-age/>.

⁶⁷³ Mark Scott, "Data Transfer Pact Between U.S. and Europe Is Ruled Invalid," *The New York Times* (October 6, 2015), accessed May 5, 2016, <http://www.nytimes.com/2015/10/07/technology/european-union-us-data-collection.html>.

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Ibid.*

⁶⁷⁶ Chesney interview.

⁶⁷⁷ Brennan Center for Justice, "Strengthening Intelligence Oversight" (2015), 8, accessed April 24, 2016, https://www.brennancenter.org/sites/default/files/publications/Church_Committee_Web_REVISIED.pdf.

⁶⁷⁸ *Ibid.*, 9.

Harbor are where [foreign judgments] matter because certain types of cooperation may have to stop. That is costly to us.”⁶⁷⁹

In response, the U.S. Congress passed the Judicial Redress Act of 2015, acknowledging that foreigners have privacy rights that the United States government will respect. The bill allows foreign citizens in designated countries to sue the United States for the unlawful disclosure of personal information—under the terms of the Privacy Act—obtained in connection with international law enforcement efforts.⁶⁸⁰ Specifically, “the Attorney General may designate a foreign country, or regional economic integration organization, or member country of such organization, as a covered country...” if the country has an information-sharing agreement with the U.S.⁶⁸¹ This Act was a key element of the E.U.–U.S. Privacy Shield enacted on February 24, 2016—the successor agreement to the U.S.–E.U. Safe Harbor Agreement. The E.U.–U.S. Privacy Shield imposes stronger obligations on U.S. companies to protect Europeans’ personal data, requires the U.S. to cooperate more with European Data Protection Authorities, and contains written commitments and assurance regarding access to data by public authorities. Professor Chesney added, “for all the hoopla that surrounded the ECJ decision and the supposed death of Safe Harbor, a few months later, Safe Harbor is back, and is called Privacy Shield. Is it that different? I don’t think so. When strong nation-states are at play and their interests are being threatened, they cannot publicly say it, but they need to make sure they are getting the benefits that come from intelligence cooperation with the United States.”⁶⁸²

The public debate surrounding global norms on personal privacy—triggered by the Snowden leaks and bolstered by the international community’s resulting actions—has also had notable domestic effects. In January 2014, the White House released Presidential Policy Directive 28 (PPD 28) on Signals Intelligence (SIGINT) declaring “that all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside, and that all persons have legitimate privacy interests in the handling of their personal information.”⁶⁸³ In explaining PPD 28, Lisa Monaco, President Barack Obama’s Homeland Security Advisor, stated:

This directive strengthened Executive Branch oversight of intelligence activities in a number of significant ways. It set forth limits on the use of SIGINT collection in bulk while preserving its use to combat counterterrorism, proliferation and other threats. It required senior government leaders to carefully and rigorously weigh the value of the information collected relative to the diplomatic, security, and economic risks of conducting these activities if they are exposed. PPD 28 also took the unprecedented step of extending certain privacy protections enjoyed by Americans to all individuals—regardless of nationality.⁶⁸⁴

⁶⁷⁹ Chesney interview.

⁶⁸⁰ Judicial Redress Act of 2015, H. R. 1428, 114th Congress (2015).

⁶⁸¹ *Ibid.*, 2d(1).

⁶⁸² Chesney interview.

⁶⁸³ **White House**, “Presidential Policy Directive—Signals Intelligence Activities.”

⁶⁸⁴ Lisa Monaco, Keynote Address, Intelligence and National Security in American Society Conference, Austin, Texas, March 30, 2016.

PPD 28 represents an unprecedented recognition by the U.S. government of the international norm of a universal privacy right, and has imposed an express limitation on the IC's collection and use of bulk SIGINT.⁶⁸⁵ It has also forced the IC to reevaluate its current practices and implement new policies and procedures that adequately limit retention, restrict dissemination, and safeguard all personal information collected through SIGINT. Thus, the recognition of privacy rights both domestically and globally has the potential to significantly alter the way the IC operates in the future.

While PPD 28 represents an unprecedented recognition by the U.S. government of the privacy rights of foreign nationals, Monaco argued that recognition of this right was done “with the premise that to do so would not affect our own national security.”⁶⁸⁶ In reaction to the Snowden leaks, “some of the reactions to the disclosures were much more pronounced internationally amongst some of our key allies and partners, and frankly it affected cooperation and that goes to the heart of our own national security.”⁶⁸⁷ In order to maintain trust and cooperation from international partners and allies, the U.S. had to do something that would be perceived by the international community as a remedy to the violation of their privacy rights. Professor Chesney argued that:

(PPD 28's) sections are designed to provide at least a face-saving basis for the German Chancellor and other allied leaders to say okay, this thing was exposed, I complained, and the Obama Administration listened and changed things. In my opinion, there is a strong element of theatre to all of this. I do not think senior government personnel are actually surprised when they find out that other world leaders are being spied on. The president is not actually surprised to find out the NSA is spying on world leaders. No one is actually surprised here, at the leadership level of all countries. But, of course, the publics are surprised—indeed, our public was surprised. This creates real domestic political consequences for these leaders. Some are more mad than others, but most have to push back nonetheless. Therefore, they needed something from the Obama Administration to point to and say “Hey, we had an effect.” They could not look like they were not doing anything.⁶⁸⁸

Monaco echoed this sentiment when she recalled, “we had partners... who were facing... constraint in sharing [intelligence] with us because of the backlash internationally on either their cooperation with us or the representation of intelligence activities by the U.S. government abroad. So there became an imperative to change the dynamic and extend protections ... consistent with our own abilities to perform foreign intelligence.”⁶⁸⁹

Thus, while the government was managing these political constraints, Monaco said, “there was a recognition from the get-go that these were decisions as a matter of policy. They were not legal

⁶⁸⁵ White House, “Presidential Policy Directive—Signals Intelligence Activities.”

⁶⁸⁶ Lisa Monaco, Q&A, Intelligence and National Security in American Society Conference, Austin, Texas, March 30, 2016.

⁶⁸⁷ Ibid.

⁶⁸⁸ Robert Chesney, interview with Danielle Oxford, Austin, Texas, March 3, 2016.

⁶⁸⁹ Lisa Monaco, Q&A, Intelligence and National Security in American Society Conference, Austin, Texas, March 30, 2016.

requirements, but decisions to extend as a matter of policy—the benefit of which outweighed any hindrance it would do to our own intelligence gathering activities.”⁶⁹⁰ Monaco contended that the effects of adopting PPD 28 have been positive. The recognition of international privacy rights has allowed our partners to “address backlash in their own governments and their own communities [and] to then unlock and enable certain sharing... In balance, it was not costly to our national security. It enabled continued relationships to not get stymied and to do the type of sharing we need. It enabled [the U.S. government] to maintain critical relationships and, frankly, they are nimble decisions. In other words, there is a mechanism to adjust certain decisions if there is a national security decision to do so... There is a nimbleness to take the national security measure we need to.”⁶⁹¹

Current Reform Proposals

The Future of Oversight and The Codification of Multilateral Intelligence Norms

The trend toward increased cooperation between security services and greater recognition of international human rights norms has generated renewed discussion regarding the necessity of codifying and enforcing international norms for intelligence activities. In 2009, the UN Human Rights Council mandated the UN Special Rapporteur on the protection and promotion of human rights while countering terrorism to “prepare, working in consultation with States and other relevant stakeholders, a compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight.”⁶⁹² This United Nations study compiled 35 noteworthy international practices and was presented to the Human Rights Council in June 2010.⁶⁹³ Although the report was specifically drafted in the context of counter-terrorism, the practices are applicable to all areas of intelligence work, as well as oversight of such activities.

The report covers the legal basis for intelligence agencies, oversight and accountability, substantive human rights compliance by states and their intelligence services, and specific activities of intelligence services, including information collection, use of personal data, and powers of arrest and detention.⁶⁹⁴ The ideal practices outlined for intelligence agencies include both legal and institutional frameworks, which serve to promote human rights and the respect for the rule of law in the work of intelligence services, but also goes beyond these legally binding obligations.⁶⁹⁵ Significant oversight practices outlined within the report include the development of “at least one civilian (oversight) institution that is independent of both the intelligence services and the executive,” providing power to oversight institutions to “initiate and conduct their own investigations, as well as full and unhindered access to the information,” and the protection of

⁶⁹⁰ Ibid.

⁶⁹¹ Ibid.

⁶⁹² Martin Scheinin, “Compilation of Good Practices on Legal and Institutional Frameworks and Measures That Ensure Respect for Human Rights by Intelligence Agencies While Countering Terrorism, Including on Their Oversight” (Human Rights Council, May 2010), accessed April 24, 2016, <https://fas.org/irp/eprint/unhrc.pdf>.

⁶⁹³ Aidan Wills, *Understanding Intelligence Oversight*, (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2010), 15.

⁶⁹⁴ Martin Scheinin, “Compilation of Good Practices on Legal and Institutional Frameworks and Measures.”

⁶⁹⁵ Ibid., 1.

classified information and personal data.⁶⁹⁶ Professor Chesney believes that the codification of IC norms will not,

be adopted with a few exceptions. One exception is for countries that don't have the capacity to do large-scale intelligence because they are relatively small or get their information shared by an ally like us. Also, countries will talk about it and make proposals, and the countries that will sign up will be countries where [the code] is utterly unenforceable...such as...authoritarian governments. Countries that have democratic and judicial capacities like the U.S., in contrast, will be much more careful signing up. If they are just nice-sounding principles, sure, but if there is any indication there is going to be a genuinely-binding "Treaty for Spying," I suspect the United States would not join.⁶⁹⁷

The essence of Chesney's argument is that the real threat of adopting these norms lies in countries pushing for IC norms that will be unenforceable against them. Due to the democratic nature of U.S. governance any adopted norms could be legally enforceable against the U.S. government, and "that gives other countries too much of an advantage."⁶⁹⁸ Thus, such a proposal is a double-edged sword: if adopted by all member states, the recommendations outlined in this report could serve as an international guideline on the legality and practical norms of intelligence activities and perhaps even serve to germinate a global oversight and enforcement mechanism; however, this would likely be detrimental to U.S. national security interests.

Preventative Legal Engagement

The IC will always conduct operations that violate both foreign and international laws that have not been adopted by the U.S.; however, in order to protect U.S. interests and officials, including foreign diplomatic relationships, the IC must be increasingly mindful of emerging global norms and their accompanying legal hazards. Thus, ensuring lawyers are involved at each stage of approval and planning of overseas operations could prevent unanticipated backlash from foreign governments and other international actors. These lawyers would be able to advise IC professionals on the existence of relevant international and foreign domestic laws that may influence how an operation should be conducted and its inherent risks.

Former Homeland Security Advisor Ken Weinstein spoke to this issue at a conference in Austin, Texas, in March 2016. He stated, "We often think that we need [more] oversight—meaning we need more eyes looking down. I would argue that we need more eyes, better-trained eyes, looking in. Within the operator himself, within the agency, in the person of really strong attorney, who are looking out, making sure safeguards are being protected."⁶⁹⁹ Weinstein observed that since the 1970s there has been a notable, "insertion of attorneys into operations in the way they were not before."⁷⁰⁰ He explained:

⁶⁹⁶ Ibid., 36.

⁶⁹⁷ Chesney interview.

⁶⁹⁸ Ibid.

⁶⁹⁹ Ken Weinstein, Conference Remarks, Intelligence in American Society Conference, Austin, Texas, March 20, 2016.

⁷⁰⁰ Ibid.

We have seen more and more lawyers and, while some would say that has the potential to gum up the works, in my experience it has actually been the opposite. Throughout my career I have seen that at every step...As a prosecutor, what do you do? An agent comes to you and says can we do this?...[A]nd as prosecutor you have a dual role, looking at that issue from the perspective of “I want to advance law enforcement and catch the bad guy,” but you are also looking at it from [the] “can we do that?” [standpoint.] Are there limitations in place we have to observe? So, you are instilled with the duality of that role very early on. I saw that playing out with the FBI OGC—full of a staff that loves to kick down doors and get the bad guys, but they recognize that their goal was to be [accomplished] according to the rules. DOJ, where I was the Assistant Attorney General, had always had that role in relation to the attorneys that help the FBI agents go in and get FISA orders. [The attorneys] play that role by helping them get the order, but also making sure they have the appropriate predicate. That got expanded in the last few years to actually have broader oversight with FBI operations.⁷⁰¹

There exists an opportunity to expand the scope of these lessons to IC operations abroad. The U.S. will still frequently violate foreign and international laws, but it is good practice to understand fully the legal environment before making decisions about activities abroad. Such knowledge could prevent unforeseen international backlash and harsh penalties.

Clarification of IC Actions for International Actors

In certain instances, independent U.S. representatives have been dispatched abroad to clarify U.S. IC policies and activities for international institutions. An objective presentation by a credible U.S. overseer may help correct misconceptions and improve the dialogue about mutually beneficial national security interests. Assurances to foreign governments and international organizations could also shape the way issues are portrayed abroad.

For example, the CIA lawyers engaged directly with the International Committee for the Red Cross (ICRC) to build confidence and address misconceptions on the CIA’s rendition, detention, and interrogation program. Specifically, CIA responded affirmatively to ICRC requests to meet and discuss their activities detaining terrorists after it became known that the CIA had been authorized to detain and question people. While the ICRC ultimately disagreed with and objected to CIA practices, they did meet with CIA attorneys to receive assurances about detainee treatment and medical care, and maintained strict secrecy about what they were told. “Today, long after the demise of CIA prisons and the EIT program ... the relationship between the CIA and the ICRC [continues].”⁷⁰² Former CIA Acting General Counsel John Rizzo wrote in *Company Man: Thirty Years of Controversy and Crisis in the CIA*:

I took considerable gratification...in serving as [former CIA Director] Mike Hayden’s point man in fostering an unprecedented relationship between the CIA and the ICRC...The ICRC approached us quietly, tentatively, to explore the possibility of establishing a dialogue about the location and fate of the Al Qaeda operatives that the Agency either was holding ... [T]he ICRC leadership was pleasantly shocked that we

⁷⁰¹ Ibid.

⁷⁰² John Rizzo, *Company Man: Thirty Years of Controversy and Crisis in the CIA* (New York: Scribner, 2014), 277.

agreed to meet with them... and the ICRC was eager to maintain a dialogue, even if no concrete results were forthcoming... I was a major proponent for establishing a line of communication between the two organizations... Eventually a remarkable relationship of respect and trust developed between the two organizations with widely disparate missions.⁷⁰³

General Michael Hayden proposed and defended this exchange. In his book *Playing to the Edge: American Intelligence in the Age of Terror*, he recalled that the interactions with the ICRC regarding the RDI program “were more productive... than [such discussions] were with Congress.”⁷⁰⁴ As a result of the dialogue between the two agencies, the CIA began quietly giving “the ICRC [a] heads-up before transferring some of the later detainees to Guantanamo, and offered what information [they] could to help the ICRC keep people safe around the world.”⁷⁰⁵ Although the ICRC did ultimately issue a report that was critical of the EIT program, they did so in a confidential manner to Congress. Hayden posited that this was due to the fact that “even when [the U.S. government] failed to find mutual understanding with the ICRC... we did develop some mutual respect.”⁷⁰⁶

In another instance, PCLOB Chairman David Medine accompanied U.S. government officials to Europe in order to meet with EU officials involved in the Safe Harbor negotiations. Medine commented on the value added of having an independent, credible voice to corroborate U.S. government statements regarding NSA’s Section 702 bulk collection program. Specifically, Medine was able to speak to the U.S. government’s efforts to respect and safeguard foreign nationals’ personal information when accessing data pursuant to the Safe Harbor. He noted at a conference that:

Just a few weeks ago, I was in Paris meeting with the Article 29 committee of the EU as they were negotiating Safe Harbor to give them some assurances that 702, for example, is not a bulk collection program even though the European Court of Justice suggested [it was]. I was there with someone from the DNI staff to say “no, have confidence, we are independent and took a hard look at it, we call it the way we see it.” 215 we called one way; 702 we called the other. 702 we said is within the law. It is a targeted program. It’s proportionate. That is way to give confidence to not only the American public, but also to the international public that these programs have had a hard look.⁷⁰⁷

Medine’s ability to comment on the U.S. government’s high-level supervision during these negotiations not only advanced American policy interests, but also his independent assessment lent credibility to U.S. government claims about rigorous IC oversight, and assisted in clearing up a serious misconception and concern on the part of the Europeans.

⁷⁰³ Ibid.

⁷⁰⁴ Michael V. Hayden, *Playing to the Edge: American Intelligence in the Age of Terror* (New York: The Penguin Press, 2016), 231.

⁷⁰⁵ Ibid., 232.

⁷⁰⁶ Ibid.

⁷⁰⁷ David Medine, PCLOB Panel, Intelligence in American Society Conference, Austin, Texas, March 30, 2016.

Conclusion

U.S. intelligence depends critically on a large network of bilateral relationships and multi-party alliances. Director Brennan succinctly characterized the importance of long-term intelligence ties: “Over time, our engagement with partner services fosters a deeper, more candid give and take, a more robust exchange of information and assessments, and a better understanding of the world that often ultimately encourages better alignment on policy.”⁷⁰⁸ These relationships provide unquestioned benefits and enhance U.S. national security, and on occasion, these relationships can also be a source of friction or serve as a constraint on U.S. IC activity. The interests and concerns of the IC’s foreign partners have an increasing impact on the nature and quality of U.S. intelligence work. Loch Johnson, an intelligence scholar, succinctly summarized the value of these relationships: “No single country has all the answers, all the information, or all the resources to respond to these challenges to freedom; by working together and sharing intelligence, as well as participating in operations against the world’s dark forces...[we] improve...[our] chances for success.”⁷⁰⁹

In addition to foreign security services, foreign court systems and international government organizations are also increasingly interested in the activities of the U.S. IC, and seek to influence how the U.S. conducts intelligence outside its borders. There are not yet treaties, conventions or binding norms that apply to U.S. intelligence activities, but there are individuals and institutions that believe the international system should move in that direction.

It is important for the U.S. government to recognize these changed realities and be prepared to plan, approve, and conduct intelligence operations with a full understanding of the international and legal environment. The U.S. IC, and its overseers, should be prepared to engage foreign partners in disciplined dialogue that will help alleviate misconceptions about U.S. aims and practices and potentially prevent actions that will harm the security interests of both the U.S. and the international system.

Recommendations

We recommend:

- IC agencies should consult with lawyers in the planning, approval, and execution stages of sensitive foreign operations in order to anticipate potential legal risks from foreign courts or international organizations; and
- IC agencies, in consultation with the State and Justice Departments, should engage directly with international human rights organizations when it is necessary to clarify misconceptions about U.S. IC activities.

⁷⁰⁸ Council on Foreign Relations, “U.S. Intelligence in a Transforming World.”

⁷⁰⁹ Johnson, *National Security Intelligence*, 180.

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Chapter 8.

Non-Governmental Organizations and U.S. Intelligence

by Danielle Oxford, Kristine Henry, and Sydney Taylor

The IC and NGOs interested in secrecy, civil liberties, and government accountability arguably have one of the most contentious institutional relationships in American society. While the IC's efforts to defend the United States and its national security interests are an invaluable service to all American citizens, a class of NGOs routinely criticize the means by which this objective is pursued. These organizations—including the American Civil Liberties Union (ACLU), Human Rights Watch, and the Federation of American Scientists, among numerous others—acknowledge that ensuring the safety of American citizens is an important responsibility of the government, yet argue it is of equal or greater importance that the civil liberties and privacy of individual citizens not be jeopardized in the process. Although national security and civil liberties are not mutually exclusive ideals, the tension between them defines the relationship between the IC and this class of NGOs. This chapter details how this relationship has historically developed between the two communities using two illustrative case studies, and analyzes how the NGO community engages in a less formalized, but increasingly impactful, type of “oversight” by monitoring, commenting on, and challenging the actions of the IC.

NGO Oversight of the IC: A Historical Account

For much of the history of the IC, NGOs have critically analyzed its actions and brought perceived abuses of power to light for the public. Though the two communities are not philosophically opposed on every topic, mutual distrust has defined their interactions for most of the IC's history. One study by CIA's Center for the Study of Intelligence noted that the relationship between the IC and NGOs has gone through several phases, with many living “through years of the government keeping NGOs at arm's length” due to this dynamic.⁷¹⁰ The following case studies are used to illustrate the manner in which the IC-NGO relationship has evolved over time, and to explain why the strained relations still exist today.

U.S. Intervention in Guatemala

The U.S.'s involvement in Latin America during the Cold War has been a long-scrutinized source of contention between the IC and NGO communities, and is well exemplified by the CIA's involvement in Guatemala's 1954 coup d'état. Working actively to combat the spread of communism and leftist movements in the region, Secretary of State John Foster Dulles and President Dwight D. Eisenhower pursued a policy of “unstinting support” to “keep Communism out of the Western Hemisphere” in order to challenge the “Communist octopus [that] had for

⁷¹⁰ Ellen B. Laipson, “Can the USG and NGOs Do More?: Information-Sharing in Conflict Zones” (Central Intelligence Agency, April 15, 2007), accessed November 21, 2015, https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol49no4/USG_NGOs_5.htm.

years used its tentacles to control events in Guatemala.”⁷¹¹ Accordingly, the Eisenhower Administration authorized the CIA to conduct Operation PBSUCCESS, which launched the coup that toppled democratically-elected Guatemalan President, Jacob Árbenz.⁷¹² The operation resulted in the installation of Carlos Castillo Armas’ military dictatorship, effectively ending the “Ten Years of Spring,” or the only years of representative democracy in Guatemalan history.⁷¹³ A succession of military tyrants held power followed the coup, causing Guatemala to descend “into three decades of a brutal civil war in which as many as 200,000 people died, many of them peasants killed by security forces.”⁷¹⁴

Despite overwhelming political support within the U.S. government for Operation PBSUCCESS and associated covert actions in Central America in the ensuing years—often including military sales and monetary support to military dictatorships—human rights NGOs during the same period “had little trouble attributing responsibility for human rights violations.”⁷¹⁵ Indeed, “Amnesty International, Human Rights Watch, and other organizations clearly stated that a government-sponsored program of mass murder was under way.”⁷¹⁶ While the U.S. government attempted to distract attention from the extensive human rights violations occurring in Guatemala in the early 1980s, it also “attack[ed] the organizations responsible for trying to document and disseminate information about these violations.”⁷¹⁷ For example, following the release of an Amnesty International report in 1982 on rural massacres conducted by the Ríos Montt government in the Guatemalan highlands, the State Department repudiated their findings, stating that the Montt government had “made significant progress” on human rights and accused NGOs like Amnesty of “being part of a ‘concerted disinformation campaign’...by groups supporting a left wing insurgency...”⁷¹⁸ This pattern of denial in the face of pointed accusation is a longstanding facet of the U.S. government-NGO relationship, and one that has largely continued in recent history.

The Iran-Contra Affair

Indeed, this paradigm applied well into the Reagan Administration—perhaps most notably during the Iran-Contra scandal. On December 1, 1981, President Reagan authorized the CIA under DCI William Casey to “support and conduct...paramilitary operations against...Nicaragua

⁷¹¹ David Barrett, “Congress, the CIA, and Guatemala, 1954: Sterilizing a ‘Red Infection’ Congress, the CIA, and Guatemala, 1954” (Central Intelligence Agency, May 8, 2007), accessed Dec. 4, 2015, <https://www.cia.gov/library/center-for-the-study-of-intelligence/kent-csi/vol44no5/html/v44i5a03p.htm>.

⁷¹² Kate Doyle and Peter Kornbluh, eds., “CIA and Assassinations: The Guatemala 1954 Documents” (The National Security Archive, The George Washington University), accessed Dec. 4, 2015, <http://nsarchive.gwu.edu/NSAEBB/NSAEBB4/>.

⁷¹³ Piero Gleijeses, *Shattered Hope: The Guatemalan Revolution and the United States, 1944-1954* (Princeton: Princeton University Press, 1991), 3.

⁷¹⁴ Elisabeth Malkin, “An Apology for a Guatemalan Coup, 57 Years Later,” *The New York Times* (Oct. 20, 2011), accessed December 10, 2015, http://www.nytimes.com/2011/10/21/world/americas/an-apology-for-a-guatemalan-coup-57-years-later.html?_r=0.

⁷¹⁵ Kathryn Sikkink, *Mixed Signals: U.S. Human Rights Policy and Latin America* (Ithaca: Cornell University Press, 2004), 166.

⁷¹⁶ Ibid.

⁷¹⁷ Ibid., 167.

⁷¹⁸ Ibid.

[the Sandinista government]” by offering money, arms, equipment, and military training to contra rebel groups, ultimately using proceeds from weapons sales to Iran.⁷¹⁹ The administration sought to overthrow the left-wing Sandinista government as part of what became known as the “Reagan Doctrine” to diminish Soviet influence in Africa, Asia, and Latin America during the Cold War.

When the scandal erupted in 1986, human rights organizations sharply condemned the Reagan Administration’s actions, particularly due to the human cost of the CIA’s support to the contras. Although NGOs denounced rights abuses by both the Sandinista government and the contra rebels, one of the most prominent human rights reports on the conflict, “implied that the contras were more culpable.”⁷²⁰ Indeed, the report issued by America’s Watch found that the contras, “engage[d] in selective but systematic killings of persons they perceive[d] as representing the Government...[and] also engage[d] in widespread kidnapping of civilians, apparently for purposes of recruitment as well as intimidation.”⁷²¹

Reagan Administration officials, contradicting the determination by America’s Watch that, “disregard for the rights of civilians has become a de facto policy of the contra forces,” called the NGO’s charges “totally unfounded” and argued that the contras’ record was improving.⁷²² Unsurprisingly, this further strained the relationship between the government’s security organs and NGO communities, particularly since, “by the 1990s, ... the leading nongovernmental organizations’ reporting on abuses worldwide...had achieved a hard-won credibility that made it difficult for any administration to dispute the facts of abuse.”⁷²³

Combined, these two case studies illustrate the adversarial foundation upon which the IC-NGO relationship was built in the latter half of the 20th century. From the IC’s perspective, NGOs were weakening public support for operations deemed necessary to combat the spread of communism on the front lines of the Cold War. Drawing attention to the human cost of these operations threatened the U.S.’s global standing at a time when international support was pivotal. From the NGO community’s perspective, these covert operations were incompatible with the most basic values of the American people; to allow the government to violate these rights in foreign countries with impunity was intolerable. Thus, the tension between civil liberties and national security has essentially characterized the IC-NGO relationship since the IC’s inception.

⁷¹⁹ Ronald Reagan, “Finding Pursuant to Section 662 of the Foreign Assistance Act of 1961 As Amended, Concerning Operations Undertaken by the Central Intelligence Agency in Foreign Countries, Other Than Those Intended Solely for the Purpose of Intelligence Collection” (December 1, 1981), accessed December 10, 2015, http://www.brown.edu/Research/Understanding_the_Iran_Contra_Affair/documents/d-all-45.pdf.

⁷²⁰ Elaine Sciolino, “U.S. Group Finds No Improvement in Contras’ Human Rights Record,” *The New York Times* (February 10, 1987), accessed December 10, 2015, <http://www.nytimes.com/1987/02/10/world/us-group-finds-no-improvement-in-contras-human-rights-record.html>.

⁷²¹ Ibid.

⁷²² Ibid.

⁷²³ Aryeh Neier, “The New Double Standard,” *Foreign Policy*, no. 105 (1996-1997): 93, accessed December 11, 2015, <http://www.jstor.org/stable/1148975>.

Current Perspectives on the IC-NGO Relationship

September 11, 2001, has often been referred to as the day that changed everything about U.S. national security policy. While 9/11 did not fundamentally transform the essential nature of the IC-NGO relationship, it nevertheless shifted the focus of the NGO community's criticism of the IC's activities. As the ACLU—arguably the most prominent NGO in the civil liberties space today—has written:

Since the 9/11 terrorist attacks, the ACLU has been working vigorously to oppose policies that sacrifice our fundamental freedoms in the name of national security. ...[We] are working to restore fundamental freedoms lost as a result of the Bush administration policies that expanded the government's power to invade privacy, imprison people without due process, and punish dissent.⁷²⁴

Although NGOs tend to focus on specific areas—such as Amnesty International on human rights or the Federation of American Scientists on government secrecy—the ACLU's goals are broadly representative of the NGO community's priorities in the post 9/11 era. The following explores the contemporary issues dividing the IC and NGO communities in order to analyze the manner in which NGO oversight of intelligence activities manifests itself today.

The CIA's Rendition, Detention, and Interrogation Program

The CIA's RDI program is perhaps the most controversial IC activity in recent history—particularly the use of “enhanced interrogation techniques” (EITs) on detainees. NGOs have suggested that EITs are merely a euphemism for information extraction via torture, and often contest the basic premise that EITs could produce reliable information. As Liza Goitein, Co-Director of the Brennan Center for Justice's Liberty and National Security Program, stated in an interview, “At the micro level, it's counterproductive because you get a lot of bad information. At the macro level, it's counterproductive because for every suspected terrorist...who [gets] torture[d], you probably create about a hundred other terrorists in the world.”⁷²⁵ While former CIA officials, including former DCI George Tenet, have adamantly insisted that “we don't torture people,” most figures in the NGO community disagree with this assertion.⁷²⁶ The techniques—including waterboarding, rectal rehydration, sleep deprivation to the point of hallucination, and extended confinement in coffin-like boxes—have been a major focus of NGO activity in recent years, with the ACLU arguing that, “the public deserves to hear the truth: torture doesn't work, and more importantly, it's never acceptable.”^{727, 728}

⁷²⁴ American Civil Liberties Union, “ACLU History,” accessed November 22, 2015, <https://www.aclu.org/about/aclu-history>.

⁷²⁵ Elizabeth Goitein, interview by Raheem Chaudhry, Kristine Henry, and Sydney Taylor, Washington, D.C., December 16, 2015.

⁷²⁶ CBS News, “Former CIA insider: My officers ‘did not torture anybody’” (December 10, 2014), accessed December 11, 2015, <http://www.cbsnews.com/news/cia-interrogation-report-flawed-inaccurate-says-former-intelligence-insider/>.

⁷²⁷ “Explaining and Authorizing Specific Interrogation Techniques,” *The New York Times* (April 17, 2009), accessed December 12, 2016, http://www.nytimes.com/interactive/2009/04/17/us/politics/20090417-interrogation-techniques.html?_r=0.

The NGO community's primary criticisms of the RDI program are that the EITs "were far more brutal and widespread than Americans were lead to believe," that extraordinary rendition resulted in the U.S. government systematically sending suspected terrorists "off to a 'who's who' of nations known to use torture" in CIA-run black sites, and that the programs broadly contradicted one of America's most basic constitutional principles of granting due process to suspected criminals.^{729,730} Although President Barack Obama and former Attorney General Eric Holder have gone on record referring to the EITs as torture and have repudiated their use, they declined to prosecute the Bush Administration officials who authorized them.⁷³¹ NGOs have largely argued that this is not enough. Indeed, in a June 2015 letter to Attorney General Loretta Lynch, Human Rights Watch, the ACLU, and Amnesty International called for the "perpetrators" of the programs to be prosecuted, including "persons in positions of command."⁷³² In October 2015, the ACLU also filed a lawsuit against the CIA contractor psychologists who designed the EITs on behalf of "three victims of CIA torture," alleging that the psychologists had committed war crimes and conducted unlawful human experimentation.⁷³³ The legacy of this program plays a central role in shaping the NGO community's commentary on IC activities today.

NSA Bulk Data Collection

In 2013, former NSA contractor Edward Snowden released a large volume of classified information to news outlets revealing mass surveillance programs conducted by NSA. The documents showed that the government, with assistance from at least nine major American telecommunications carriers, had been collecting telephone metadata on millions of Americans since at least 2001.⁷³⁴ Section 215 of the USA PATRIOT Act granted the NSA the "authority to intercept wire, oral, and electronic communications relating to terrorism," while electronic collection under the PRISM program involved the NSA and the FBI tapping directly into the central servers of U.S. Internet companies under a judicial warrant in order to "extract audio and

⁷²⁸ Ashley Gorski, "ACLU Sues CIA for Reports on Its Torture Program" (American Civil Liberties Union, November 26, 2013), accessed December 12, 2016, <https://www.aclu.org/blog/aclu-sues-cia-reports-its-torture-program>.

⁷²⁹ Human Rights First, "Torture," accessed December 7, 2015, <http://www.humanrightsfirst.org/topics/torture>.

⁷³⁰ American Civil Liberties Union, "Extraordinary Rendition," accessed December 7, 2015, <https://www.aclu.org/issues/national-security/torture/extraordinary-rendition>.

⁷³¹ Jennifer Bendery and Ali Watkins, "Despite Torture Uproar, DOJ Still Says No to Prosecutions," *The Huffington Post* (December 9, 2014), accessed December 12, 2015, http://www.huffingtonpost.com/2014/12/09/doj-torture_n_6298276.html.

⁷³² Salil Shetty, Anthony D. Romero, and Kenneth Roth, "Human Rights Watch, ACLU, Amnesty Call for Special Prosecutor for Torture" (Human Rights Watch, June, 23, 2015), accessed December 10, 2015, <https://www.hrw.org/news/2015/06/23/human-rights-watch-aclu-amnesty-call-special-prosecutor-torture>.

⁷³³ American Civil Liberties Union, "ACLU Sues Psychologists Who Designed and Ran CIA Torture Program" (October 13, 2015), accessed December 10, 2015, <https://www.aclu.org/news/aclu-sues-psychologists-who-designed-and-ran-cia-torture-program>.

⁷³⁴ Electronic Frontier Foundation, "NSA Spying on Americans," accessed December 8, 2015, <https://www.eff.org/nsa-spying>.

video chats, photographs, e-mails, documents, and connection logs that enable[d] analysts to track foreign targets.”⁷³⁵⁻⁷³⁶

Many Americans were surprised and concerned by the revelations, as were NGOs working on privacy issues. According to the Pew Research Center, a majority of Americans opposed the government collecting bulk data on its citizens and believed that there were not adequate limits on what data could be collected.⁷³⁷ Although the IC and Obama Administration defended the programs, arguing that they were not conducting “warrantless wiretapping,” and that the standards governing how the metadata was handled were strictly monitored by the Federal Intelligence Surveillance Court, NGOs largely found these explanations unsatisfying. Steve Aftergood, Director of the Federation of American Scientists Project on Government Secrecy, for example, concluded that, “The government engaged in a form of mass surveillance that did not have public consent and, when it was discovered, had to be ratcheted back. There’s good reason to believe that secrecy has exceeded legitimate boundaries and has become counterproductive.”⁷³⁸

Moreover, NGOs such as the Electronic Privacy Information Center, the Electronic Frontier Foundation, and the ACLU argued that these surveillance programs were, “in violation of the privacy safeguards established by Congress and the U.S. Constitution” and that they “permit[ted] the government to conduct surveillance that has no real connection to the government’s foreign intelligence interests” due to an overly lenient FISC.⁷³⁹⁻⁷⁴⁰ The ACLU has also argued that these infringements on privacy rights have a domino effect on other civil liberties violations: “Innocuous data is fed into bloated watchlists, with severe consequences—innocent individuals have found themselves unable to board planes, barred from certain types of jobs, shut out from their bank accounts, and repeatedly questioned by authorities.”⁷⁴¹ Amie Stepanovich, U.S. Policy Manager for Access Now, noted in an interview that, “We need to talk about other ways to get this information. It seems like there’s nothing that can replace bulk data collection from the IC’s perspective because nothing else collects all the data. Bulk collection may give [the IC] what they need, but what are the alternatives?”⁷⁴² NGOs focused on Internet privacy thus continue to contest the surveillance programs through litigation such as *First Unitarian v. NSA* and *Smith v.*

⁷³⁵ Barton Gellman and Laura Poitras, “U.S., British intelligence mining data from nine U.S. Internet companies in broad secret program,” *The Washington Post* (June 7, 2013), accessed January 20, 2016, https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html.

⁷³⁶ Electronic Privacy Information Center, “USA PATRIOT Act (H.R. 3162),” accessed February 24, 2016, <https://epic.org/privacy/terrorism/hr3162.html>.

⁷³⁷ George Gao, “What Americans think about NSA surveillance, national security and privacy” (Pew Research Center, May 29, 2015), accessed December 15, 2015, <http://www.pewresearch.org/fact-tank/2015/05/29/what-americans-think-about-nsa-surveillance-national-security-and-privacy/>.

⁷³⁸ Aftergood interview.

⁷³⁹ Electronic Frontier Foundation, “NSA Spying on Americans.”

⁷⁴⁰ American Civil Liberties Union, “How the NSA’s Surveillance Procedures Threaten Americans’ Privacy,” accessed Dec. 8, 2015, <https://www.aclu.org/how-nasas-surveillance-procedures-threaten-americans-privacy>.

⁷⁴¹ American Civil Liberties Union, “Privacy and Surveillance,” accessed December 9, 2015, <https://www.aclu.org/issues/national-security/privacy-and-surveillance>.

⁷⁴² Stepanovich interview.

Obama, which challenge the controversial metadata collection programs that continue to this day with only slight statutory revisions regarding data storage.⁷⁴³

CIA Drone Operations

The use of unmanned aerial vehicles to conduct targeting killings of suspected terrorists is another area where the NGO community is monitoring and commenting on IC activity. The program began in 2001 under the Bush Administration, but has been expanded as part of President Obama's counterterrorism strategy in Yemen, Somalia, Pakistan, Afghanistan, Syria, and Libya.⁷⁴⁴ CIA officials have defended the program, arguing that "[t]hese operations have been the single most effective tool in the last five years for protecting the United States from terrorists...[and undoubtedly] have prevented another attack on the scale of 9/11."⁷⁴⁵ While these officials have acknowledged that drone operations have caused collateral damage in the form of civilian casualties, they have nevertheless highlighted the utilitarian calculus of the drones' ability to efficiently decimate the leadership ranks of America's terrorist enemies: "Collateral damage is not zero, but it is very close to zero, as these unmanned aerial vehicles (UAVs) and the missiles they carry are among the most precise weapons in the history of warfare."⁷⁴⁶

Foreseeably, human rights NGOs have harshly condemned targeted killings. They argue that the drone strikes enable the Obama Administration to singlehandedly operate as the judge, jury, and executioner of suspected terrorists. Human rights NGOs have questioned the legality of drone strikes under international law and human rights conventions, and have accordingly denounced them. Although the IC and Obama Administration have defended the drone strikes' legality by arguing that the Constitution empowers the President to protect the nation from an imminent threat or attack, and Congress further condoned such actions against specific terrorists by the Authorization for Use of Military Force, NGOs like Human Rights First, Amnesty International, and the ACLU have questioned whether the targets of drone strikes truly represented threats capable of causing "imminent harm."⁷⁴⁷ Human rights organizations have also argued that the program essentially functions under a "guilty until proven innocent" assumption, unduly harms foreign civilians, and allows the government to conduct potentially unlawful killings with impunity due to the program's extreme secrecy.⁷⁴⁸

Rights NGOs have therefore called for numerous reforms to the program, including requesting that the Obama Administration and Congress "disclose further legal and factual details" about drone strikes, recognize the application of human rights law to those outside U.S. territory, and "end claims that the USA is authorized by international law to use lethal force anywhere in the

⁷⁴³ Electronic Frontier Foundation, "NSA Spying on Americans."

⁷⁴⁴ The Bureau of Investigative Journalism, "Covert Drone War," accessed December 9, 2015, <https://www.thebureauinvestigates.com/category/projects/drones/>.

⁷⁴⁵ Morell, *The Great War of Our Time*, 137.

⁷⁴⁶ *Ibid.*, 138.

⁷⁴⁷ American Civil Liberties Union, "Targeted Killing," accessed December 9, 2015, <https://www.aclu.org/issues/national-security/targeted-killing>.

⁷⁴⁸ Amnesty International, "Drones," accessed December 9, 2015, <http://www.amnestyusa.org/our-work/issues/security-and-human-rights/drones>.

world under the theory that it is involved in a ‘global war’ against al-Qa’ida.”⁷⁴⁹ In March 2016, President Obama’s Homeland Security and Counterterrorism Advisor Lisa Monaco announced that the Obama Administration would, “publicly release an assessment of combatant and noncombatant casualties resulting from strikes taken outside areas of active hostilities since 2009,” and provide these figures annually, arguing that, “not only is greater transparency the right thing to do, it is the best way to maintain the legitimacy of our counterterrorism actions and the broad support of our allies.”⁷⁵⁰ These statistics have not yet been released.

Taken together, these three major areas of contention in the contemporary IC-NGO relationship illustrate the basic tension between the two communities. The question for the NGOs remains: to what lengths should the U.S. IC be permitted to go to protect the American people when its actions implicate the civil liberties and human rights of individuals around the globe? The fact that the U.S. IC serves principally to protect and defend American interests, and not a broad conception of universal human rights, will likely remain a central point of contention between the two communities.

American and international NGOs will continue to function as outside watchdogs of the IC well into the future, but to what extent will their monitoring, commentary, and responsive actions truly impact the conduct of U.S. intelligence? NGO staff members and supporters clearly work in the hope that their policy briefs, blog posts, and lawsuits will raise public awareness of problems that demand critical thought and policy attention. Successful lawsuits like *ACLU v. Clapper*—in which the U.S. Court of Appeals for the Second Circuit held that the bulk telephone metadata program was not authorized by the USA PATRIOT Act—demonstrate that the courts can be a productive venue for NGOs seeking to change government policy.⁷⁵¹ The IC, however, remains under no formal obligation to address NGO criticisms directly outside of the context of litigation.

The creation of offices such as the ODNI’s Civil Liberties and Privacy Office (CLPO)—although mandated by the 2004 Intelligence Reform and Terrorism Prevention Act, and not a direct response to NGO advocacy—could be an example for other agencies within the IC to productively address NGO commentary outside of the courts. During research interviews in Washington, D.C., numerous NGO representatives complimented the CLPO and the office’s service as an intermediary between their organizations and the IC. The creation of offices like the CLPO at other agencies may help demonstrate to the NGO community—and the public more broadly—that the IC is committed to the same American values.

NGOs represent the views of some segment of the American public, and they have the time, energy, and resources to do so in a professional manner. Therefore, while the IC is not required to be responsive to the NGO community, doing so on a voluntary basis can be a prudent step in many situations and ultimately improve the IC’s reputation for lawful and ethical conduct. The

⁷⁴⁹ Amnesty International, “USA: ‘Targeted killing’ policies violate the right to life,” accessed December 9, 2015, <http://www.amnestyusa.org/research/reports/usa-targeted-killing-policies-violate-the-right-to-life?page=2>.

⁷⁵⁰ Josh Gerstein, “Obama to release drone casualty report,” *Politico* (March 7, 2016), accessed May 12, 2016, <http://www.politico.com/blogs/under-the-radar/2016/03/barack-obama-drone-casualty-report-220388>.

⁷⁵¹ See generally *ACLU V. Clapper*, 785 F.3d 787 (2d Cir.2015), accessed May 10, 2016, https://www.aclu.org/sites/default/files/field_document/clapper-ca2-opinion.pdf.

scrutiny of responsible NGOs can therefore be a positive force in the development and implementation of lawful, effective, and accountable intelligence programs.

Recommendation

We recommend:

- IC agencies that have not already done so should establish Civil Liberties and Privacy Offices to help demonstrate to the NGO community—and the public more broadly—that the IC is committed to the same American values.

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Chapter 9. The Intelligence Community and the Media

by Liam Kozma, Anna Waterfield, and Keith Pitstick

The relationship between the media and the U.S. IC has fundamentally changed in the digital age. Prominent journalists and intelligence officials agree that mutual trust has been eroded, making it more difficult for both the IC and media to perform their functions. This chapter uses recent events to illustrate how the proliferation of digital technologies and changes in IC behavior have contributed to the current state of the relationship.

Technology Changes:

- Availability of data;
- Digital publishing;
- Rise of new media outlets; and
- Different revenue streams.

Intelligence Community Actions:

- Over-classification;
- Militarization;
- New legal interpretations;
- Weak “whistleblower” protections; and
- Politicization of interactions with media.

These lists are informed by the perspectives of contemporary journalists and help explain how they regard the media’s role in oversight of the IC in the 21st century.

History

The operation of the government’s elaborate system of checks and balances is itself checked by a free and independent media.⁷⁵² To facilitate the media’s check on government power, the Constitution prioritizes the freedom of the press. Accordingly, the government has traditionally respected the rights of reporters to keep their sources secret and to investigate the government with an eye toward exposing official actions that are illegal, ineffective, or unethical. CNN reporter Jim Sciutto explained, “I absolutely think that the media function as an oversight mechanism. It puts pressure on people in the IC to make sure that their actions hold up under scrutiny and public revelation.”⁷⁵³

⁷⁵² Ken Auletta, interview by *Frontline* (PBS, February 13, 2007), accessed December 7, 2015, <http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/auletta.html>.

⁷⁵³ Jim Sciutto, interview by Kristine Henry, Raheem Chaudhry, and Sydney Taylor, Washington, D.C., December 15, 2016.

In the mid-20th century, President Franklin Roosevelt could rely on the “patriotic press” to cooperate in withholding secret information that could damage the country’s security. In *Power and Constraint*, Harvard Law School Professor Jack Goldsmith highlighted the 1960 downing of the U-2 spy plane as the turning point in the relationship between the Executive Branch and the media. The press became much more distrustful of the Executive Branch after they discovered that the IC was misleading the media with the aim of covering up the incident. Goldsmith wrote that, after the Bay of Pigs, “the lesson that journalists began to draw was that the national interest demanded honest and independent national security reporting.”⁷⁵⁴ The ensuing Pentagon Papers and Watergate scandals were essentially the nails in the coffin with respect to the media’s willingness to unquestioningly trust the representations of the Executive Branch on national security matters.

Current Perspectives

The Digital Age and the New Media

The media landscape has changed drastically in the digital age, affecting the relationship between traditional media outlets and the IC and creating a new class of journalists with different backgrounds, perspectives, and objectives. Traditional media outlets have found themselves under pressure due to increased competition for readers and viewers, and for advertising dollars. The following examples illustrate these developments.

Availability of Data

In the digital age, leakers can gather and distribute vast quantities of data using a tool as simple as a thumb drive. Digital files are vulnerable to hackers who can steal secrets in ways that were not possible before the advent of the Internet. As a result, media outlets find themselves in possession of vast quantities of classified defense information which needs to be analyzed, verified, stored, and if necessary, reported.

Traditional media figures undertake a thoughtful process to determine how to handle the publication of classified information and how to store classified information that they choose to withhold from disclosure. This process is not always easy. “I think journalists have been very sparing and judicious in [censoring information] ... which is a reflection of how uncomfortable it makes them—appropriately so,” remarked *The New York Times* national security reporter Charlie Savage.⁷⁵⁵

Digital Publishing

In the age of digital media, the difference between originating a story and following a story might be measured in minutes. *The New York Times* reporter Eric Schmitt explained, “We are now in an age when speed is really important to many news organizations. How quickly can you get your news alert out? How quickly can you get a tweet out? ... That’s going to drive your digital traffic which in many ways is what’s pushing us today and we as journalists...have to be

⁷⁵⁴ Jack Goldsmith, *Power and Constraint* (New York: W. W. Norton & Company, 2012), 59.

⁷⁵⁵ Charlie Savage, interview by Liam Kozma and Raheem Chaudhry, Austin, Texas, November 11, 2015.

constantly resisting that temptation to get a story out there too fast...just so we can get a quick hit.”⁷⁵⁶ Web traffic creates revenue and, in an age when traditional revenue streams are drying up, this traffic has become vital to a news outlet’s success. This creates a problematic incentive to rush to print a potentially newsworthy but sensitive story.

It is also true that stories published digitally are easier to correct if minor errors are later found. Journalist and scholar John Walcott spoke frankly about the relationship between speed and advertising revenue at a 2016 conference:

Speed is not the only thing that’s gone wrong here. I think the erosion of the financial foundations of the traditional media has eaten away at our ability to do the right thing...it’s led to this need for speed and, frankly, it doesn’t matter if the story is right or wrong if you get it out first ... Unfortunately Mark Twain had it right a hundred years ago when he said, ‘the lie is halfway around the world before the truth can get its pants on.’ That’s increasingly true today ... There are so many organizations out there that are eager to pull the trigger and the more sensational a story is, right or wrong, full or incomplete, the more attention it will get because of pure sensationalism.⁷⁵⁷

The New Media

In the 21st century, there are few barriers to publishing information. Organizations such as WikiLeaks make it their mission to publish whatever classified material they can get their hands on. This affects how traditional media outlets determine what to publish. In situations where leakers or WikiLeaks partner with traditional media sources to publish stolen information, there is a reasonable expectation that the leaker will go somewhere else if their first choice of media partner elects not to publish. The desire to originate stories combined with the crowded media landscape creates pressure on media organizations to make quicker decisions.⁷⁵⁸ Additionally, traditional media outlets may now feel pressure to publish information ahead of new media competitors because they realize they have the resources and experience necessary to present the information in a fair and balanced way.

Markos Moulitsas of the Daily KOS stated there is a “need and the desire for a press that acts like a check on government, that acts like it’s working in the public interest, as opposed to just trying to ingratiate themselves with the people in power and get invited to the right cocktail parties. There’s a hunger for this kind of reformation of the media.”⁷⁵⁹ Such new media actors apply different calculations when deciding whether to publish classified national defense

⁷⁵⁶ Eric Schmitt, “Media’s Responsibility in National Security Reporting Panel Discussion,” Intelligence in American Society Conference, The University of Texas, Austin, March 30, 2016. Schmitt continued to mention how it is important for journalists to make sure they have trusted, knowledgeable sources to verify information.

⁷⁵⁷ John Walcott, “Media’s Responsibility in National Security Reporting Panel Discussion,” Intelligence in American Society Conference, The University of Texas, Austin, March 30, 2016.

⁷⁵⁸ Steve Coll, interview by Liam Kozma and Keith Pitstick, Austin, Texas, October 6, 2015. Coll stated that there is some tidal pull from digital self-publishing. Because their editing process is less rigorous there is a different flow to decision-making. While previously there was a tight editorial process that has endured for print editions today, now the web content is often “shoved out the door.” This new structure has caused journalists to have a tendency to fix mistakes after the fact, rather than at the front end through careful editorial deliberation.

⁷⁵⁹ Moulitsas, interview by *Frontline*.

information and, it seems, fewer scruples about ignoring IC requests to refrain from publishing particularly harmful information. Because they accord relatively greater respect for IC operational concerns, traditional media outlets are often easier to deal with for IC officials when they are seeking to prevent the disclosure of certain items of leaked information. Although they may not always agree with the IC's claims, the traditional media are usually willing to listen. In an interview, CNN's Jim Sciutto hinted at the differences between traditional, larger media outlets and smaller outlets in terms of ethics and responsibility: "We make an effort to follow ethical guidelines. A lot of [newer] outlets don't do that."⁷⁶⁰

Changing IC Behavior

Since 2001, the relationship between the media and the IC has become increasingly contentious. Research interviews revealed that the distrust is linked to real or perceived trends in IC behavior: over-classification, militarization at the CIA, divergent interpretations of law, weak whistleblower protections, and politicization of IC-media interactions. These cases highlight the growing tension between the IC and the media.

Over-classification and Disclosure of CIA Officer Identities

In 2015, *The New York Times* disclosed the true names of undercover CIA officers involved in the controversial drone "targeted killing" program. The *Times* ultimately ran the story with the names after a lengthy debate with the Obama Administration and despite their objections. *Times* Editor Dean Baquet explained his decision to publish, "Give me a compelling reason... You can't just say that it hurts national security. You can't just say vaguely that it's going to get somebody killed. You've got to help me, tell me."⁷⁶¹ The *Times* argued that the IC had not made an adequately compelling argument that the officers would be in danger of terrorist retaliation if their names were published. After the story was published, there is no information that would indicate these officers were threatened or physically harmed. This contributed to the perception that the IC was reflexively protecting secrets without critically analyzing the potential harm from disclosure.

Baquet's skepticism stemmed from the perception that the government routinely over-classifies documents upon their creation. This has led reporters and editors to be dubious about the need to keep most leaked information secret. When asked about over-classification, Charlie Savage of the *Times* explained, "Over-classification is a well-documented problem. It means when government bureaucrats mark as 'secret' information that would be harmless if disclosed, or that it is even already available through public sources. There are sweeping categories of things that the government treats as highly secret that are no secret to anybody, such as the fact that the CIA

⁷⁶⁰ Sciutto interview. Full quote: "We make an effort to follow ethical guidelines. A lot of outlets don't do that. People have their own facts. A lot of the time, people don't even use *those* facts, though. This habit has migrated from some of the small outlets to the large ones, which can have an expanded impact."

⁷⁶¹ Dean Baquet, "Publication Decisions about Intelligence Secrets, and More," interview by Jack Goldsmith (Lawfare Blog, April 29, 2015) accessed December 8, 2015. <https://www.lawfareblog.com/interview-dean-baquet-executive-editor-new-york-times-publication-decisions-about-intelligence>.

conducts drone strikes in tribal Pakistan. This stifles the open debate and accountability that makes democracy work.”⁷⁶²

This tendency toward over-classification, combined with the perception that the government keeps information secret longer than is necessary, erodes trust with journalists. In the case where CIA officers’ names were published, for example, many members of the media concluded that the government was not forthright.

Militarization—The CIA Drone Program

The evolution of the drone program changed the traditional media’s view and treatment of the IC. In 2002, the CIA executed the first drone strike outside of a declared war zone.⁷⁶³ Since that time, the program has troubled some in the media who think targeted killings in sovereign states outside war zones merits greater public awareness and scrutiny. The CIA’s targeted killing of individuals blurred a line between traditional covert action activities and those missions that have traditionally belonged to the military. While there are notable exceptions, the military is generally much more open to public scrutiny than the CIA. Mark Mazzetti of the *Times* made the point, “If the CIA is going to act like a military organization, the media is going to treat them like a military organization.”⁷⁶⁴

Divergent Legal Definitions—Enhanced Interrogation Techniques

After President Obama took office, his administration declared that that the Bush Administration had been in error when it determined certain enhanced interrogation techniques employed with detained al Qaeda terrorists were legal. This reversal alarmed some observers because it implied that what is lawful can change based simply on varying legal interpretations by Executive Branch lawyers associated with different presidential administrations. Charlie Savage observed, “Secret executive branch lawyering is a pressure point in our democratic system. It has centered in the Justice Department’s Office of Legal Counsel, which issues binding opinions about what the law means for the rest of the executive branch... What we have is a growing body of what is essentially secret law that sets the scope and limits of government power in all kinds of important areas that will never see the inside of a courtroom.”⁷⁶⁵ As Savage indicated, unease among some members of the media stemmed from the notion that customary oversight mechanisms could be skirted through flexible legal interpretations.

Whistleblower Protections

Several journalists expressed the view that whistleblower protections for IC employees are inadequate. In an interview, the Dean of Columbia University’s School of Journalism Steve Coll concluded that whistleblower protections were “laughable.” For Coll and those who share this point of view, there is no effective means for individuals working in the IC to legally bring about

⁷⁶² Savage interview.

⁷⁶³ *The Intercept*, “The Drone Papers: The Assassination Complex” (October 15, 2015), accessed May 11, 2016, <https://theintercept.com/drone-papers/the-assassination-complex/>.

⁷⁶⁴ Mark Mazzetti, interview by Meenakshi Awasthi, Washington, D.C., February 29, 2016.

⁷⁶⁵ Savage interview.

change within the government without a legitimate fear of retribution. Leaking is therefore the only recourse for disgruntled intelligence officers, thereby creating for the media a role in changing the IC's behavior through disclosure and public debate. This perception may be difficult or impossible to change. However, greater trust and cooperation between the IC and media may afford the IC the opportunity to present their point of view before the media accepts and amplifies a leaker's version of a story.

Politicization of IC Media Interaction

Numerous journalists mentioned how important it was for reporters and the Public Affairs Officers (PAOs) at intelligence agencies to build trust through regular interaction and honest discourse. At the 2016 "Intelligence in American Society" Conference in Austin, John Walcott, *The Wall Street Journal's* former national security correspondent, indicated that reducing the ability of PAO staff and intelligence agencies to interact with the media without political supervision had adversely impacted relationships. "This White House...has exerted a great deal of control over the IC's interaction with the press. I don't think that's a healthy thing because it introduces political objectives into what, I think, is the need for the IC to produce unvarnished information."⁷⁶⁶ The perception that IC public affairs officers are working to advance administration policy objectives has harmed the relationship between PAOs and reporters who think that their exchanges are being monitored and shaped for partisan political purposes. Thus, journalists are more likely to be skeptical of the explanations they are being provided.

Overall, militarization, over-classification, shifting legal opinions, inadequate whistleblower protections, politicization of IC-media relations and the new media landscape have caused the traditional media to increasingly incline toward publishing classified information even in the face of IC objections. In the current environment, the IC carries a heavy burden to prove why information should not be published. When it fails to meet this burden journalists will act to advance the public's right to know of the government's activities.

Analysis

Most journalists consider national security and the safety of intelligence officers when deciding whether to publish secret material.⁷⁶⁷ An examination of the process shows that, when a media outlet is deciding whether to publish, the IC has few opportunities to influence that decision. Mutual trust is therefore critical in this process. Although no two circumstances are identical, most follow these steps:

1. Illuminate the context. Leaked information often contains snapshots of intelligence activity. In most cases, the journalist lacks the full context to understand the reason for

⁷⁶⁶ Walcott, Conference Panel Discussion..

⁷⁶⁷ Savage interview. Quote: "The questions I'm asking of that document or that piece of information are different than whether a government person has decided to classify it or not classify it. Is it news and if it is news, then my presumptive impulse is to publish it. But then also, within my business the norm is you go to the government before you publish something and you seek comment and that gives the government an opportunity to say, we don't want you to publish this, or please don't publish this. And at *The New York Times*, that would then trigger a process...It's a very serious thing for *The New York Times* to withhold information that it thinks is newsworthy from the public. And that's way above my pay grade."

the activity, the legal justification, the ramifications of revealing the activity, and the purpose of the program. Journalists will try and gather this information through sources and by contacting agencies directly through the PAOs. At this stage, agencies have a choice to make. They can provide the requested information and paint a more complete picture for the journalist, or they can leave him or her with only the leaked information. In cases like these, the journalist will fill in the blanks to the best of his or her ability.

2. Determine the damage caused by publishing. Journalists are sensitive to the fact that classified information, when revealed, may endanger lives and damage programs necessary to defend the national security. They do their best to determine the harm the information they hold may cause by asking the appropriate PAO for assistance. In so doing, they hope that the PAO will provide accurate information about why the activity is secret.⁷⁶⁸ Mark Mazzetti observed, “It’s their job to be honest and upfront about the level of danger since they know more, to explain to us so we can better make a judgment. They also need to be very judicious about how they make a case about the level of harm—are they crying wolf?”⁷⁶⁹
3. Determine the veracity of the IC’s claims. Journalists, if possible, will reach out to sources and former intelligence officials to determine if a PAO’s claims regarding leaked information are legitimate or exaggerated. Reporters use contacts, preferably former intelligence or government officials, to determine if the government is exaggerating. When talking about his process, John Walcott gave an example from his career, saying “I went to someone I had known and trusted for some time—we’d had an existing relationship—who was an expert on these matters. And I asked him, “what would happen if I published [the information]?”⁷⁷⁰ After receiving a response from the individual, he “digested all of [the information] and [it] never appeared in *The Wall Street Journal*.” In this case, Walcott went to a trusted source outside of the intelligence community rather than the PAO office; however, many journalists do both.
4. Determine when to publish. The media outlet then decides whether to publish. If journalists determine that the damage caused by revealing secret information is too great, they may choose not to release the information immediately.⁷⁷¹ However, they are unlikely to abandon the story. Instead, the media outlet will store the classified information and wait until a more appropriate time to publish.

The sequential process outlined above illustrates how important it is for the media to gain access to accurate information when they are verifying leaked information so that they understand the

⁷⁶⁸ Savage interview. Quote: “[Editors] take less seriously, or not persuaded by, vague sense of...’this is a secret thing and we don’t want to advertise that the secret thing is happening’, especially if it has policy implications.”

⁷⁶⁹ Mazzetti interview.

⁷⁷⁰ The quote continues, “And he said, well, two things would happen. First of all, the Russians would know that we knew...They would have their own leak investigation and that’s not a good thing. Second, he argued that they would know how many additional officers we would have to assign to keep track of their additional officers which had the benefit of giving me a graduate course in counter surveillance...and third, he argued, ‘what difference does it make to the American public if the Soviets added three officers in Vienna or six? It doesn’t matter. So I digested all of that and the numbers never appeared in *The Wall Street Journal*.” Walcott, Conference Panel Discussion.

⁷⁷¹ Sciutto interview. Quote: “We do choose not to report due to operational security sometimes.”

damage that disclosure might cause. If a PAO chooses to reveal little about the program but urges the journalist not to publish based on potential harm, the PAO is trading on trust. When reflecting on his time as CIA's PAO, Bill Harlow mentioned the harm that not providing contextual information can cause: "[When a journalist] comes to a spokesman and they get disappointed, then they quit going to him. Then you get more and more stuff in the media that's just totally off the wall."⁷⁷² His solution was to communicate honestly and to help the reporter without disclosing damaging information. "I would always comment as much as I could. I would find a way to say something. If a reporter came to ask me a question which I couldn't possibly answer, I would at least give them the rationale for why I couldn't answer it: 'I understand why you're asking that question. It's a very logical question, but if I were to answer it I would be giving aid and comfort to the enemy...but what I can tell you is...' and then you tell them something that's related to it that will help inform their product."

Unfortunately, many journalists indicated that this kind of relationship is rare today. "The necessary trust between members of the media and members...of the intelligence community...has deteriorated to the point that those kinds of conversations are almost impossible to have," assessed John Walcott. Without the ability to have these frank informative conversations, the media is left to make decisions based on incomplete information.

The 2005, *The New York Times* published a story on a secret program code-named STELLARWIND, which involved monitoring overseas communications to detect terrorist plots. The IC, in order to protect this productive program, declined to give the *Times* more complete information on STELLARWIND. When the *Times* decided to publish despite IC objections, the resulting story gave the American public an incomplete account of the government's activity and procedures under the program. "The *Times* had a story but not really the story," wrote former NSA Director Michael Hayden.⁷⁷³ Not providing a journalist with a full account of the program may help to keep parts of the program secret, but it also leaves the media in a position where they must make decisions without having all of the facts. After they publish, the resulting inaccuracies are difficult to correct. Initial reports acquire momentum. As Bill Harlow remarked:

For the IC, it's an added burden because when people get stuff wrong, sometimes you're not permitted to tell them that it's wrong or you're not allowed to correct it... That's why it's important...for people in my old position [as a PAO] to continue to try and work with reporters to try and understand them... Sometimes you can't explain to them why they will be doing damage but if they work with you enough, if they've trusted you, if you've not led them down the primrose path before, they may listen to you... If they had no experience with you [or] if you have maybe shut them off, you have no hope of influencing the outcome.⁷⁷⁴

The IC should consider that providing additional clarifying information, rather than withholding it, may be the best way to convince journalists not to publish leaked information. This would

⁷⁷² William Harlow, "Media's Responsibility in National Security Reporting Panel Discussion," Intelligence in American Society Conference, The University of Texas, Austin, March 30, 2016.

⁷⁷³ Michael V. Hayden, *Playing to the Edge: American Intelligence in the Age of Terror* (New York: Penguin Books, 2016), 103.

⁷⁷⁴ Harlow, Conference Panel Discussion.

help journalists make an informed decision. Additionally, providing information would ensure that the initial story is complete and accurate, thereby preventing the media and public from filling in the gaps with inferences and guesses. This practice could potentially increase trust in the IC both by the media and the public over time. Eric Schmitt of the *Times* summarized, “A little bit of access goes a long way.”⁷⁷⁵

The best way for the government to prevent publication of a leaked national security secret is to persuade the media outlet that the damage caused by its publication is too great. However, if the media does not trust the IC or the administration it serves, this effort will likely fail. In the absence of trusting relationships between journalists and IC public affairs officers, it may be useful to identify an independent third party, trusted by both sides, to offer objective counsel on the question of harm to the national security by disclosure of leaked secrets.

Recommendations

We recommend:

- The leading media organizations should establish a Media Advisory Board, comprising a small number of respected former government officials and journalists, to assist in evaluating the potential damage to national security by publication of classified defense information. The IC should support this initiative by granting security clearances and sharing relevant information to board members to inform their advice; and
- IC leaders should decline requests from the White House to provide background briefings to journalists. Substantive interaction between IC experts and the media should be considered exclusively in response to a media request or the IC’s independent judgment of public interest in a topic.

⁷⁷⁵ Eric Schmitt, “Media’s Responsibility in National Security Reporting Panel Discussion,” Intelligence in American Society Conference, The University of Texas, Austin, March 30, 2016.

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Chapter 10.

Leakers and Whistleblowers in the U.S. Intelligence Community: Finding a Balance between Transparency and Secrecy

by Meenakshi Awasthi

Introduction

Columbia Law School Professor David Pozen likens the U.S. government to a “sieve...saturated with, vexed by, and dependent upon leaks.”⁷⁷⁶ It appears that for every secret, there is a reason to disclose it. Whether heralded or condemned, leakers have taken security determinations into their own hands, choosing to disclose classified information for reasons of personal gain, moral outrage, professional advantage, or pure politics. To complicate matters, the leak culture remains generally tolerated and even perpetrated by government officials with an ulterior motive—political or personal. This explains a large portion of planted leaks on the front pages of *The New York Times* and *The Washington Post*.

The utility and costs of leaks are highly contested, but leaks have unquestionably led to public scandals that impacted intelligence community activities and oversight. Leaks are a double-edged sword: their merit or harm depends on an array of variables often unclear at first glance, or even after thorough investigation. Divulging classified information invites technical and moral hazards to national security, but leaks can and do serve as a check on the power wielded by agencies such as the CIA. When activities of questionable legality or efficacy are revealed, the public’s trust in the IC erodes.

Although the laws that apply to both leakers and whistleblowers are complicated, it is clear that anyone who purposely provides classified information to an unauthorized person is breaking the law. Former Acting Director of the Defense Intelligence Agency and CIA officer David Shedd argued that these avenues exist, but the culture to utilize them does not. The following analysis will clarify the differences between leakers and whistleblowers, evaluate the impact of leakers and whistleblowers on the U.S. IC, and explore the effect of leakers and whistleblowers on public perception of the IC.

Context

Whistleblowing

It is important to distinguish whistleblowers from leakers, as whistleblowers are assumed to have followed strict, explicit reporting procedures established to allow an employee to expose illegal or improper government activity.⁷⁷⁷ Implied in the term itself is the idea that whistleblowers are

⁷⁷⁶ David E. Pozen, “The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information,” *Harvard Law Review* 127 (2013): 515.

⁷⁷⁷ Lindsay B. Barnes, “The Changing Face of Espionage: Modern Times Call for Amending the Espionage Act,” *McGeorge Law Review* 46 (2014): 521.

acting in the interest of the people, blowing the whistle much as a referee in an athletic competition would to signal an infraction. Former CIA Director of Congressional Affairs John Moseman views sanctioned whistleblower channels as the proper alternative to leaks, proposing that “if a member of the IC is uncomfortable with something, there should be an escape route without consequence. That’s why training and trust matter so much.”⁷⁷⁸

Many senior IC officials, including former CIA IG John Helgerson, judge access to whistleblower channels as “adequate.”⁷⁷⁹ For employees and contractors of the U.S. IC, whistleblower procedures are described in IC and agency directives. They instruct a complainant to inform his or her supervisor and/or the relevant IG of any urgent concern—a defined term. To properly convey a complaint to Congress, employees must follow written guidelines instructing them to file information with the IC IG, who has two weeks to determine the credibility of the complaint and transfer credible complaints to the Director of National Intelligence. The DNI has one week to forward the complaint to the congressional intelligence committees. A complainant is only permitted to make direct contact with the intelligence oversight committees if he or she informs the IC IG of an intention to do so, or obtains permission from the DNI.⁷⁸⁰ Classified information that may form part of an employee’s report remains under government control and does not become public. It, therefore, cannot inform the public debate or perception of the IC. Therefore, a person without a security clearance and a need to know the information will never learn that a whistleblower came forward and made an allegation of IC wrongdoing.

The existence of whistleblower channels may not correlate closely with their effectiveness or accessibility: individuals have complained about the existing system. For example, Gabriel Schoenfeld—author of *Necessary Secrets: National Security, the Media, and the Rule of Law*—describes current whistleblower procedures as “clear and workable,” further noting that all government officials who signed the Classified Information Nondisclosure Agreement were made explicitly aware of the responsibilities they were undertaking.⁷⁸¹ Former DIA official Shedd argued on the other hand that these safe harbors may exist, but a culture that encourages employees to utilize them does not. Nonetheless, Shedd was clear and adamant: “There is no personal right to leak with all of the avenues currently available.”⁷⁸²

Leaking

An individual who discloses classified information outside of authorized reporting procedures is a leaker. Leaks can be categorized as authorized, unauthorized, or third-party, and each category implicates different consequences. Authorized leaks are strategically dribbled into the press on a regular basis with the knowledge and tacit approval of senior officials.⁷⁸³ Pozen terms these

⁷⁷⁸ Moseman interview.

⁷⁷⁹ John Helgerson, interview by Meenakshi Awasthi and Anna Waterfield, Washington, D.C., March 1, 2016.

⁷⁸⁰ Office of the Director of National Intelligence, “How to File a Whistleblower Complaint,” accessed April 25, 2016, <https://www.dni.gov/index.php/about-this-site/contact-the-ig/how-to-file-a-whistleblower-complaint>.

⁷⁸¹ Gabriel Schoenfeld, *Necessary Secrets: National Security, the Media, and the Rule of Law* (New York: W.W. Norton & Company, Inc., 2010), 262.

⁷⁸² David Shedd, interview by Danielle Oxford and Anna Waterfield, January 15, 2016.

⁷⁸³ Barnes, “The Changing Face of Espionage,” 511.

planted leaks “pleaks,”⁷⁸⁴ a portmanteau describing a common and condoned aspect of government culture.

More problematic for the IC are unauthorized leaks and third-party leaks, rogue leaks of classified information to media organizations.⁷⁸⁵ Some regard leakers as honorable patriots who risk their careers for the good of the country. Others regard leakers and the journalists who publish their secrets as cogs in an imperfect but necessary machine that keeps the IC in check.

There is little moral clarity in the universe of leakers and whistleblowers. Not all leaks are damaging, and not all whistleblowers have the nation’s best interests at heart. But all such disclosures of classified intelligence information contribute to the public’s perception of the U.S. government overall, as they often result in a public debate and can have positive or negative repercussions. For Moseman, leaks “cause people to have a misunderstanding of the intelligence community,” feeding perceptions that leaked programs were conducted illegally or without necessary approvals.⁷⁸⁶ Both traditional and new media outlets have profoundly shaped the public perception of the IC by publishing secret information—impacting both its standing and effectiveness. Some would contend that by choosing to publish national security information, the media outlet is as guilty as the person who violated the law by disclosing the information. Intelligence scholar Loch Johnson recognized the media’s role in conducting a manner of oversight, “driven in part by a profit motive to sell newspapers by exposing government scandals and failures.”⁷⁸⁷

Regulations

A vestige of the Woodrow Wilson Administration and World War I, the Espionage Act of 1917 was amended in 1918 to include the Sedition Act. Together, these statutes criminalize “willfully” publishing classified information. This requirement of “criminal intent” present in sections 793 and 794 of the Espionage Act makes it problematic to prosecute people strictly for leaking. The element of willfulness or intent is difficult to prove.⁷⁸⁸ The Obama Administration has pursued indictments under the Espionage Act of eight leakers (Thomas Drake, Shamai Leibowitz, Chelsea Manning, and Stephen Kim in 2010; and Jeffrey Sterling, John Kiriakou, James Hitzelberger, and Edward Snowden in 2013)—more than all previous administrations combined.⁷⁸⁹ Critics have argued this is a misuse of the Espionage Act, while proponents of the crackdown insist that prosecution is the only way to plug leaks that place U.S. national security at risk.

Multiple provisions in Title 18 of the United States Code (18 U.S.C.) expressly proscribe activities that may injure, compromise, or betray U.S. national defense and security capabilities via intentional, willful disclosure of intelligence information. Section 798 of 18 U.S.C. prohibits

⁷⁸⁴ Pozen, “The Leaky Leviathan,” 515.

⁷⁸⁵ Barnes, “The Changing Face of Espionage,” 524.

⁷⁸⁶ Moseman interview.

⁷⁸⁷ Loch K. Johnson, *Intelligence and National Security* (United Kingdom: Polity Press, 2011), 161.

⁷⁸⁸ Barnes, “The Changing Face of Espionage,” 514.

⁷⁸⁹ Yochai Benkler, “A Public Accountability Defense for National Security Leakers and Whistleblowers,” *Harvard Law and Policy Review* 8 (2014): 281.

the publication of classified intelligence activities and information, but implies that publication by the media is only illegal if the government information is properly classified, thus allowing for the publications to defend their actions by claiming information was inappropriately classified.⁷⁹⁰

Whistleblower Protections

The federal government has worked to ensure that its employees understand that whistleblowing is an acceptable, even necessary, practice. Whistleblower protections have existed in the U.S. since the second Continental Congress.⁷⁹¹ These protections were greatly enhanced in the Whistleblower Protection Act of 1989. The language of the original 1989 Federal Whistleblower Protection Act (WPA) allowed courts to reduce protections afforded to specific federal whistleblowers, such as employees of the NSA, FBI, or CIA. Even the strengthened 2012 Whistleblower Protection Enhancement Act (WPEA) excluded employees of the IC.⁷⁹² Legal protections were not provided specifically to IC whistleblowers until the 1998 Intelligence Community Whistleblower Protection Act (ICWPA), the Presidential Policy Directive 19 (PPD 19), and Title IV of the Intelligence Authorization Act of 2014 (Title IV). Furthermore, it was President George H.W. Bush's Executive Order 12674 that first required federal employees to report waste, fraud, abuse, and corruption.⁷⁹³

The ICWPA allows for IC employees to “be free from retaliatory actions” after properly reporting “urgent concerns,” which are defined as any “serious or flagrant problem, abuse, violation of law or Executive Order, or deficiency relating to the funding, administration, or operation of an intelligence activity involving classified information, but does not include differences of opinion concerning public policy matters.”⁷⁹⁴⁻⁷⁹⁵

PPD 19, a directive issued by President Obama, further clarifies whistleblower protections as safeguarding employees against inappropriate retaliation in the workplace, such as withdrawal of security clearances or negative personnel interactions.⁷⁹⁶ PPD 19 also allows employees to appeal to the IC IG for an external review after their agency's review process has been completed.⁷⁹⁷ PPD 19 does not have the full force of law, therefore, these protections can be eliminated by a future President. Title IV further protects whistleblowers that properly air

⁷⁹⁰ Gabriel Schoenfeld, “Has the New York Times Violated the Espionage Act?” (March 1, 2006), accessed April 20, 2016, <https://www.commentarymagazine.com/articles/has-the-new-york-times-violated-the-espionage-act/>.

⁷⁹¹ Dan Meyer and David Berenbaum, “The Wasp’s Nest: Intelligence Community Whistleblowing & Source Protection,” *Journal of National Security Law & Policy* 8, no. 1 (2015), accessed April 20, 2016, <http://jnslp.com/wp-content/uploads/2015/05/The-Wasp%E2%80%99s-Nest.pdf>.

⁷⁹² Candice Delmas, “The Ethics of Government Whistleblowing,” *Social Theory and Practice* 41, no. 1 (2014): 77-105.

⁷⁹³ Executive Order 12674 (April 12, 1989), Principles of Ethical Conduct for Government Officers and Employees, 54 Fed. Reg. 15159.

⁷⁹⁴ Office of the Director of National Intelligence, “Whistleblower Protection Laws,” accessed April 25, 2016, <https://www.dni.gov/index.php/about-this-site/no-fear-act/whistleblower-protection-laws>.

⁷⁹⁵ Office of the Director of National Intelligence, “Making Lawful Disclosures,” accessed April 25, 2016, <https://www.dni.gov/index.php/about-this-site/contact-the-ig/making-lawful-disclosures>.

⁷⁹⁶ Ibid.

⁷⁹⁷ Office of the Director of National Intelligence, “Whistleblower Protection Laws.”

grievances to the DNI, the IC's IG, the respective agency head, the respective agency's IG, or the congressional intelligence committees, in part or whole.⁷⁹⁸ The Intelligence Authorization Act passed in 2014 also outlines statutory protections for employees using approved whistleblower channels.

Dan Meyer, Executive Director of ICW&SP, and David Berenbaum wrote that this series of actions reinforced the government's position that "whistleblowing is not merely a discretionary option; it is not a 'nice to have.'"⁷⁹⁹ Meyer applies these principles in his own work. He acknowledged that, due to the nature of intelligence work, many employees are reluctant to talk about work matters outside of their immediate work space. Meyer uses training and outreach to encourage federal employees to report potential wrongdoing.⁸⁰⁰

These regulations alone, however, may not be enough to prevent retaliation against IC whistleblowers, and they certainly offer no protection for leakers who disregard the official system for reporting complaints.⁸⁰¹ They may also not be enough to encourage use of these channels, thus rendering them little more than window dressing. Critics argue that unless the IC undergoes an extensive culture shift, employees will not regard existing whistleblower channels as accessible. Steve Aftergood, Director of the Federation of American Scientists' Project on Government Secrecy, commented that although whistleblowers are an essential part of the oversight process, Edward Snowden had "nowhere to go except the public, and the public's discontent validated Snowden's decision, indicating a fundamental defect in the whistleblower apparatus."⁸⁰²

The current DNI has sought to develop trust by prioritizing whistleblower protection. Meyer's office, in particular, has gone to great lengths to protect the identities of whistleblowers.⁸⁰³ Furthermore, Meyer stated that he has seen an uptick in reporting to the ODNI and Congress in the last few years, suggesting that federal employees are becoming increasingly open and willing to utilize whistleblower channels. The next step, he noted, is to publicize instances where the IC IGs have demonstrated a commitment to whistleblower protections in order to demonstrate to federal employees that IGs will protect whistleblowers and that their concerns will be heard.

Perspectives

The Role of Leaked Information

For better or worse, leakers often expose controversial government activities that can generate public debate that may not otherwise take place. The threat of a potential leak can keep the CIA, other IC agencies, and their traditional congressional overseers alert. Leaks by Daniel Ellsberg, Chelsea Manning, and, most recently, Edward Snowden informed important public debates on

⁷⁹⁸ Office of the Director of National Intelligence. "Whistleblower Protection Laws."

⁷⁹⁹ Meyer and Berenbaum, "The Wasp's Nest," 6.

⁸⁰⁰ Dan Meyer, interview by Raheem Chaudhry and Courtney Weldon, telephone interview, April 14, 2016.

⁸⁰¹ Rodney M. Perry, "Intelligence Whistleblower Protections: In Brief" (Washington, D.C.: Congressional Research Service, October 2014).

⁸⁰² Aftergood interview.

⁸⁰³ Meyer interview.

government activities. Current DNI James Clapper said that the “surveillance debates” triggered by the Snowden documents “actually needed to happen.”⁸⁰⁴

The IC often reacts to controversies sparked by leaks by attempting to increase transparency to explain its actions, or to change the relevant laws.⁸⁰⁵ The IC recognizes its tendency to over-classify, thus increasing the probability of a leak. Leaks, especially highly publicized ones, can negatively affect public perception of the IC, deepening an already sizeable trust deficit between the American people and their government. This risk is particularly acute when the information revealed concerns the infringement of privacy or civil liberties of American citizens.

The legality of both leaking and publishing of national security information can be endlessly debated. Proponents of leaking contend that the role these individuals play is essential to keeping an otherwise opaque IC from running amok. Those who condemn leaking do so because they believe the IC keeps secrets for a reason—namely, to protect the nation and its citizens. Leaked information appears daily in major newspapers. Some journalists regard it as moral responsibility to publish any information, classified or otherwise, in which the public is interested.

Impact of Technology

Advanced technology like data encryption can prevent leaks, but the same tools can help leakers gather and disseminate large volumes of classified information. Citizen journalism and digital publication platforms have increased the sheer number of outlets available to circulate leaked information. Gone are the days when cordial relationships between mainstream media figures and IC leaders could stanch the flow of confidential leaks. The digital age has also reduced the “cost of gathering and disseminating information...to almost zero,” especially if the perpetrator is not caught and the government is indeed in the wrong.⁸⁰⁶ While Daniel Ellsberg, leaker of the Pentagon Papers, meticulously photocopied individual documents exposing the details of the Johnson Administration’s conduct of the Vietnam War, Chelsea Manning downloaded the Iraq and Afghanistan War logs—comprising almost 500,000 sensitive documents—with several keystrokes and passed them along to WikiLeaks.⁸⁰⁷ This illustrates the ease, speed, and volume at which leakers and whistleblowers can distribute sensitive information today.

Public and Political Influence

Historically, demands for government transparency typically follow harmful leaks and damaged trust. Leaks revealing NSA surveillance and U.S. government drone programs in recent years have further fueled the public’s demand for more information. In response to outrage sparked by the Snowden papers, Congress passed legislation, including the USA Freedom Act, that authorized but modified procedures for IC collection of telecommunications data. Although

⁸⁰⁴ Ken Dilanian, “Clapper: Snowden Case Brings Healthy Debate; More Disclosures to Come,” *Los Angeles Times* (September 12, 2013), accessed April 20, 2016, <http://articles.latimes.com/2013/sep/12/world/la-fg-wn-clapper-snowden-disclosures-20130912>.

⁸⁰⁵ Serge Grossman and Michael Simon, “And Congress Shall Know the Truth: The Pressing Need for Restructuring Congressional Oversight of Intelligence” *Harvard Law and Policy Review* 2 (2008): 435.

⁸⁰⁶ Mary-Rose Papandrea, “Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment,” *Boston University Law Review* 94 (2014): 457.

⁸⁰⁷ *Ibid.*

critics (including some members of Congress) argued the new law would not meaningfully affect the NSA's activities, recent cases involving Apple, Microsoft, and Google have thrown the privacy debate into the public spotlight.⁸⁰⁸ Intelligence leaks also contributed to heightened customer privacy safeguards at technology companies and investigations by the U.K. and German governments into U.S. intelligence activities.⁸⁰⁹

American public perception of leaks is largely contextual, as demonstrated by the “firefighter” responses to intelligence disclosures.⁸¹⁰ In times of national danger, such as the period following September 11, 2001, the public is apt to support increased security measures and more intrusive surveillance methods. After the immediate danger abates, the focus returns to individual civil liberties and the constitutional privacy rights afforded to American citizens. As a result, the public is more likely to condone leaking when they feel relatively safe from external threats. Individuals who participate in disclosing classified information are often recognized as crusaders of transparency and liberty. For example, 35 years after the Pentagon Papers controversy, Daniel Ellsberg was presented the 2006 Right Livelihood Award. Glenn Greenwald received a Pulitzer Prize for public service. Siobhan Gorman, the reporter who published information leaked by Thomas Drake, was also lauded for her series of articles.⁸¹¹ Drake himself was the recipient of the 2011 Ridenhour Truth-Teller Award.⁸¹²

Conclusion

Leaking classified national defense information has become commonplace, and efforts to curb or punish it have been inconsistent and largely ineffective. There are two sides to the leaking debate, and each party can be reasonably defended. Leaked information often instigates and informs important public debates. In other cases, leaks of classified information aid America's enemies and make everyone less safe. Furthermore, there is clearly a double standard—punishment and prosecution vary depending on who discloses the information and what the information is, and the government's culture of routine leaks encourages and buffers officials on a daily basis.

Although the concept of secrecy inherently clashes with fundamental ideals people ascribe to in a democratic, open government, the government relies on secrecy to effectively defend the nation and its citizens from real threats. Government secrecy, however, is inherently incompatible with an open, participatory, and democratic form of government.

Legislative and Executive Branch regulations have been developed to encourage government employees to report wrongdoing in secure channels and to protect these whistleblowers from retaliation for their actions. These laws and procedures must be further improved so government

⁸⁰⁸ Matt Sledge, “The Snowden Effect: 8 Things That Happened Only Because of The NSA Leaks,” *Huffington Post* (June 5, 2014), accessed May 5, 2016, http://www.huffingtonpost.com/2014/06/05/edward-snowden-nsa-effect_n_5447431.html.

⁸⁰⁹ *Ibid.*

⁸¹⁰ Loch K. Johnson, “Intelligence and National Security,” 161.

⁸¹¹ Jane Mayer, “The secret sharer,” *The New Yorker* (2011): 46-57.

⁸¹² Americans Who Tell the Truth, “Thomas Drake,” accessed May 8, 2016, <http://www.americanswhotellthetruth.org/portraits/thomas-drake>.

shortcomings can be identified and corrected without damaging our national security. Even while whistleblower programs are refined and improved, however, the debate within American society over the legality and morality of disclosing secret information outside of approved channels will continue. There is no clean way to guarantee that classified information remains classified: at the end of the day, the IC is a system created by humans, run by humans, and affected by human issues and values such as rights, liberties, and freedom.

This humanity, however, may be the IC's saving grace. Understanding the reasons why people leak information can realistically and applicably direct IC whistleblower reform toward a more transparent, user-friendly process that IC officials can feel comfortable navigating. Humanity also extends to leadership, which ultimately dictates organizational culture. Good leadership can encourage positive internal dialogue between employees, eventually resulting in decreased illegal leaks and increased use of whistleblower mechanisms. An IC culture shift embracing trust and transparency (without compromising national security) can help employees and consumers develop confidence in the system that tirelessly works to keep Americans safe.

History demonstrates that leakers and whistleblowers have forced a traditionally reactive U.S. IC to start thinking proactively. These circumstances can indeed compel the IC to answer for its actions, but at what price? What is an appropriate balance between transparency and secrecy in the U.S. IC, and what is the role of a leaker in maintaining (or upsetting) this equilibrium? The public and the IC must come to an understanding, yet in a political atmosphere that demands both public accountability and national security, it will be difficult to agree on a compromise until adequate trust is established.

Recommendations

We recommend:

- IC agencies should strengthen mandatory, periodic training sessions for employees on whistleblower protections and procedures and for entry-level supervisors on how to facilitate a culture of openness via leadership skills;
- IC agencies should implement reward or encouragement programs for employees who voice their concerns through the appropriate channels; and
- IC agencies should form Employee Advisory Boards as expert counsel available to IC employees who request assistance in navigating correct whistleblower procedures. This recommendation also moves away from the term “whistleblower,” which may deter employees from coming forward with concerns.

Chapter 11. The Intelligence Community and the Public

by Keith Pitstick and Imaad Khan

There is a long history of mistrust between the American people and government authority. It was present at the country's founding and persists to this day. Americans demand to control their destinies, and this extends to the destiny of the country as a whole. Americans are innately suspicious of a powerful and intrusive government that acts in secrecy on their behalf. Nonetheless, Americans are practical and understand that national security requires intelligence-gathering and that effective intelligence requires secrecy. Similarly, most Americans understand that they cannot and should not be involved in all governmental decisions. In this environment, the government faces the challenging task of gaining and maintaining the trust of the people while simultaneously withholding from the public information regarding some of the most consequential actions it takes to defend the state.

The IC for decades has attempted to maintain essential secrecy while also demonstrating that it is accountable for its actions.⁸¹³ The modern IC is monitored and overseen by all three branches of the federal government, multiple and redundant internal mechanisms, and ultimately the media that prioritizes its role as government watchdog. Acting individually, and often in concert, these oversight bodies have served in multiple instances to detect and address IC conduct that was unlawful, ineffective, wasteful, or inconsistent with mainstream American values. Public opinion is not generally regarded as a direct constraint on IC action, but the public's favorable or unfavorable view of our intelligence agencies does have an influence on decision-making in the intelligence field. Past and current IC leaders have expressed the view that an intelligence enterprise that lacks a foundation of popular support by the electorate cannot survive, or at least cannot act with the confidence required to address the multitude of serious threats facing the country.

The current DNI launched an IC-wide Transparency Initiative that acknowledges the influence of public opinion and seeks to increase public understanding of U.S. intelligence. The Transparency Initiative unfolds in the wake of high-profile controversies involving IC agencies, including the inability to detect and disrupt the 9/11 terror attacks, the mistaken pre-war assessment of Iraq's weapons of mass destructions, and aggressive interrogation techniques employed by CIA with al Qaeda terrorists in its custody. Widespread public interest in intelligence was most recently animated by the disclosure of previously-classified information on mass surveillance programs undertaken by the National Security Agency in an effort to detect terrorist plotting.

We will first outline a recent event involving U.S. intelligence that have negatively affected public trust. Next, we analyze available metrics for gauging public trust, along with a brief discussion on the difficulties that are encountered in seeking to measure such an amorphous

⁸¹³ Walter Pincus, "'Front-Page Rule' Is Unprecedented in U.S. Intelligence Community," *The Washington Post* (December 25, 2015), accessed April 24, 2016, https://www.washingtonpost.com/world/national-security/front-page-rule-is-unprecedented-in-us-intelligence-community/2013/12/25/2ddb25f8-6c0a-11e3-b405-7e360f7e9fd2_story.html.

concept. Finally, we discuss how the ODNI-led Transparency Initiative may affect the public's understanding of, and trust in, our intelligence agencies.

Recent Events

Following the 9/11 attacks, the CIA, was authorized by President George W. Bush to develop a program to capture, detain, and question terrorists. The program included an approved set of enhanced interrogation techniques, for example, sleep deprivation, small space confinement, and waterboarding.⁸¹⁴ In a recent poll, 59% of the American public expressed the opinion that these techniques were justified after 9/11, but 54% believed that the IC had misled the public regarding the details and effectiveness of the program.⁸¹⁵ The public debate over EITs became highly politicized and the public remains divided on their use. President Barack Obama issued a directive banning EITs and IC leaders have committed not to use them again.⁸¹⁶

In September 2002, the IC prepared a national intelligence estimate (NIE) assessing the weapons of mass destruction in Saddam Hussein's Iraq. The Bush Administration cited the conclusions of the NIE in its efforts to build support for the invasion of Iraq the following spring. After the collapse of the Saddam Hussein regime, and an extensive search of government facilities, it was discovered that many important aspects of the Iraq NIE were incorrect. By 2005, nearly half of the respondents in nationwide polling indicated that the administration had misled the public about the basis for waging the Iraq war.⁸¹⁷ Public trust in the IC was shaken: 59% of self-described Independents and 68% of Democrats indicated they were "not at all confident" in the IC. By comparison, 41% of Republicans lacked confidence in the IC, while 47% said they were only "somewhat confident."⁸¹⁸ Poor intelligence work had contributed to a policy decision to undertake a war that proved extremely costly (in lives and dollars) and politically divisive in American society.

Measuring Public Opinion

Measuring public opinion will always be imprecise and provide only an approximation of the attitude of the population. Whether the public is polled directly or popular opinions are measured through social media use, understanding what the U.S. public thinks about any particular issue can be difficult. The challenge is even greater for highly complex topics like the capabilities or activities of our intelligence agencies. Polling on NSA surveillance programs offers a useful illustration.

⁸¹⁴ Michael L. Gross, *Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (Cambridge: Cambridge University Press, 2010), 128.

⁸¹⁵ Adam Goldman and Peyton Craighill, "New Poll Shows Majority Back Harsh CIA Interrogation," *The Washington Post* (December 16, 2014), accessed December 1, 2015, https://www.washingtonpost.com/world/national-security/new-poll-finds-majority-of-americans-believe-torture-justified-after-911-attacks/2014/12/16/f6ee1208-847c-11e4-9534-f79a23c40e6c_story.html.

⁸¹⁶ Kristen East, "CIA director: We won't waterboard," *POLITICO* (April 11, 2016), accessed April 24, 2016, <http://www.politico.eu/article/cia-director-john-brennan-donald-trump-we-wont-waterboard-torture/>.

⁸¹⁷ Joseph Carroll, "Public Doubts 'Smarts' of U.S. Intelligence Community" (April 26, 2005), accessed December 1, 2015, <http://www.gallup.com/poll/16009/public-doubts-smarts-us-intelligence-community.aspx>.

⁸¹⁸ *Ibid.*

In May 2006, a *Washington Post/ABC News* poll asked the following question:

It's been reported that the National Security Agency has been collecting the phone call records of tens of millions of Americans. It then analyzes calling patterns in an effort to identify possible terrorism suspects, without listening to or recording the conversations. Would you consider this an acceptable or unacceptable way for the federal government to investigate terrorism? Do you feel that way strongly or somewhat?

This question described the controversial Terrorist Surveillance Program implemented by the NSA shortly after the 9/11 attacks.⁸¹⁹ The poll found that 63% of Americans thought that the program was an acceptable way to investigate terrorism: 44% of those surveyed felt strongly that it was acceptable, and 51% of those surveyed in 2006 approved the way President Bush was handling privacy matters.⁸²⁰

In the same month, Gallup/*USA Today* asked: "Based on what you have heard or read about this program to collect phone records, would you say you approve or disapprove of this government program?"

The results for this poll were starkly different. Only 43% said they approved of the program, while 51% disapproved.⁸²¹ A *Newsweek* poll asked an almost identical question as the Gallup poll and found similar results: 41% said the program was necessary, while 53% said that it went too far.⁸²² The discrepancy between these results of these polls and the responses to the *Washington Post's* polling has been attributed to the *Post's* use of the term "investigate terrorism" in the question.⁸²³

While phrasing of question is an important aspect of polling, the timing of the poll can also influence results. In June 2013, in the midst of the media coverage of leaks sourced to former NSA contractor Edward Snowden, The Pew Research Center ("Pew") conducted a poll to gauge public opinion on the NSA's bulk collection of telephone metadata. According to the poll, 56% of Americans thought that the NSA program was an acceptable way to investigate terrorism while 41% said they disapproved.⁸²⁴ Pew conducted another survey in January 2014, after President Obama outlined changes to the NSA phone and data collection program. Support for the program had declined considerably. Pew reported that only 40% of Americans approved of the program, while 53% disapproved.⁸²⁵ In May 2015, Pew reported roughly the same numbers,

⁸¹⁹ Risen and Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts."

⁸²⁰ Richard P. Morin, "Poll: Most Americans Support NSA's Efforts," *The Washington Post*, (May 12, 2006), accessed December 10, 2015, <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/12/AR2006051200375.html>.

⁸²¹ Jeffrey M. Jones, "More Americans Disapprove than Approve of Government Collecting Phone Records" (May 15, 2006), accessed December 10, 2015, <http://www.gallup.com/poll/22789/More-Americans-Disapprove-Than-Approve-Government-Collecting-Phone-Records.aspx>.

⁸²² *Ibid.*

⁸²³ *Ibid.*

⁸²⁴ Pew Research Center, "Majority Views NSA Phone Tracking as Acceptable Anti-Terror Tactic" (June 10, 2013), accessed December 10, 2015, <http://www.people-press.org/2013/06/10/majority-views-nsa-phone-tracking-as-acceptable-anti-terror-tactic/>.

⁸²⁵ While the questions differ slightly between the 2013 and 2014 polls, both questions mention the anti-terror aspects of the program. Pew Research Center, "Obama's NSA Speech Has Little Impact on Skeptical

with 54% disapproving of the program and 42% approving.⁸²⁶ In his speech, the President was critical of the data collection program and offered some reforms meant to assuage public opinion about the lack of oversight in surveillance. At the same time, the President was staunchly supportive of the critical work that the IC does to protect Americans. The President's speech in addition to the seven months of debate brought about by the Snowden leaks could be potential reasons for the drop in polling numbers.

A study published in 2016 by Pew explored the dynamic between security and privacy in the wake of significant national events.⁸²⁷ A December 2015 poll conducted six days after the shooting in San Bernardino, California, showed that 56% of Americans were more concerned that government anti-terror policies did not go far enough to protect security, while only 28% said that the policies went too far and threatened civil liberties.⁸²⁸ Based on these poll results, this Pew study shows that even while Americans are “becoming more anxious about their privacy,” Americans tend to favor security over privacy in the immediate aftermath of a security incident.⁸²⁹ Security concerns also appear to subside over time; the closer in time Americans are to an incident, the more likely they are to support aggressive government and law enforcement measures. As time passes, and Americans feel more secure, concerns over civil liberties tend to take precedence.⁸³⁰

Polling can accurately measure public opinion, but public opinions can change rapidly. The phrasing of a question, when the question is asked, and who asks it are all critical variables that can affect the outcome of the poll. Assessing how the public feels about specific topics, like certain government programs, can only ever be a snapshot of the public's view at a given time. Therefore, in order to acquire a more complete picture of how the public feels, especially on such contentious topics like national security and civil liberties, polling data must be supported by other metrics.

One way to augment polling is with data from social media. A recent study in the *Journal of Computer-Mediated Communication* showed that social media analysis is increasingly used to measure public opinion.⁸³¹ The report revealed that there were three main ways in which social media was used by journalists to measure public opinion: quotations of individuals, raw quantitative statements, and semantic polling. The first metric—quoting individual users—is a practice used by journalists for many years. News outlets often use quotes from individuals to give viewers or readers a sample of what those engaged with the subject might be thinking. Instead of cold-calling potential observers, news outlets now have access to millions of opinions

Public” (January 20, 2014), accessed April 24, 2016, <http://www.people-press.org/2014/01/20/obamas-nsa-speech-has-little-impact-on-skeptical-public/>.

⁸²⁶ Gao, “What Americans Think about NSA Surveillance, National Security and Privacy.”

⁸²⁷ Lee Rainie and Shiva Maniam, “Americans Feel the Tensions between Privacy and Security Concerns” (Pew Research Center, February 19, 2016), accessed April 24, 2016, <http://www.pewresearch.org/fact-tank/2016/02/19/americans-feel-the-tensions-between-privacy-and-security-concerns/>.

⁸²⁸ Ibid.

⁸²⁹ Ibid.

⁸³⁰ Ibid.

⁸³¹ Nick Anstead and Ben O’Loughlin, “Social Media Analysis and Public Opinion: The 2010 UK General Election,” *Journal of Computer-Mediated Communication* (September 30, 2014), accessed April 24, 2016, <http://onlinelibrary.wiley.com/doi/10.1111/jcc4.12102/pdf>.

through social media. Raw quantitative statements are a measure of how often a hashtag statement or unique phrase is used. Unique to social media, hashtag statements that become viral can help illustrate what a large number of Internet users are discussing. Finally, semantic polling is an analysis on *how* individuals talk about a certain subject. For example, semantic polling would reveal if the majority of Twitter tweets describe an issue using positive or negative language. Proponents of social media analysis as a measure of public opinion argue that monitoring social media eliminates some of the problems related to traditional polling like semantics, slow responses, and intervention. Critics of the practice contend that those on social media are not representative of the broader public. In light of the IC's extensive online presence, namely through Twitter and Tumblr accounts, an analysis of traffic, keywords, and site hits could be extremely valuable in measuring where the public stands on issues of interest to U.S. intelligence. There is, however, a thin line between measuring public opinion and shaping it, especially in the realm of social media. While the plethora of information available in social media analysis could be useful, it would be foreseeable that the IC would ultimately be accused of engaging in propaganda and seeking to influence U.S. domestic audiences—furthering feelings of distrust by the public.

Transparency Initiative

While the launching of the ODNI's formal IC-wide Transparency Initiative is unprecedented, the ODNI, CIA, and other IC agencies have had a Web presence and active public relations offices for decades. For example, former CIA Director of Public Affairs Bill Harlow pressed for increased public speaking engagements by then-Director George Tenet, as well as consulting and working with Hollywood on TV and film projects.⁸³² “The Principles of Intelligence Transparency Implementation Plan,” released by ODNI in October 2015, makes it clear that the IC will seek to protect vital information while at the same time enhancing public understanding of intelligence activities.⁸³³ The plan includes a range of initiatives that aim to increase transparency and promote public understanding of IC activities. This includes the declassification and release of certain documents, “direct engagement...with media, civil society, oversight entities, and foreign partners,” and aligning IC roles and processes to promote transparency.⁸³⁴ In October 2015, Director Clapper explained at a conference at George Washington University, “I have to confess that—because of my experience growing up in the [signals intelligence] business and my five decades in intelligence work—the kind of transparency we’re engaged in now felt almost genetically antithetical to me, at least for the first couple of years, but it doesn’t really feel that way anymore.”⁸³⁵ He went on to say, “...if the

⁸³² Bill Harlow; interview by Imaad Khan, Austin, Texas, March 30, 2016.

⁸³³ Office of the Director of National Intelligence, “Principles of Intelligence Transparency Implementation Plan” (October 27, 2015), accessed April 20, 2016, <https://www.dni.gov/files/documents/Newsroom/ReportsandPubs/PrinciplesofIntelligenceTransparencyImplementationPlan.pdf>.

⁸³⁴ *Ibid.*

⁸³⁵ Josh Gerstein, “Clapper's Transparency Plan for Intelligence Community Grinds Forward,” *Politico* (October 27, 2015), accessed April 20, 2016, <http://www.politico.com/blogs/under-the-radar/2015/10/clappers-transparency-plan-for-intelligence-community-grinds-forward-215203>.

American people don't understand what we are doing...why it's important...and how we're protecting their civil liberties and privacy, we'll lose their confidence.”⁸³⁶

The new interest in transparency is partially rooted in the democratic idea that the public has a certain right to know about its government's actions, or else it cannot make informed decisions. But, as Director Clapper mentioned, even supporters of the IC's mission believe that transparency is desirable because it may lead to a more trusting public. Recent empirical data, however, casts doubt on this common-sense proposition. Amy Zegart, Co-Director of the Center for International Security and Cooperation (CISAC), hypothesized “that public ignorance was compounding the NSA's trust problems.”⁸³⁷ Her organization commissioned a YouGov national poll to better understand the relationship between public misperception of IC activities and their confidence in the IC. Her findings were surprising: the more respondents knew about the U.S. intelligence agencies, the *less* likely they were to support the IC. For example, of the 43% of respondents who could correctly identify Director Clapper, 53% had an “unfavorable impression,” of the IC whereas just 33% of those who did not know Director Clapper held the same negative view.⁸³⁸

While these findings may be disappointing to the architects of the IC's Transparency Initiative, the YouGov polling may reveal an opportunity to build public trust. Zegart argued that Americans were “willing to give their government significant leeway if they think counterterrorism tools are effective.”⁸³⁹ That is, if the public were aware that a program was used for counterterrorism purposes and the IC could demonstrate that those programs were effective in that capacity, the public would feel more positive about the program.

This poll appears to indicate that the IC could alleviate public pressure by persuading the public that the programs in place were effective. Of course, finding a way to demonstrate the effectiveness of IC programs without compromising state secrets is a constant challenge. Some former IC officials have proposed that IC agencies build public support by engaging in, and broadly publicizing, activities with clear domestic benefits. Phillip Lohaus, a former National Geospatial-Intelligence Agency (NGA) analyst cited that agency's existing practice of assisting “...local authorities and the military on a host of issues, from natural disasters and land use issues to urban planning and navigation.”⁸⁴⁰ He acknowledges that there are legal restrictions on what kind of work the different IC agencies are able to carry out on American soil, but finding ways that the IC can use its considerable capabilities to help local communities could go a long way in building public trust.

The IC's Transparency Initiative has also been criticized as potentially leading to the disclosure of information that will assist the nation's enemies. The U.S. government has already lost significant amounts of sensitive data to foreign cyber-attacks, and the possibility that the U.S. would volunteer more information of utility to foreign rivals is a strong deterrent from releasing

⁸³⁶ Ibid.

⁸³⁷ 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>

⁸³⁸ “The NSA's Image Problem - Latimes.”

⁸³⁹ Ibid.

⁸⁴⁰ Ibid.

information. Lisa Monaco, President Obama’s Homeland Security Advisor, commented that there is “no easy solution for balancing an open and honest relationship with the American public and the need for secrecy from a national security standpoint, the [Transparency] [I]nitiative is nonetheless necessary.”⁸⁴¹

Recommendations

We recommend:

- The ODNI should continue implementing the IC Transparency Initiative; and
- Congress should authorize the ODNI or a third party to conduct appropriate polling designed to measure public attitudes toward U.S. intelligence and the effectiveness of IC efforts to build trust through greater transparency.

⁸⁴¹ White House, “Remarks by Lisa O. Monaco at the Intelligence Studies Project at the University of Texas-Austin” (March 30, 2016), accessed April 20, 2016, <https://www.whitehouse.gov/the-press-office/2016/03/30/remarks-lisa-o-monaco-intelligence-studies-project-university-texas>.

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Chapter 12.

Ethics and Morality as a Constraint on Intelligence Activities

by Anna Waterfield, Kristine Henry, and Darby O’Rear

Ethics and morality pervade nearly every decision made in the U.S. intelligence agencies, and are also prominent within the myriad institutions that oversee them. While ethics and morality are the least tangible constraint on these agencies, they offer a consistent underlying theme in the discourse surrounding oversight. However, the particularity of each official’s moral compass and ethical priorities makes it difficult to reach blanket conclusions about the cumulative impact of ethics and morality in shaping IC activities.

Schools of Ethical Thought and Spying

Ethics and morality serve as guidelines for identifying right conduct and good character, and both play instrumental roles at different levels of the decision-making process in the IC. Different schools of normative ethical thought produce different conclusions about what is ethical. The school of deontological ethics, derived from the Greek *deon* (duty) and *logos* (science), is action-oriented and holds that “at least some acts are morally obligatory regardless of their consequences for human weal or woe.”⁸⁴² The school of aretaic, or virtue, ethics, has character traits at its foundation and advocates that one is to “look for moral norms not in duty concepts but within the virtues or traits of character that one needs to flourish as a human being.”⁸⁴³ The school of consequentialist ethics⁸⁴⁴ is defined by theories that “hold . . . the moral rightness of an action is always determined by its tendency to promote certain consequences deemed intrinsically good,” or in other words, that justify the means based on the ends they achieve.⁸⁴⁵ The Encyclopedia of Philosophy offers a further caveat to consequentialist ethics: “a duty or moral obligation is regarded as acceptable only if it can be shown that such conduct tends to produce a greater balance of good than do possible alternatives.”⁸⁴⁶

That the IC consistently attests it is strictly following ethical guidelines suggests its interpretation of ethics is likely rooted in the consequentialist school of thought. The intelligence business can encompass a litany of sins: lying, deceiving, and even killing. For many intelligence officers, the justification for these means lies in the end of serving the greater good by protecting American lives and interests. As Nathan Hale famously put it, “Any kind of service necessary to the public good becomes honorable by being necessary,” regardless of the moral nature of the service itself.⁸⁴⁷ Aretaic ethics may be another plausible ethical grounding for intelligence work: the intelligence officer makes honorable sacrifices for his or her country through the embodiment of ethical principles such as duty, loyalty, and service.

⁸⁴² Paul Edwards, *The Encyclopedia of Philosophy* (London: Macmillan, 1967), 343.

⁸⁴³ *Ibid.*, 583.

⁸⁴⁴ Also called teleological ethics, these are derived from the utilitarian school.

⁸⁴⁵ Edwards, *Encyclopedia of Philosophy*, 583.

⁸⁴⁶ *Ibid.*, 88.

⁸⁴⁷ Edward Everett Hale, “Captain Nathan Hale (1755-1776),” accessed December 9, 2015, http://www.connecticutsar.org/patriots/hale_nathan.htm.

Ethical justification for the practice of spying goes back almost to the beginning of civilization, with biblical precedents scattered throughout the Old Testament. Perhaps more relevant today, the just war doctrine holds that the use of armed force is justified under certain conditions.⁸⁴⁸ Subscribing to the just war doctrine involves an implicit subscription to the practice of spying, an indispensable part of any war.⁸⁴⁹ According to former CIA officer and scholar James Olson, for an intelligence operation to be acceptable, it must follow the same rules that bind war operations under just war doctrine. It must serve the mission of defending the U.S. against an external threat and not for any other motive; the potential loss must be outweighed by the potential gain; and so on.⁸⁵⁰ However, the ambiguity that has been a trademark of war in the late 20th and 21st centuries, from the Cold War to the preemptive war doctrine, has blurred the distinction between wartime and peacetime. The emergence of non-state actors as enemies has challenged the conventional understanding of armed conflict and invites a state of perpetual war, undefinable by traditional definitions. This uncertainty is problematic for determining whether, for example, a CIA operation is ethical at any given time when using just war doctrine as a standard for evaluation.⁸⁵¹

Prominence of Ethics and Morality in the IC

One of the strongest underpinnings for the argument that the IC acts ethically is the substantial overlap between ethics and the law. Even if the institution or the individual is not doing the “right” thing as a result of a commitment to an ethical code, in many circumstances they are still doing the “right” thing because they are inclined to follow the law, and the law and the “right” thing frequently coincide. However, frequently does not mean always, and what is legal may be suitable under one interpretation of ethics but not another. For example, intelligence collection is legal even though it often requires actions that, in isolation, are considered immoral, such as eavesdropping, theft, and manipulation.⁸⁵² Thus, the moral and ethical character of intelligence activities cannot be evaluated simply based upon adherence to the rules without considering the broader question of whether those rules are ethical.

How often, when decisions are being made regarding the practice of intelligence, do policymakers or intelligence officers cite ethical or moral values? Responses to this question vary depending on who is asked. Harrowingly, William Sullivan, the former head of FBI intelligence operations, testified:

During the ten years that I was on the U.S. Intelligence Board, a board that receives the cream of intelligence for this country from all over the world and inside the United

⁸⁴⁸ Encyclopædia Britannica, “Just War” (Chicago: Encyclopædia Britannica, 2013).

⁸⁴⁹ James Olson, *Fair Play: The Moral Dilemmas of Spying* (Lincoln: Potomac Books, 2007), 21.

⁸⁵⁰ *Ibid.*

⁸⁵¹ Mark M. Lowenthal, *Intelligence: From Secrets to Policy* (Thousand Oaks: CQ Press College, 2011), 308.

⁸⁵² *Ibid.*, 313-314.

States, never once did I hear anybody, including myself, raise the question: “Is this course of action which we have agreed upon lawful, is it legal, is it ethical or moral?”⁸⁵³

Other accounts of the moral milieu of the IC differ strongly from Sullivan’s account, which paints a picture of the IC as it operated over 40 years ago. More contemporary accounts describe a compendium of organizations that set a high moral bar and vigorously self-police to make sure that bar is consistently cleared. “There’s more than morals, there’s a real idealism among case officers,” said one CIA officer.⁸⁵⁴ CIA Director John Brennan said of his own moral compass, “I have been comfortable at CIA in terms of what it is that I have done, what I have been asked to do, that this is consistent with my moral compass. I have told officers that I don’t want them to do something that they feel is inconsistent with their personal ethics and values.”⁸⁵⁵

Ethical Codes and Enforcement

The ODNI promulgated the first ethical code for the IC in 2012. DNI James Clapper asked the ODNI’s CLPO to prepare it. “I felt that a professional ethical code was necessary because we live in a classified world, where the details of even our oversight are secret, and so it is even more important for us to hold ourselves accountable,” said Director Clapper.⁸⁵⁶ Some employees of the IC are subject to other ethical codes as well. Individual intelligence agencies have their own codes of conduct or core values, and employees of the Executive Branch and the military must also follow each respective organization’s existing ethical guidance. The NSA, for example, is known throughout the IC as the “boy scouts,” always exhibiting good conduct, respect for others, and honesty.⁸⁵⁷ Rick Ledgett, NSA’s Deputy Director, explained there is a culture within the NSA of owning up to mistakes quickly. His people, Ledgett said, are trained rigorously to identify possible rules violations and take corrective action, not to wait for an outside overseer to discover problems.⁸⁵⁸

The ODNI’s Principles of Professional Ethics

The ODNI’s code generally only tracks the law or other commonly accepted expectations of anyone operating in a professional capacity. For example, the code pledges, “we...comply with the laws of the United States,” and “we seek to improve our performance and our craft

⁸⁵³ Supplementary Detailed Staff Reports on Intelligence and the Rights of Americans, “**Final Report of the Select Committee to Study Governmental Operations**,” accessed December 9, 2015, <http://terrasol.home.igc.org/HustonPlan.htm>.

⁸⁵⁴ James Paul Pope (CIA officer) in discussion with the author, November 2015.

⁸⁵⁵ John O. Brennan, “**Intelligence in American Society**” (September 15, 2015), accessed February 21, 2016, <http://intelligencestudies.utexas.edu/brennan>.

⁸⁵⁶ John O. Brennan, “**Intelligence in American Society**” (September 15, 2015), accessed February 21, 2016, <http://intelligencestudies.utexas.edu/brennan>.

⁸⁵⁶ James R. Clapper, “**Remarks as Delivered by the Honorable James R. Clapper**” (September 18, 2014), accessed December 9, 2015, <http://www.dni.gov/index.php/newsroom/speeches-and-interviews/202-speeches-interviews-2014/1115-remarks-as-delivered-by-the-honorable-james-r-clapper-director-of-national-intelligence-afcea-insa-national-security-and-intelligence-summit>.

⁸⁵⁷ Rick Ledgett, NSA Deputy Director, in discussion, March 8, 2016.

⁸⁵⁸ Ibid.

continuously.”⁸⁵⁹ Compared to other U.S. government agencies’ ethical codes, the ODNI’s is quite spare. The ethical codes that apply to employees of the United States Agency for International Development (USAID) and employees of the Executive Branch consist of dozens of pages, detailing the ethical systems as they apply to different types of employees within their jurisdictions.⁸⁶⁰

Seemingly not a tool of significant assistance to intelligence officers making day-to-day choices involving ethical considerations, the ODNI’s code may have other utility, such as assuaging public concerns over a freewheeling IC or holding outside supervision at arm’s length. Former NSA Director and Deputy Director of Central Intelligence, Bobby R. Inman, said of the relatively unambitious code that the words themselves do not matter so much as the spirit with which the code was developed; in his opinion, its mere existence is enough.⁸⁶¹

Challenges to Development and Enforcement

There are challenges in devising a system to enforce an interagency ethical code for the IC. Unlike the American Bar Association (ABA) and the American Medical Association (AMA), systems with far-reaching and well-established ethical codes, the IC does not have a forum where an officer can be judged by peers on whether he or she met the profession’s ethical standards. Under the ABA’s Model Rules of Professional Conduct, attorneys and judges are required to report their colleagues who engage in unethical conduct, which a board of lawyers and non-lawyers then reviews.⁸⁶² Failure to report a colleague’s violation could result in professional discipline and may expose individuals or entire firms to civil liability.⁸⁶³ As a member of the AMA, one is subject to review by the Council on Ethical and Judicial Affairs whenever evidence of improper conduct is brought to the council’s attention, and disciplinary proceedings could ensue. Punishments for a violation range from a less severe admonishment to probation, monitoring for a defined period of time, or revoking of AMA membership.⁸⁶⁴

The IC’s lack of a similar system invites more government-mandated oversight than the medical or law professions. The public assumes those communities are adequately internally policed by trained practitioners equipped with the high degree of technical specialization necessary for effective oversight. More rigorous self-policing by the IC’s professional ranks could create a

⁸⁵⁹ The Office of the Director of National Intelligence, “Principles of Professional Ethics for the Intelligence Community,” accessed December 9, 2015, <http://www.dni.gov/index.php/intelligence-community/principles-of-professional-ethics>.

⁸⁶⁰ The United States Agency for International Development, “ADS Chapter 109, Ethics and Standards of Conduct,” accessed April 11, 2016, <https://www.usaid.gov/sites/default/files/documents/1876/109.pdf>.

⁸⁶¹ Bobby R. Inman (United States Admiral, Retired) in discussion with the author, February 2016.

⁸⁶² American Bar Association, “Do the Right Thing: Policing the Profession and the Attorney’s Duty to Report Misconduct,” accessed April 12, 2016, http://www.americanbar.org/content/dam/aba/events/labor_law/2013/03/employment_rightsresponsibilitiescommitteemidwintermeeting/25_warren.authcheckdam.pdf.

⁸⁶³ Douglas R. Richmond, “Law Firm Partners as Their Brothers’ Keepers,” accessed April 12, 2016, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conf_session14_richmond_brothers_keeper.authcheckdam.pdf.

⁸⁶⁴ American Medical Association, “Rules for Review of Membership,” accessed April 12, 2016, <http://www.ama-assn.org/ama/pub/about-ama/our-people/ama-councils/council-ethical-judicial-affairs/governing-rules/rules-review-membership.page?>

similar dynamic, one in which external oversight bodies like Congress feel they can be less intensively engaged and still trust the IC to meet high professional standards.

When describing the process of devising the code, DNI Clapper questioned whether there is room to devise a system intricate enough to incorporate the many layers of employees in the IC.⁸⁶⁵ The definition of an intelligence officer is murky: employees of the IC include analysts, case officers, lawyers (who have their own separate ethical code to uphold), technicians, and members of many other disciplines. One way of overcoming this issue could be to write an ethical code and implement a peer review board for ethical violations by profession, rather than at the agency or community level. For example, analysts working in the DIA, the NSA, and the CIA would be subject to the same ethical code pertaining to intelligence analysis, and would participate in the same peer review system.

Even if there were a standard definition of an intelligence officer, the question remains whether those individuals are the ones ultimately making ethical and moral decisions. Whose ethics matter: The policymakers setting the IC's agenda? The President? The CIA Director? At what level are these ethical and moral decisions being made? According to Olson, acceptable moral behavior in operational situations is often left to individual intelligence officers, their supervisors, or other senior officials.⁸⁶⁶ Given the array of decision-makers and their vested authorities and the secrecy surrounding their actions, a rigorous selection and training process that emphasizes moral character is extremely important, as is instituting a regular, meaningful series of ethical trainings throughout each officer's career.

Influence on Public Perception

Ethics and morality are extremely important to the public's perception of the IC. Living in a society whose very backbone is built upon the ideal of freedom lends itself to a strong distaste for secrecy, a hallmark of the IC. Some segments of the public therefore tend to be wary of an organization composed of actors whose actions will never be made public, and whose requirements are typically set according to security needs, not ethics. Having faith that the actions of intelligence officers are compatible with the public's conception of ethics is contingent on the public believing that the IC today has a strong ethical code, enforces it, and is staffed by professionals with a strong moral character. The public needs to believe that the IC has improved in these aspects compared to earlier in history, when "FBI, CIA, and the NSA had engaged in activities such as spying on Americans for political gain, and assisting foreign leaders that sometimes exceed their mandates and violated deeply held American values."⁸⁶⁷

Public Perception throughout History

The public's moral and ethical perceptions of the IC have fluctuated throughout history. Americans generally held a historical aversion to spying throughout their nation's history (hence the United States' late arrival to the intelligence game). This started to shift during World War II, when Franklin D. Roosevelt created the United States' first state intelligence organization, the

⁸⁶⁵ Clapper, "Remarks as Delivered by the Honorable James R. Clapper."

⁸⁶⁶ Olson, *Fair Play*, ix.

⁸⁶⁷ Goldsmith, *Power and Constraint*, 66-67

Office of Strategic Services (OSS). Rigid rules rooted in ethical behavior dictated the actions of the OSS. There was great reluctance to read the Russians' internal communications because they were U.S. allies, and as former Secretary of State Henry Stimson remarked a decade earlier, "Gentlemen don't read each other's mail."⁸⁶⁸

Changing attitudes toward the IC are a reflection of the dynamic nature of ethics and morality: what was once viewed as unacceptable is now okay. For example, cryptanalysis is now ubiquitous in international relations between allies and enemies alike, as evidenced by Edward Snowden's apparent disclosure that the NSA monitored German Chancellor Angela Merkel's and her ministers' mobile phones.⁸⁶⁹ But changes in what is considered ethical would not preclude the IC from enforcing a uniform and more specific ethical code. Even old ethical codes like the Hippocratic Oath have some flexibility to adapt with society.⁸⁷⁰ The Hippocratic Oath has been updated to reflect the current modern environment, showing that similar provisions could be made for the IC's ethical code and that changing ethics does not mean that it is impossible to enforce an ethical code.⁸⁷¹

Ethics and Enhanced Interrogation Techniques

In addition to changing with evolving social and cultural contexts, ideas about what is ethically and morally sound can fluctuate in the short-term based on current events. Immediately following 9/11, the use of enhanced interrogation techniques on terrorists responsible for the attacks would likely have received widespread public support. In 2014, however, the nation was split over whether the CIA's methods were justified.⁸⁷² When the American public feels threatened, it turns to the IC for protection and gives the community the latitude to draw from a much broader repertoire of techniques than during peaceful periods.⁸⁷³ This phenomenon, which Olson calls the "righteousness trap," also prevailed throughout the Cold War, when perceived threat levels were high and sustained.⁸⁷⁴ Rather than demonstrating a temporary shift in what is considered ethical, these examples may show that the public will set aside ethics altogether in favor of self-preservation during periods of peril.

On the other hand, the IC's internal debates over use of EITs illustrate a more deliberate decision-making process within which ethical considerations played a substantive role. CIA officers at the Counterterrorism Center (CTC) were convinced that usual methods of interrogation were not going to be effective in the isolated cases in which they chose to apply EITs. These methods were unprecedented for the CIA, but had been used for years by the U.S. military in training exercises.⁸⁷⁵ CTC analysts, psychologists, and outside consultants sought

⁸⁶⁸ Olson, *Fair Play*, 37.

⁸⁶⁹ "Wikileaks: US spied on Angela Merkel's ministers too, says German newspaper," *Guardian* (London, July 1, 2015).

⁸⁷⁰ Tyson, "The Hippocratic Oath Today," March 27, 2001, accessed April 14, 2016, <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>.

⁸⁷¹ Ibid.

⁸⁷² Pew Research Center, "About Half See CIA Interrogation Methods as Justified" (Washington, D.C., December 15, 2014).

⁸⁷³ Olson, *Fair Play*, 40.

⁸⁷⁴ Olson, *Fair Play*, ix.

⁸⁷⁵ Rizzo, *Company Man*, 183.

authority to employ specific EITs they thought would be most effective in each circumstance and drew the line at techniques they found too extreme or potentially ineffective.⁸⁷⁶ They also decided the EITs would be “judiciously” applied only for the period and only at an absolutely necessary level.⁸⁷⁷ Oversight bodies that approved the use of EITs included the Executive Branch, Justice Department, and leaders of the relevant committees in Congress.⁸⁷⁸ Senior government policymakers who were involved in the decision-making process included National Security Adviser Condoleezza Rice, Vice President Dick Cheney, and even President George W. Bush.⁸⁷⁹

While emotion undoubtedly played a role in the deliberations and their ultimate conclusion, the IC and its overseers still underwent such a cautious process that ethics and morality infused the discourse surrounding the decision to use EITs. Now, the opinions of many intelligence officers have also shifted away from supporting use of EITs, whether due to a shift in moral judgment or to avoid the heavy criticism the CIA has sustained since the program became public knowledge. “If some future president is going to decide to waterboard, he better bring his own bucket, because he’s going to have to do it himself,” former CIA director Michael Hayden remarked. “The agency’s not going to do this again.”⁸⁸⁰

Further Challenges and Discrepancies in Morality and Ethics

Many individuals and institutions charged with evaluating the IC take an approach to morality and ethics that diverges from consequentialist interpretations. Using the Iran-Contra affair as a case study, at least three competing interpretations of ethics are identifiable. When explaining why he lied to Congress about his central role in the Iran-Contra affair, Lieutenant Colonel Oliver North said, “Lying does not come easily to me. But we all had to weigh in the balance the difference between lies and lives.”⁸⁸¹ This utilitarian explanation for the ethical correctness of this controversial activity starkly contrasts with the majority opinion in Congress, a key body overseeing the IC. In its report, the Congressional Committee Investigating Iran-Contra found that the CIA acted dishonestly in its knowing violation of the Boland Amendment.⁸⁸² North, a National Security Council official, believed he was acting ethically in trying to protect U.S. interests; Congress thought those involved with the affair acted unethically in employing dishonesty and deception (a deontological approach); and those who were involved from the CIA believed they were acting ethically by following the orders given to them from the White House (an aretaic approach).

⁸⁷⁶ Ibid.

⁸⁷⁷ Ibid., 184.

⁸⁷⁸ Ibid., 190.

⁸⁷⁹ Ibid., 196.

⁸⁸⁰ Mariam Baksh, “Former CIA Directors Disagree On Torture,” *Huffington Post* (New York City, November 6, 2015).

⁸⁸¹ Donald C. Menzel, *Ethics Management for Public Administrators: Building Organizations of Integrity* (New York: Routledge, 2006), 37.

⁸⁸² Congressional Committee Investigating Iran Contra., “The Iran-Contra Report,” accessed December 9, 2015, <http://www.presidency.ucsb.edu/PS157/assignment%20files%20public/congressional%20report%20key%20sections.htm>.

Whistleblowers

There are also internal disagreements within the IC about how to deal with ethics. If intelligence officers feel that their morality is incompatible with the institution they work for, they may feel compelled to call outside attention to whatever practice or policy is making them uncomfortable, or to resign. If the former, the two paths someone would take are either to go through a formal, institutionalized whistleblowing process, or to leak information to the media. Regardless of the mechanism a dissenter chooses, he or she probably feels that the law no longer reflects the morality of the society it is applied to.⁸⁸³ The difference is that whistleblowers act upon their moral obligation to protect the public and its freedoms in a responsible manner, limiting the scope of disclosures and minimizing potential harm to national security.

Whistleblowing is arguably the most morally defensible form of dissent. While it is not entirely free of controversy, and some regulatory gaps exist in the special protections extended to whistleblowers in the IC, whistleblowing is less stigmatized than leaking.⁸⁸⁴ Leakers' actions stem from a conflict between ethics and their own morality: leakers from the IC have made a commitment to maintain confidentiality, and breaking that commitment is a violation of one's ethical obligation. The most notorious leaker in recent history, Edward Snowden, unilaterally leaked a trove of highly classified NSA documents to the media and has since refused to accept legal accountability for his actions. The fierce public debate that ensued after the Snowden disclosures is evidence of the diversity of moral and ethical interpretations of his actions—especially regarding the IC's controversial mass surveillance. In the words of journalist Edward Lucas, Snowden and his supporters believe that “democracy, the rule of law and constitutional government have been so eroded that the West carries no moral weight at all. The authorities are capable of anything, so it is sensible to assume that they do what they are capable of. Why would they stop?”⁸⁸⁵

The Media

The IC and the media frequently clash on matters of mortality and ethics.

Journalists walk a fine line between protecting national security and upholding their commitment to provide “organized, expert scrutiny of government.”⁸⁸⁶ Given that the government does not share the same commitment to full transparency as the press, many stories published by *The New York Times*, *The Washington Post*, and other high-profile newspapers have earned the ire of the IC, the Executive Branch more broadly, and often Congress as well.

Further complicating this relationship is the rising influence of “new wave” media, where the less formal reporting style practiced lacks the structural ethical integrity of the establishment

⁸⁸³ Victor Xu, “Edward Snowden Talks Ethics of Whistleblowing,” *Stanford Daily* (Stanford, May 18, 2015).

⁸⁸⁴ Daniel D’Isidoro, “Protecting Whistleblowers and Secrets in the Intelligence Community,” *Harvard Law School National Security Journal* (September 29, 2014), accessed May 10, 2016, <http://harvardnsj.org/2014/09/protecting-whistleblowers-and-secrets-in-the-intelligence-community/>.

⁸⁸⁵ Edward Lucas, *The Snowden Operation: Inside the West’s Greatest Intelligence Disaster* (Amazon Digital Services, 2014).

⁸⁸⁶ Robert Trager, Joseph Russomanno, and Susan Dente Ross, *The Law of Journalism and Mass Communication* (Thousand Oaks: CQ Press, 2009).

media. Instead of a conflict between diverging professional codes, this conflict is between the government's commitment to maintaining secrecy in the name of national security and the new wave media's lack of discernable ethical standards that contribute to a tendency toward anarchy.

Conclusion

The role of ethics and morality in regulating the IC is complex yet critical. For the IC to be allowed to operate effectively, it must enjoy the public's trust. Individuals who work in U.S. intelligence can only gain this trust if they are guided by a clear and consistent set of ethical principles, and if they remain cognizant of the moral implications of their individual actions. Other involved actors, including oversight bodies, must participate in the dialogue on this topic in order to reach areas of common understanding. Doing so will help to ensure that the intelligence officers who bear the responsibility for protecting American lives are held to ethical and professional standards that reflect the weight of this task.

Recommendations

We recommend:

- The ODNI through IC-wide personnel directives should emphasize and enforce high standards for moral and ethical conduct by intelligence professionals; and
- The ODNI or an IC agency should pilot a system of peer review and potential punishment for violations of professional standards that are different from legal and regulatory provisions that apply to all federal employees. The American Bar Association's Code of Professional Responsibility may serve as a model for such a system.

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Conclusion

Our research confirmed that the U.S. supports the most extensive intelligence oversight system in the world. No foreign intelligence or security service is subject to the same level of supervision and oversight as our IC. Formal bodies in the Executive, Legislative, and Judicial branches of government work daily to constrain IC activities. These mechanisms seek to ensure that IC activities are lawful, effective, and aligned with American values. External actors such as international governmental organizations and foreign governments, non-governmental organizations, the media, and leakers and whistleblowers provide an added check on decision-making on intelligence matters. This extensive oversight system serves the safety and civil liberties interests of American citizens, and also has the potential to increase the public's trust in our intelligence agencies. For example, if the ODNI's Transparency Initiative were continued and expanded, public awareness and education about ongoing oversight could increase the public's support for the IC and ultimately make our intelligence more effective and resilient.

Several consistent themes emerged from our research. First, while the intelligence oversight system is generally structured well, it does not always function effectively or even adequately. Second, personalities matter. During periods when well-suited people held important leadership positions in the IC and in the relevant oversight bodies, the system functioned well. Effective working relationships are crucial yet they are difficult, if not impossible, to mandate by law or directive.

New oversight bodies and procedures were established in reaction to historic events. No one would sit down and design a system of supervision and oversight that looks like the one that operates today. The amount of oversight that takes place and the attention that the public pays to it fluctuates with current events. We have also come to appreciate the myriad meanings of the term "oversight"—it should not always be viewed as a constraining mechanism; oversight can also be an empowering and galvanizing force.

Most importantly, we learned the importance of trust and leadership within the government and the IC. Although policies and committees constitute necessary formal structures, rules and laws alone are not sufficient for proper oversight. Ethics, morality, personal integrity, and relationships contribute to the most important condition: trust.

Our report does not present a comprehensive solution to all the vexing challenges surrounding oversight of the IC. It will, we hope, enhance and deepen academic and public discussions on the topic. Many issues explored in this report merit additional research, analysis, and debate. We hope participants in the oversight process will thoughtfully consider the merits of our recommendations, as well as the underlying forces that led us to make them. Finding the appropriate balance between secrecy and transparency, surveillance and privacy, and efficacy and oversight is frustrating but necessary. Doing so is essential for the continued survival and resilience of our free society.

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Appendix A. Expert Interviews

Aftergood, Steve
Washington, D.C.
December 15, 2015

Allen, Michael
Washington, D.C.
January 14, 2016

Baker, James
Austin, Texas
February 5, 2016

Bellinger, John
Washington, D.C.
January 15, 2016

Bellovin, Steven
Austin, Texas
March 24, 2016

Brand, Rachel
Austin, Texas
March 30, 2016

Brennan, John
Austin, Texas
September 15, 2015

Bobbitt, Philip
Austin, Texas
February 4, 2016

Booker, Bradley
Washington, D.C.
March 1, 2016

Butler, Alan
Washington, D.C.
December 15, 2015

Chesney, Robert
Austin, Texas
March 3, 2016

Coll, Steve
Austin, Texas
October 6, 2015

Collins, Elisebeth
Washington, D.C.
January 2016

Dempsey, Joan
Austin, Texas
March 29, 2016

Eilenberger, Dawn
Washington, D.C.
March 1, 2016

Goitein, Elizabeth
Washington, D.C.
December 16, 2015

Goss, Porter
Austin, Texas
September 16, 2015

Greenwald, Eric
Austin, Texas
February 5, 2016

Hadley, Steve
Washington, D.C.
December 15, 2015

Halchin, Elaine
Washington, D.C.
February 29, 2016

Harlow, William
Austin, Texas
March 30, 2016

Helgerson, John
Washington, D.C.
March 1, 2016

Holmgren, Brett
Austin, Texas
January 14, 2016

Hulings, Jay
Austin, Texas
February 5, 2016

Inman, Admiral Robert
Austin, Texas
February 18, 2016

Kadlec, Robert
Washington, D.C.
January 15, 2016

Kahl, Colin
Austin, Texas
December 4, 2016

Kahn, Geof
Washington, D.C.
February 29, 2016

King, Peter
Austin, Texas
November 9, 2015

Langdon, James
Austin, Texas
February 25, 2016

Lettre, Marcel
Washington, D.C.
February 29, 2016

Ledgett, Richard
Austin, Texas
March 8, 2016

Mazzetti, Mark
Washington, D.C.
February 29, 2016

McDermott, Patrice
Washington, D.C.
December 16, 2015

McMillian, Jeanette
Telephone interview
April 15, 2016

McLaughlin, John
Austin, Texas
November 19, 2015

Medina, Carmen
Austin, Texas
March 3, 2016

Medine, David
Austin, Texas
March 30, 2016

Meyer, Dan
Telephone interview
April 14, 2016

Miles, Anne
Washington, D.C.
February 29, 2016

Monaco, Lisa
Austin, Texas
March 20, 2016

Moseman, John
Washington, D.C.
January 15, 2016

Mudd, Philip
Austin, Texas
October 24, 2015

Osburn, Stefanie
Washington, D.C.
January 14, 2016

Powell, Benjamin
Washington, D.C.
January 14, 2016

Reed, Tom
Austin, Texas
September 29, 2015

Richardson, William
Austin, Texas
October 15, 2015

Sanchez, Julian
Washington, D.C.
December 15, 2015

Savage, Charlie
Austin, Texas
November 11, 2015

Schmitt, Eric
Austin, Texas
March 30, 2016

Shedd, David
Washington, D.C.
January 15, 2016

Sciutto, Jim
Washington, D.C.
December 15, 2016

Slick, Stephen
Austin, Texas
April 11, 2016

Snider, Britt
Washington, D.C.
March 1, 2016

Snyder, Rodney
Washington, D.C.
February 29, 2016

Stepanovich, Amie
Washington, D.C.
December 16, 2015

Treverton, Gregory
Austin, Texas
April 13, 2016

Vickers, Michael
Austin, Texas
November 20, 2015

Walsh, Deirdre
Washington, D.C.
March 1, 2016