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When Should Secrets Stay Secret?  
Accountability, Democratic Governance, and Intelligence

By

Genevieve Allison Lester

A dissertation submitted in partial satisfaction of the

Requirements for the degree of

Doctor of Philosophy

In

Political Science

in the

Graduate Division

of the

University of California, Berkeley

Committee in charge:

Professor Bruce E. Cain, Chair  
Professor Joel D. Aberbach  
Professor Ron E. Hassner  
Professor Neil Fligstein

Spring 2012

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Accountability, Democratic Governance, and Intelligence

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## Abstract

### When Should Secrets Stay Secret? Accountability, Democratic Governance, and Intelligence

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This dissertation investigates how intelligence activities, largely opaque from the public view, are held accountable in a democracy. Much of regulation and what is considered good governance is the result of strong, transparent regulatory structures, the activities of interest groups, openness to the media, and to the public. National security and intelligence matters, by necessity, do not fit neatly within these expectations of transparency. This dissertation explores how the three branches of government maintain control over the intelligence agencies, describes the mechanisms that have been developed to assure accountability, and explains what causes them to change over time.

The institutional development of oversight mechanisms described above contributes to an original theoretical framework of accountability that disaggregates the nebulous concept of accountability into two sets of characteristics that can help understand the concept of accountability on a more granular and, eventually, operational, level. This project divides “accountability” into two sets of components: those that correspond to external accountability—through mechanisms external to the supervised agency—and those that relate to internal accountability—incorporating internal control mechanisms, institutional culture, and organizational standard operating procedures. The objective of this disaggregation of accountability within the context of intelligence is to understand how to assess the oversight mechanisms for both weaknesses and strengths when it comes to their oversight responsibility over the intelligence function. Specifically this approach facilitates understanding how responsibilities for oversight and control over intelligence activities vary across government institutions.

Beyond contributing a unique theoretical framework to the academic assessment of accountability and intelligence, this project contributes to the study of intelligence oversight in the breadth of its operational analysis. While many studies focus on one branch of government, usually Congress, to understand how intelligence is supervised, this study incorporates the oversight mechanisms from all three branches of government. The purpose of this expansive approach is to understand how the mechanisms interact in practice, and thus to understand how

they may be developed to meet the needs of an emerging threat environment and thus an adaptive intelligence community.

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## **List of Abbreviations**

CIA: Central Intelligence Agency  
COINTELPRO: Counterintelligence Program (FBI)  
DCI: Director of Central Intelligence  
D/CIA: Director, CIA (post advent of Director of National Intelligence)  
DHS: Department of Homeland Security  
DI: Directorate of Intelligence  
DNI: Director of National Intelligence  
DO: Directorate of Operations  
FBI: Federal Bureau of Investigation  
FISA: Foreign Intelligence Surveillance Act  
FISC: Foreign Intelligence Surveillance Court  
FISCR: Foreign Intelligence Surveillance Court of Review  
HPSCI: House Permanent Select Committee on Intelligence  
HUMINT: Human Intelligence  
IC: Intelligence Community  
IG: Inspector General  
IRTPA: Intelligence Reform and Terrorism Prevention Act  
JTTF: Joint Terrorism Task Force  
PFIAB/PIAB: President's Foreign Intelligence Advisory Board/President's  
Intelligence Advisory Board  
NCS: National Clandestine Service  
NSA: National Security Agency  
NSC: National Security Council  
OGC: Office of the General Counsel  
OIG: Office of the Inspector General  
OSINT: Open Source Intelligence  
SSCI: Senate Select Committee on Intelligence  
TECHINT: Technical Intelligence  
TIARA: Tactical Intelligence and Related Activities  
TSP: Terrorist Surveillance Program  
WMD: Weapons of Mass Destruction

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A final note must remain anonymous, but over the course of this project I have been truly humbled by the generosity and openness of the intelligence community. Some of my early interview subjects have become good friends; almost every single individual I have spoken to has remained in contact. I still cannot believe my luck in having had the opportunity to get to experience at least a small piece of the reality of a world I find so fascinating, and I owe many, many thanks to the array of individuals who contributed to this work with their life experiences, opinions, and wisdom. This is, I hope, just the beginning.

## Chapter 1:

### The Theoretical Foundations: Accountability and Intelligence

*For decades Congress and the courts as well as the press and the public have accepted the notion that the control of intelligence activities was the exclusive prerogative of the Chief Executive and his surrogates. The exercise of this power was not questioned or even inquired into by outsiders. Indeed, at times the power was seen as flowing not from the law, but as inherent, in the Presidency. Whatever the theory, the fact was that intelligence activities were essentially exempted from the normal system of checks and balances.<sup>1</sup>*

This quote from the Church Committee's report is indicative of the complex position intelligence has in the American democracy. Intelligence activities exacerbate the information asymmetry issues inherent to representative government. The nature of the secret, and in some cases highly technical work, creates a unique culture distant from the regulatory mechanisms of conventional democratic governance. The core of accountability and oversight is the issue of overcoming this information asymmetry issue. Mechanisms have developed over several decades to rebalance this relationship with varying degrees of success. Equilibrium, of course, between intelligence actors and overseers will never be achieved due to the nature of the work, its inherent secrecy, and the traditional executive ownership and control of it. Further, the gentility and distance of academic discourse can rapidly give way to a different sensibility once the details of some aspects of intelligence are described in detail.

Torture, for example, raises conflicted feelings when it is conducted on the behalf of the United States. These methods are considered something done elsewhere, a vestige of a medieval society or, unfairly perhaps, the tool of a developing country. The CIA under the Bush administration engaged in some practices that are considered by many to have been torture. On September 17, 2001 President Bush signed a finding stating that covert methods could be used against the leadership Al-Qaeda, including capture, detention, and enhanced interrogation methods—or EITs. It is widely known that detainees were held abroad in secret CIA-run prisons known as “black sites” and treated exceptionally harshly.<sup>2</sup> The program at the black sites was compartmentalized to such a degree that exceptionally few knew about the program. Authorized by the director of the CIA directly, independent internal oversight over the program was slight. No intelligence officers of the Bush administration confirmed their full awareness of the black site operation to me personally. However, former CIA Inspector General John Helgerson confirmed that “his office, uniquely, by law has access to all Agency sites, personnel, and

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<sup>1</sup> Intelligence Activities and the Rights of Americans, Book II, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, (Church Committee) United States Senate, Section IV. Conclusions and Recommendations, April 26, 1976, section (a).

<sup>2</sup> This issue is politically very polarizing. One critical treatment is Jane Mayer, *The New Yorker*, August 13, 2007. [http://www.newyorker.com/reporting/2007/08/13/070813fa\\_fact\\_mayer?currentPage=all](http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer?currentPage=all) (as of January 24, 2012).

documents, and that the OIG relies on this unfettered access in its oversight of Agency programs of all kinds.”<sup>3</sup> This comment offers an example of the complexity of access, oversight, and accountability of intelligence activities that will be discussed at length below.

Opinions vary on the use of these methods on alleged terrorism suspects. Some, such as former-Vice President Dick Cheney argue that any tool should be used to defend the country. Along these lines, it is argued that is acceptable to treat an individual harshly in order to protect the greater number—the ticking bomb argument. Some suggested that the methods were not that extreme as they are regularly used to train US soldiers to resist their captors should they be taken prisoner. US Army SERE training, Survival, Evasion, Resistance, and Escape, includes extreme measures, such as waterboarding, in order to prepare soldiers to resist potential captors.<sup>4</sup> Former CIA Director General Hayden argued to me in an interview that the measures used against detainees were not that extreme and had only been done a handful of times against select individuals.<sup>5</sup> On the other side of the debate, critics argue that torture “degrades a society.”<sup>6</sup> Or that it is operationally ineffective, although this again is a controversial claim, with senior CIA officials, such as General Hayden arguing that the program was an “irreplaceable tool” for the purposes of counterterrorism.<sup>7</sup> In his words: “Do not allow others to say it didn’t work. It worked.”<sup>8</sup> Others have more recently defended the program by stating that information elicited from detainees led to the eventual killing of Osama bin Laden. The methods used, as described by former detainees in journalistic accounts, break international law, violate human rights, and previously would have been considered war crimes.<sup>9</sup> Internally, CIA officers were concerned about the legality of the program and were anxious lest they be held personally liable for actions conducted according to its mandates.

In terms of oversight practice there are many problems with this situation. First, while there are ranging opinions on the value of the information gathered from the detainees, it is certain that these activities not only stretched the mission of the CIA but were also conducted with minimal accountability. Few within the intelligence community knew about the program or the locations of the sites, and even fewer still know exactly what occurred in these locations. In terms of mandated reporting to oversight mechanisms, there are many questions regarding how the program was reported to Congress. For example, there remains ambiguity as to whether the interrogation techniques were included in the original finding, second, there are concerns that the program was briefed to a limited number of individuals, and third, the timing of the briefing was also ambiguous, with legislators stating that they were not sure whether the activities had already commenced when they were briefed, or whether the briefings occurred before the program started. There is also variation across individuals on how they were briefed and how detailed the information provided them was. Finally, there was also ambiguity surrounding how objections

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<sup>3</sup> Personal communication with John L. Helgerson. March 10, 2012.

<sup>4</sup> Interview with Charles E. Allen, February 4, 2010.

<sup>5</sup> Interview with General Michael Hayden, April 7, 2010. General Hayden demonstrated one technique on himself – walling – in order to convince me that the methods were not egregious.

<sup>6</sup> Richard A. Posner, “Torture, Terrorism, and Interrogation,” in *Torture: A Collection*, ed. Sanford Levinson. (Oxford: Oxford University Press, 2004), 292.

<sup>7</sup> Mayer, [http://www.newyorker.com/reporting/2007/08/13/070813fa\\_fact\\_mayer?currentPage=all](http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer?currentPage=all) (as of January 24, 2012).

<sup>8</sup> Greg Miller, “Departing CIA Chief Hayden Defends Interrogations,” *Los Angeles Times*, January 16, 2009.

<sup>9</sup> According to Mayer, soldiers were court martialed for waterboarding until as recently as the Vietnam War.

were dealt with. It is widely known that Jane Harman objected to the program, and that House Speaker Pelosi argued she hadn't been briefed on it.

The torture scandal highlights both the weakness of current oversight mechanisms, and limitations on oversight practice. This issue of timeliness and its relationship to oversight impact will be a theme that runs throughout this project. Did the individuals briefed have any recourse to change the program if they objected to it? How? Finally, the issue of the use of torture in this country is of monumental importance. It tests national values and ethics, and challenges American adherence to international conventions. How can it occur without public accountability, and how can those charged with the oversight of all intelligence activities deny responsibility for the programs they are charged to supervise? The resonance of the CIA's alleged involvement in torture for the current project is the sheer complexity of maintaining accountability when the activities are exceptionally secret, complicated, and politically fraught for both sides. Torture as an operational tool crosses the boundary that divides the scandals in the chapters below; it is not a political scandal in itself, like the abuses or Iran-Contra, but it is scandalous. It is also not an operational failure, like the failure to prevent the attacks on 9/11, but it does represent a deviation from the norm of expected intelligence activity. Or does it?

The complexities of modern governance require that mechanisms serve as proxies for the public at least partially because of the inherent asymmetry of information on intelligence and security matters but also because of operational and classification imperatives that limit the transparency of intelligence activities and the agencies that conduct them. The conundrum in terms of intelligence and accountability is how to meet the transparency and governance responsibilities of democratic government to the public when the domain is secret, highly technical, and heavily defended. This is also not just an academic matter. Operational requirements mandate that the services support the entire range of government activities at all times. Aside from academic hand-waving over the balance of transparency and security, concrete security, in terms of understanding emergent plans, terrorist groups, threats to infrastructure, threats to overseas citizens and assets, threats to the economy and public health, must be maintained constantly. Oversight mechanisms in the judiciary and legislative branches of government serve as proxies for the role of the public in controlling and supervising intelligence activities, while control mechanisms in the executive maintain internal control of the programs and accountability according to the requirements of internal accountability.

Very few interest groups or private citizens have access to the intelligence agencies, leaving the agencies relatively opaque, apart from the apertures created by oversight mechanisms, and every now and then, a media break.<sup>10</sup> Because of the complexity and variety of intelligence tasks and the composite nature of legal guidance on intelligence matters, a range of mechanisms are charged with the duty of investigating and supervising how these activities are conducted. They are institutionalized in all three branches of government, with each mechanism responsible for a different aspect of intelligence and oversight conducted through individualized processes. It is through these mechanisms that the intelligence services are integrated into a chain of accountability that connects the three branches of government horizontally to each other, vertically to individual agency leadership, and to the public. Over the course of time, we discover

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<sup>10</sup> Loch Johnson, "The U.S. Congress and the CIA: Monitoring the Dark Side of Government," *Legislative Studies Quarterly* 5 (1980): 489, 495.

that while internal accountability remains relatively strong and stable, external accountability breaks down or is challenged at particular inflection points. This project explains how this occurs by developing a unique theoretical framework of accountability.

The development and process of the mechanisms that have developed to maintain accountability support broader expectations of governance. By thinking of accountability as the end objective of government activity, we can define it, observe the causal mechanisms that lead to it, and evaluate its efficacy. Further, without understanding how the branches engage with each other on these matters, and the distinct limitations placed on both the judiciary and legislative branches by law, custom, and executive process, it is impossible to get a grasp on why intelligence oversight operates the way it does. The components of intelligence, oversight mechanisms, government agencies, the media and the public are all linked together in chains of accountability. Taking an artificially narrow perspective that does not engage with the relational dynamics of accountability limits the explanatory power of any theory advanced on the issue. Finally, an understanding of the internal culture and process of the agency being assessed by external oversight mechanisms provides valuable insight into where and why these external mechanisms may face challenges.

The theoretical framework for accountability that I introduce here supports theory-building regarding the challenges that external oversight mechanisms face, what causes the mechanisms to change, and, finally, the broad question of what impact change has on the accountability of the intelligence community to the rest of the government and to the public. It also explains why internal accountability as the focus of study is important, although it is often overlooked in studies of intelligence, and how the internal organizational culture of the *overseen* affects all aspects of oversight and accountability. I look at oversight mechanisms as tools that serve the broader purpose of maintaining accountability of the intelligence agencies.<sup>11</sup> I explore the development of cross-branch oversight mechanisms, and disaggregate the concept of accountability into a series of component categories in order to refine the focus of analysis and assess, in more granular detail, which particular aspects of a mechanism are working effectively and which are not developing as well as they could. The similarities, differences, and friction points between the branches are highlighted through the use of this theoretical framework, and will lead to a series of policy prescriptions on how to create a resilient framework of oversight mechanisms that can cooperate in adapting to a changing threat environment. This framework fills an important gap in the literature and overall discourse about intelligence and accountability by linking accountability to the specific oversight mechanisms, and by investigating in detail what constitutes accountability, and how it changes and in response to which variables. I integrate a study of the culture, organizational processes, and internal control mechanisms within the CIA into the larger cross-branch accountability discussion precisely to provide a vantage point for understanding these complexities. Finally, I am using an unconventional approach to the issue of intelligence oversight, in that I did not set out with the assumption that US oversight over intelligence represents failure, or that the intelligence community itself is an a continuous

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<sup>11</sup>The definitions I develop in this project differentiating the terms accountability and oversight, rather than combining the two terms into one concept is similar to the framework described by Thorsten Wetzling in his dissertation, *Intelligence Accountability in Germany and the United Kingdom: Same Myth, Different Celebration?* (PhD diss., University of Geneva, 2010). We developed our approaches separately, although I benefited from both his scholarship and his counsel. This separation will be further elucidated in the discussions of the literatures below.

state of almost failure, as much of the literature would suggest.<sup>12</sup>

As mentioned above, oversight is challenged by the overwhelming secrecy and complexity of the intelligence community. Intelligence components are both atomized and overlapping with one another. Due to the nature of the secret and highly technically complex work, there is very little transparency. Understanding the internal workings of the agencies from outside is extremely difficult—by design. The figure below provides an overview of the intelligence enterprise as of 2007.<sup>13</sup> It does not include contractors or changes that have been made to the agencies since that time. What is immediately apparent in this diagram is the vast number of intelligence components that deal with intelligence issues within agencies not normally considered intelligence related, such as the Treasury and State Departments. It is clear from the diagram that the world of intelligence is atomized into very small components that support activities as disparate as gun control, drug enforcement, law enforcement, tax policy enforcement, diplomacy, and espionage. In order to organize this vast range of tasks, the entities are grouped into seven broad categories:<sup>14</sup>

- Nationally focused counterterrorism efforts
- Department of Homeland Security (DHS)-centered activities
- Department of Justice centered activities
- Department of Defense centered activities
- Counternarcotics and anti-money-laundering activities (DEA and Treasury)
- State, local, and private-sector focused activities
- Activities conducted by other federal agencies

The figure also shows how many entities of the intelligence community have had their focus re-oriented to counterterrorism in the post-9/11 era. It also demonstrates how intelligence operates at many levels of government. These also tend to overlap with each other in terms of jurisdiction and focus of work. The usual expectation of intelligence is that agencies work at the national level, for example, the NSA, CIA, and FBI. While these are the national intelligence agencies responsible for dealing with foreign signals intelligence, foreign intelligence, and domestic law enforcement, respectively, they are only one tripartite piece of the puzzle. Intelligence gathering in the post-9/11 environment has expanded to include a broader range of agencies both horizontally and vertically, including agencies that have altered their own intelligence components to focus in more detail on counterterrorism, as well as the additional components that have grown up as a result of legislation, such as that which established the Department of Homeland Security (DHS), and IIRTPA, that reorganized the intelligence community by creating both issue-focused work centers and the Office of the Director of

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<sup>12</sup> Literature on intelligence and intelligence oversight tends to focus overwhelmingly on the failure of both. Richard Betts highlights this point nicely in his recent book, *Enemies of Intelligence*. This trend became noticeable and particularly obvious within the public forum after the 9/11 attacks, but it actually served as a firm motif throughout most discussions of intelligence since the inception of the CIA in 1947. The discussion of oversight failure intensified in the mid-1970s with the congressional investigations.

<sup>13</sup> This figure is drawn from Brian A. Jackson (ed.), *The Challenge of Domestic Intelligence in a Free Society: A Multidisciplinary Look at the Creation of a U.S Domestic Counterterrorism Intelligence Agency* (Santa Monica: RAND, 2009), 52. I worked closely with the RAND team on this project, but can take no credit for this exemplary figure.

<sup>14</sup> Jackson, *Domestic Intelligence*, 56.

National Intelligence (ODNI).

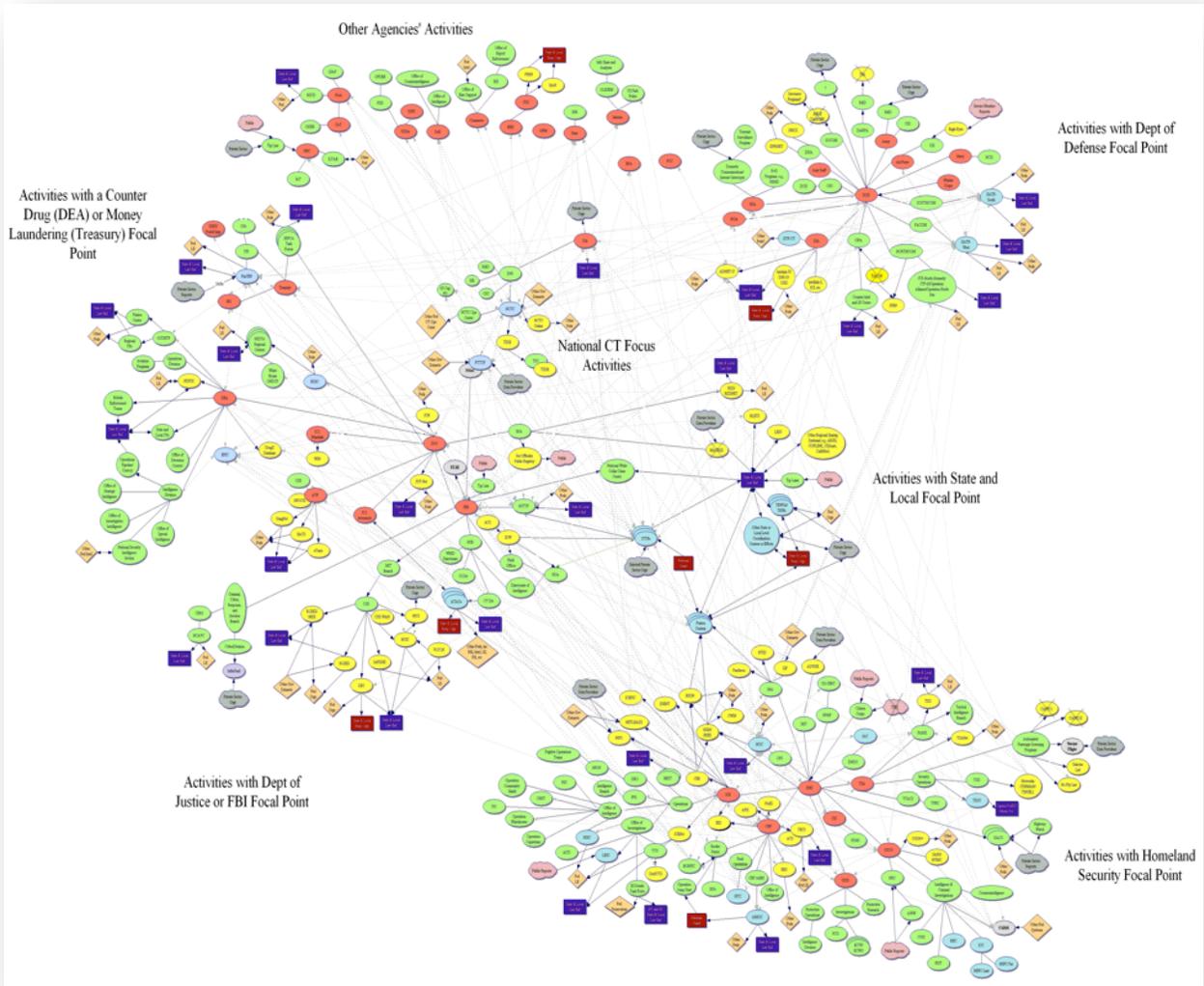


Figure 1: US Intelligence Community 2007. RAND Corporation

### Interpreting the figure:<sup>15</sup>

There are two types of lines connecting the intelligence components in the figure. The organizational relationships are delineated by lines with no arrows, whereas the information-sharing relationships are represented by lines with arrows. Because of the sheer complexity of the connections, some lines are darkened in order to improve the readability of the image. The characteristics of each intelligence entity are portrayed by varying colors and shapes:

- Light red oval: Major agency (DHS, DOJ, FBI) or its component
- Green oval or circle: Component office or program-level organization or activity within a

<sup>15</sup> Key from Jackson, *Domestic Intelligence*, 52.

**larger organization**

- **Blue oval or circle: Unit, office, center, or task force specifically created to be a multiagency, highly linked node within the domestic intelligence network (ie fusion center, JTTF, National Counterterrorism Center (NCTC))**
- **Yellow oval or circle: Database or information system**

**Another range of colored shapes represents more generic entities:**

- **Purple rectangle: State or local law enforcement**
- **Dark-red rectangle: State or local response organization or National Guard**
- **Beige diamond: Other federal organization or system**
- **Gray irregular shape: Private-sector organization**
- **Pink irregular shape: The public**

This figure provides an introduction to the vast number of entities in the intelligence community, as well as the array of relationships that each entity is responsible for maintaining, particularly in terms of the sharing of intelligence information. The diversity of entity size, range of tasks, jurisdiction, and transparency is striking, as is the overlapping nature of the entities' responsibilities as well as the opacity of many of their functions. After diagramming the complexities of the intelligence community, it is clear that oversight of this behemoth is enormously complicated and, unsurprisingly, prone to failure. Oversight mechanisms can simply not learn about the technicalities of the huge number of intelligence programs continually operating. As it stands, the mechanisms that are currently installed in the three branches of government only cover a tiny percentage of the full range of active intelligence agencies. The figure shows the challenges of the intelligence community; the following three chapters describe the development of the mechanisms designed to control it.

## **A Theoretical Framework of Accountability**

In this section, I first provide a series of definitions of accountability drawn from the literature, and then disaggregate the term and expand it for the purposes of my own theoretical framework. I describe the framework in detail and then place it within the broader context of literature both on accountability generally and on intelligence specifically. Accountability requires complex government activities to be subject to review, monitoring, and correction by mechanisms charged with the responsibility of supervision. By convention, accountability is taken to assume an external control over an agent—that is, accountability is maintained through external means, through a calling to account by an external supervisory body invested with authority. This external body is empowered with the ability to control the behavior of the supervised through consequences and sanction. Two scholars define accountability as implying:

... [T]hat some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met. Accountability presupposes a relationship between power-wielders and those holding them accountable where there is a general recognition of the legitimacy of 1) the operative standards for accountability and 2) the authority of the parties to the relationship (one to exercise

particular powers and the other to hold them to account).<sup>16</sup>

One author rather succinctly describes the three commonly accepted components of accountability as *external*, involving *social interaction and exchange*, and including *rights of authority*.<sup>17</sup> While this conceptualization of accountability is sensible, it does not grasp how problematic it is to acquire a firm definition of this rather vague, normative, and emotional concept. In the accurate words of scholar Mark Bovens:

Accountability is one of those golden concepts that no one can be against. It is increasingly used in political discourse and policy documents because it conveys an image of transparency and trustworthiness. However, its evocative powers make it also a very elusive concept because it can mean many different things to different people...<sup>18</sup>

Accountability, as Bovens points out, is the authorities *themselves* being held accountable by their citizens.<sup>19</sup> He notes the vagueness of the term, as well, by mentioning its “elusiveness.” He quotes another scholar, who describes accountability as a term that “has come to stand as a general term for any mechanism that makes powerful institutions responsive to their particular publics.”<sup>20</sup> As Bovens himself continues, “It is one of those evocative political words that can be used to patch up a rambling argument, to evoke an image of trustworthiness, fidelity and justice, or to hold critics at bay. For anyone reflecting on accountability, it is impossible to disregard these strong evocative overtones. As an icon, the concept has become less useful for analytical purposes, and today resembles a dustbin filled with good intentions, loosely defined concepts and vague images of good governance.”<sup>21</sup>

While most scholars point to the vagueness, abstractness, or all inclusiveness of the term, these have been recent developments in the literature. I would argue that the breadth of the term itself reflects the manifold understandings and uses to which accountability is regularly put. I also argue that the concept can be salvaged and analytical promise restored. While scholars natter around definitions of accountability, I suggest that the core of the concept that transcends all applications is that it is *relational*. Accountability links one organization to another either through formal organized institutions, such as oversight mechanisms, governing bodies, or trustee groups, or institutionalized processes such as reporting requirements and regular review. The key characteristic of this relationship, wherever it occurs, and however its process is defined, is that it involves inequality; the supervisor has authority and the right of sanction over the supervised. The complexity of the apparently straight-forward subordinate relationship in this context is that outside of the bounds of the accountability chain, the subordinate in almost every circumstance has the upper hand in terms of expertise, access to information, and freedom of decision-making over process, tasks, and resources. In essence, accountability is an external

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<sup>16</sup> Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics,” *American Political Science Review* 99 (2005): 29.

<sup>17</sup> Richard Mulgan, “‘Accountability’: An Ever-Expanding Concept?,” *Public Administration* 78 (2000): 555.

<sup>18</sup> Mark Bovens, “Analysing and Assessing Accountability: A Conceptual Framework,” *European Law Journal* 13 (2007): 448.

<sup>19</sup> Bovens, “Conceptual Framework,” 449.

<sup>20</sup> Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave, 2003) quoted in Bovens, “Conceptual Framework,” 449.

<sup>21</sup> Bovens, “Conceptual Framework,” 449.

check on explicit and specific power. The process of accountability acts to recalibrate this relationship into one where the titular authority, the overseer, can supersede the operational authority of the overseen. The remainder of this chapter describes various approaches to both explaining and designing this relationship. It concludes with a discussion of the mechanisms that serve the purpose of maintaining the accountability relationship within the context of intelligence, focusing on the intelligence oversight mechanisms of all three branches of American government.

### **Accountability as a Goal; Oversight as a Tool**

As mentioned above, accountability has always been seen as a broad, vague, but nice, virtue in the literature, whereas oversight as a technical mechanism has been viewed as something that operates poorly and often fails. Literature on the former engages with definition and philosophical direction; literature on the latter considers what goes wrong in Congress to create a situation in which legislators choose *not* to engage with their responsibility to oversee. My objective here is to understand the objective of accountability and to explain the processes of oversight that contribute to the end goal of oversight, which should be accountability.

According to conventional wisdom, Congress has played a single-handedly pivotal role in the development of intelligence oversight. While the relationship between the intelligence community and Congress has become very important, developing in a quirky, stepwise manner, constrained but also guided by the opaque activities of intelligence agencies, the custom of executive privilege, the political dynamics of specific time periods, and varied interest on the part of would-be congressional supervisors, it provides only one stream of information on intelligence activities. The term *oversight* calls up images of imperious congressional committees demanding an accounting for the activities of the intelligence agencies, usually the CIA, and usually after a particularly scandalous operation was made public by accident. While congressional oversight is core to maintaining the accountability of intelligence in the American democracy, this image does not capture the entire range of activities that must occur to ensure that intelligence activities are both conducted within the expected bounds of an advanced democracy, and are also effective in helping maintain the security of that democracy.

These additional oversight activities include judicial review by a secret court, the Foreign Intelligence Surveillance Court, and the multiple mechanisms that control intelligence activities within the executive branch. Conventional conceptions of intelligence also do not often engage with the post-9/11 explosion of intelligence units, some of which straddle multiple lines between the government and private sector, foreign and domestic intelligence, and agencies from the federal down to the local level.<sup>22</sup> Further, due to the exponential growth of intelligence information production and consumption, traditional concepts of oversight do not grasp the complexities of the layered, interwoven, but still atomized intelligence community. This network involves all branches of the government, the media, the public, and internal accountability mechanisms within the agencies themselves. These relationships are constantly in dynamic,

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<sup>22</sup> See Henry Willis, Genevieve Lester and Gregory F. Treverton, "Information Sharing for Infrastructure Risk Management: Barriers and Solutions," *Intelligence and National Security* 24 (2009): 339-365 for a discussion of the complexities of the relationship between public and private sectors in terms of intelligence information-sharing in the more integrated post-9/11 security environment.

iterative motion, responding to political activity, the vagaries of partisan politics and ideology, and the changing threat environment.

Finally, most of the conventional literature views oversight and accountability as punitive, and driven by sanction and an eagerness to find fault. It also views the intelligence agencies as eager to avoid this supervision.<sup>23</sup> This perspective is built into the old trope about the intelligence agencies being “rogue,” and also ignores the other side of the equation—that intelligence agencies may view external mechanisms as legitimizing forces that corroborate the appropriateness of decisions and programs. Oversight in this case could be *fault sharing* rather than fault-finding. Intelligence officers assert, fairly in many cases, that overseers simply did not want the information, or refused to take responsibility for having been briefed once a story about a program broke publicly. This positive view of the credibility that can stem from active external involvement is supported by a series of theoretical points regarding institutional isomorphism made by scholars of organization theory, who assert that: “(a) [organizations] incorporate elements which are legitimated externally, rather than in terms of efficiency; (b) they employ external or ceremonial assessment criteria to define the value of structural elements; and (c) dependence on externally fixed institutions reduces turbulence and maintains stability.”<sup>24</sup> The authors conclude in a comment that should be kept in mind as the reader peruses the empirical chapters here: “. . . [T]he use of external assessment criteria—that is, moving toward the status in society of a subunit rather than an independent system—can enable an organization to remain successful by social definition, buffering it from failure.”<sup>25</sup>

In order to grasp the complexities of the range of players in the world of accountability and their multifarious preferences, roles, cultures, and processes, I use two separate sets of criteria—one for external accountability and one for internal—as analytical building blocks for my framework. The categories that comprise external accountability are: knowledge conditions, awareness of activities as well as appropriate expertise to understand them; external independence, independence of the overseer from the overseen; organizational complexity, the impact of the institutional structure of the overseen on the mechanism; and temporality, the moment in the process of intelligence activity that the mechanism is made aware of the program, prior to, during, or after the activity. Transparency is the final category, meaning level of transparency of the activities of the mechanism both to other members of government and to the public. Internal accountability relies on a different set of criteria: hierarchical authority, organizational complexity, bureaucratic process, legality, recourse, and internal independence. The last two of these criteria require further explanation. Recourse entails the ability to deliver consequences to correct behavior, while internal independence requires that the internal culture and rules of the organization not inhibit the activities of the mechanism. I describe the characteristics and some implications of these categories below in order to provide the contours

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<sup>23</sup> See Tim Weiner, *Legacy of Ashes: The History of the CIA*. (New York: Doubleday, 2007); Amy B. Zegart, *Flawed by Design: The Evolution of the CIA, JCS, and NSC*. (Stanford, CA: Stanford University Press, 1999); and John Diamond, *The CIA and the Culture of Failure: US Intelligence from the End of the Cold War to the Invasion of Iraq* (Stanford, CA: Stanford University Press, 2008) for some examples of this approach.

<sup>24</sup> John W. Meyer and Brian Rowan, “Institutionalized Organizations: Formal Structure as Myth and Ceremony,” in *The New Institutionalism in Organizational Analysis*, ed. by Walter W. Powell and Paul J. Dimaggio (Chicago: University of Chicago Press, 1991), 49.

<sup>25</sup> Meyer and Rowan, “Formal Structure,” 49.

of the framework. The empirical chapters of the dissertation will provide the bulk of the relevant detail.

### **External Accountability**

- **Knowledge Conditions**
  - **External Independence**
  - **Organizational Complexity**
  - **Temporality**
  - **Transparency**
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- **Knowledge Conditions**

The core of this project is the concept of rectifying the information asymmetry between agencies that conduct secret activities, the rest of government, and the public. Information runs the entire intelligence enterprise, and thus access to this flow is key to the efficacy of any external oversight mechanism. A break in the smooth delivery of intelligence information can cause external oversight mechanisms to break down completely. Access to information, breadth and depth of information provided, the timeliness of delivery, the openness of the intelligence community regarding the details of intelligence programs are all clearly of core importance to the efficacy, validity, and legitimacy of accountability. Further, there are other aspects of knowledge that are key to the success of the mechanisms. Beyond the crucial access to intelligence information, competencies on the part of the staff of the oversight mechanisms are also important. These include enough expertise on technical matters of intelligence to be able to interpret the programs that are presented, appropriate staffing support, particularly for the congressional committees, and appropriate infrastructure for reading and analyzing intelligence information. Compared to the major core issues, information asymmetry and access to intelligence information, these last issues seem minor, but in fact, the practical details of process: engaging with and understanding intelligence, have been a sticking point both for overseers, particularly congressional committees, and for the intelligence community.

First, it takes years to understand the technicalities of intelligence and for many decades both committees had term limits on the members' participation in the committees. This was intended to limit capture, but on the whole, it resulted in limited and superficial knowledge of the technicalities involved with intelligence oversight. Second, as is well known, Congress does not function without the support of staff. Legislators are spread too thin across too many issue areas to have time to delve deeply into the particular arcane details of an intelligence program. Thus, appropriate staffing levels as well as staff access to intelligence briefings are key to the efficacy of oversight. This, in practical terms and in order for oversight to be effective, means that staff must have appropriate clearances and that specialized sub-group briefings, such as to the Gang of Four or Eight, that exclude both staff and prohibit note-taking should be limited. Limited briefings will be discussed in greater detail below but they occur when the executive branch decides that a matter is too sensitive to be briefed to the full committee. The main anxiety here on the part of the intelligence community is, of course, a fear of the details of a program being leaked to the media.

In terms of the judiciary, knowledge conditions have a different cast. In some ways, the Foreign Intelligence Surveillance Court has more direct authority than does the congressional committees as it can deny or require extensive revisions to order requests—how this process works will be discussed in detail below. On the other hand, the scope of the court’s authority is narrow and its current or *post facto* recourse options are very limited. Thus, there are trade-offs when it comes to knowledge of intelligence activities and the processes of oversight that have developed to balance the information asymmetry with the executive branch and maintain accountability over intelligence. The nuances of this trade-off will be discussed below.

- **External Independence**

Independence is key to the authority of accountability and to oversight mechanisms. Within the context of this framework, this requires that the mechanisms have an independent and autonomous role from the overseen; that they have a separate statutory basis for their operations, and, thus, that their activities and decisions can not be influenced by pressure from the overseen. Further, external independence means that mechanisms can provide information on intelligence activities to other branches of government and to the public, usually, of course, in redacted form. Most important in terms of actual independence of the mechanism is recourse, that is, the ability of the supervisor to exact consequences and require change in behavior through these consequences. Within the world of intelligence oversight, external supervision has tended to be played down, a victim, perhaps, of gentlemen’s agreements and an overall unwillingness to engage with secret and, sometimes, suspect matters. External independence as a criterion thus marks an

External independence and authority over the supervised is different from the managerial control that a mechanism responsible for internal accountability might possess. Although external independence is quite a strong remedy against bureaucratic overstep, it still occurs some distance away from actual bureaucratic managerial control over an agency activity. *Control*, as such, will be discussed in further detail in the next section that focuses on the categories that comprise internal accountability. An interesting boundary-crossing amalgam of internal and external independence will be presented by the role of the statutory Inspector General in the first empirical chapter of this project. While the role itself, as well as the activities of one of the Inspectors-General, have created considerable anguish and irritation within the CIA, the rationale behind why this is the case is explained by the theoretical framework I advance here.

- **Organizational Complexity**

The complexity of the organizations the mechanisms are charged with overseeing has a clear impact on the efficacy of accountability. This is the case on two levels: first, overall, the intelligence community is enormous and complicated; second, the intelligence entities themselves are composed not only of multiple components, but components that vary in composition, tasks, workload, transparency, and objectives. Further, there is variation across the oversight mechanisms in terms of the breadth of the programs and agencies they are responsible for. Thus, while Congress oversees the full range of activities, the oversight mechanism in judiciary, the FISA court, is only responsible for a slim sector of foreign intelligence gathering.

The depth and breadth of a mechanism's activities have an effect on the efficacy of oversight and thus the maintenance of accountability; the level of organizational complexity can confound both the depth and breadth of information gathered on that agency.

- **Temporality**

Temporality is key to conceptualizing accountability. Within the context of this framework, it includes the time in the process of planning, conducting, and reviewing intelligence programs where the oversight mechanism is involved. It also includes the *frequency* of involvement per program. The common concept of accountability is an external *post facto* accounting of acts committed by public officials. I expand the use of this term in the project to include all aspects of temporality; that is, while accountability is generally defined as after the fact, the process of maintaining the chain of responsibility over intelligence activities occurs prior to, during, and after the conduct of the relevant programs. The space where oversight occurs varies across the mechanisms, for example, judicial oversight occurs before the activity, executive control occurs prior to, during, and after the fact, and legislative oversight occurs also along the spectrum of temporality: from the required notice of covert action to yearly reviews of programs as the committees go through the authorization and appropriations process. Frequency refers to the number of times the mechanism will deal with a particular program. This is quite important because if a mechanism is charged with preview, in process review, and then *post facto* review, it has numerous occasions to change intelligence behavior through the consequences it levies on the agencies responsible for the programs. The level of recourse is thus heightened by contact at multiple points. The linked issues of temporality, frequency, and strength of recourse clearly vary depending on whether we are discussing external or internal accountability. These categories form the basis of the stability of internal accountability in contrast to the incremental development and change of external mechanisms.

- **Transparency**

Transparency has many facets within the current context. On the broadest level, governmental openness and transparency is a key feature of democratic governance. Demands for greater information by the public have increased in recent decades, as procedures have been put into place to accede to these demands for greater information on internal government operations. Expectations have risen; populations in advanced democracies expect to be informed about the decisions their governments are making on their behalf.<sup>26</sup> The “right to know” has increasingly been accepted as fundamental to democratic governance.<sup>27</sup> In the United States this right to know, or idea that the population should have access to government records, was codified in the Freedom of Information Act (FOIA). This “sunshine” concept and assumption of governmental transparency has, however, been challenged by the exceptionalism of national security issues. As Roberts points out, “In many countries, disclosure laws have been carefully tailored to ensure

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<sup>26</sup> Bruce E. Cain, Patrick Egan, and Sergio Fabbrini, “Towards More Open Democracies: The Expansion of Freedom of Information Laws,” in *Democracy Transformed? Expanding Political Opportunities in Advanced Industrial Democracies*, ed. Bruce E. Cain et al. (Oxford: Oxford University Press, 2003), 115.

<sup>27</sup> Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* (Cambridge: Cambridge University Press, 2006), 9.

that the security sector survives as an enclave of security.”<sup>28</sup> The United States is one of the countries where this is the case, and in the post-9/11 threat environment, increasingly so.

I argue that transparency is key to the efficacy of accountability in a democracy, but a key question in terms of this project is how much transparency is sufficient when it comes to matters of national security? Where should the balance between openness and security fall, and how can the appropriateness of this balance be gauged when the matter is subjective and opinion so widely bifurcated? Finally, issues of national security have traditionally fallen outside the common expectations of openness required of “regular” government, including exceptions to Freedom of Information Laws and other laws intended to create a more open government. What level of openness, thus, should be expected of the national security agencies to their overseers, and finally to the public? This is particularly the case when it comes to secret activities done in the name of the country, as the history of intelligence abuses directed against the American population was actually the driving force behind establishing intelligence oversight mechanisms. These questions are all a part of my analytical approach to understanding the importance of transparency within the overall frame of accountability, as well as attempting to gauge the balance of its worth in relation to national security concerns.

### **External Accountability and Intelligence Oversight**

The discussion up to this point in this chapter has concerned accountability and a context for my theoretical framework for accountability. The next section focuses purely on *external* oversight and the mechanisms used to maintain accountability from outside the context of the supervised. Generally, the study of oversight in American politics stands alone, analyzing why and how, usually, congressional overseers are performing their duties. These are extremely important studies and I include mention of them here. I shift, however, the frame in which I choose to analyze oversight. For the purposes of this project, oversight fits under the broader concept of accountability. Oversight is a tool one uses to achieve accountability, rather than the core issue I am seeking to explain. This is not an odd approach when one reviews the theoretical literatures on both accountability and oversight. It is, however, quite different from the usual approaches taken to the study of *intelligence* oversight. In this section, I will introduce common complexities and problems of the study of intelligence, integrate the academic literatures on oversight and intelligence oversight, investigating where the intelligence literature falls short, and introduce gaps that will be informed by my framework in the empirical chapters below.

A common introduction to most pieces on intelligence in academic journals begins with the lament that intelligence is “under-theorized,” meaning that the literature does not possess extensive normative theory, although as Richard Betts points out, theories of failure abound.<sup>29</sup> Rather, the literature on intelligence is descriptive, historical, and, usually, anecdotal, relying on the experiences of practitioners or close associates of practitioners for information via personal

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<sup>28</sup> Roberts, *Blacked Out*, 18.

<sup>29</sup> Richard K. Betts, *Enemies of Intelligence: Knowledge and Power in American National Security* (New York: Columbia University Press, 2007), 20. The discussion of under-theorization appears throughout the literature on intelligence but specific works focusing more directly on it include, Loch K. Johnson, “Bricks and Mortar for a Theory of Intelligence,” *Comparative Strategy* 22 (2003) and David Kahn, “An Historical Theory of Intelligence,” *Intelligence and National Security* 16 (2001).

stories. This is not to under-estimate the value of anecdotal evidence, but a constant problem in the study of intelligence has been the bifurcation between the two groups of individuals who conduct this type of research. There is a marked divide between those who have been practitioners, insiders, and those who observe intelligence from the external world. The very issues of accountability and transparency that form the core of this project and the foundations of all literature on oversight can entangle even those with secret access working on the topic in an academic setting. This is due to the limited accounts practitioners are allowed to give based on classified information; the internal review process that all current and former intelligence officers must go through, limiting potential publication of information perceived sensitive by the agencies; and the hubris of private control of information to which former practitioners—even those trying to expand transparency of the agencies—can fall susceptible.

A second difficulty is social scientific: the failure to *explain*. Here I join intelligence scholars, Amy B. Zegart and Thorsten Wetzling, in asserting that a foremost problem in intelligence studies is the failure to endeavor to take the next analytical step and explain occurrences, institutions, and development, in contrast to the familiar mode in intelligence studies of describing and historicizing.<sup>30</sup> We weaken ourselves by accepting within our sub-field those who claim an *exceptionalism* of subject matter, even within the academic sphere, that allows them to evade the common norms and methodology of social science. I assert this here to provide a basis for the methodological approach of this project, not to malign any particular individuals. Intelligence, still, is imbued with a gentlemanly haze of reminiscence. Many discussions refer back to the authors' time spent in an intelligence agency or on a committee assessing the performance of the intelligence agencies. The assertions in these accounts not only do not help build a theoretical basis for the study of intelligence, but in some cases, I have found, they actively undermine it by limiting information about sources or other material that could potentially help build knowledge about this secret world. Thus, in most ways, practitioners and scholars of intelligence find themselves diametrically opposed in terms of their main objectives: the former seek operational success and secrecy; the later analytical achievement and transparency. This links back to the most common assertion about intelligence studies—that it does not theorize. In this project, I leave aside theorizing about the purpose of intelligence, but, as is by now clear, I do focus extensively on developing a theoretical framework for intelligence accountability.

In terms of accountability, few scholars of intelligence grapple with the complexities of the theoretical concept of accountability and focus instead on describing the empirical issues of the oversight mechanisms themselves, when they do address accountability at all.<sup>31</sup> Rather than dealing with accountability, most literature on intelligence discusses how the agencies operate,

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<sup>30</sup> Thorsten Wetzling. "Intelligence Accountability in Germany and the United Kingdom: Same Myth, Different Celebration?" PhD diss., University of Geneva, 2010. See also Amy Zegart's, *Eyes on Spies: Congress and the United States Intelligence Community* for a discussion of intelligence studies' weak position in social science research, 35-54. She also introduced these issues and the difficulty in finding an academic "home" for intelligence in her first book, *Flawed by Design*.

<sup>31</sup> The core works that demonstrate this approach are Frank J. Smist, Jr, *Congress Oversees the United States Intelligence Community: 1947-1994* Second Edition (Knoxville: University of Tennessee Press, 1994); L. Britt Snider, *The Agency and the Hill: CIA's Relationship with Congress, 1946-2004* (Washington DC: Center for the Study of Intelligence, 2008); and David M. Barrett, *The CIA and Congress: The Untold Story from Truman to Kennedy* (Lawrence, KS: University Press of Kansas, 2005).

asserts and describes how they function sub-optimally, and recommends how they should change. This was the trend even prior to the 9/11, but intensified greatly after the attacks.<sup>32</sup> In the limited number of cases where scholars address issues of intelligence and oversight, they seldom address mechanisms in more than one branch of government, focusing solely on the practices within one branch. Very few focus on the mechanisms within the executive branch or within the CIA itself.<sup>33</sup> The limited work on the executive branch is due both to problems of access, and an ostensible bias against including executive control under the rubric of accountability.

Turning to the literature on oversight: some broad themes have emerged in the political science literature, mainly focusing on what constitutes effective oversight behavior on the part of individual overseers, what catalyzes or hinders it, and how its success is measured. The literature focuses almost purely on Congress as overseer. The first wave of literature on oversight asserted that most congressional oversight was *ad hoc*, informal, and reactive. The scholarly reaction to this assertion was to attempt to debunk the idea that Congress did not, in fact, engage in the practice at all, but rather that oversight *is* conducted, but along different definitional lines than previously argued. Most of these arguments approach the issue of oversight with an overt analytical plan in mind—usually one that views categorization as the primary goal of the analysis.

Ogul, in his classic text on oversight, for example, argues that accusations of a deficit in congressional oversight have been based on a definitional problem. According to his argument, oversight has been, in fact, conducted through a wide range of congressional activities that suffered only in not be recognized as oversight.<sup>34</sup> In order to prove this point, he differentiates between “manifest”—formal—oversight and “latent”—oversight conducted through more informal means and relationships in Congress. Ogul and Rockman propose a further dichotomy—between anticipatory and *ad hoc* oversight. As they describe it, while manifest oversight reviews activities after the fact, latent oversight can review after the fact but also in advance of

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<sup>32</sup> There was a flood of work on the failure of the intelligence community replete with extensive recommendations on how it should change to work with the changed security environment. Among the most solid of the book-length treatments are Amy B. Zegart, *Spying Blind: The CIA, the FBI, and the Origins of 9/11* (Princeton: Princeton University Press, 2007); Richard A. Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (Stanford: Hoover Institution Press, 2005); and Richard K. Betts, *Enemies of Intelligence: Knowledge and Power in the American National Security* (New York: Columbia University Press, 2007). Tim Weiner contributed a controversial and biased account of CIA failure in *Legacy of Ashes: The History of the CIA* (New York: Doubleday, 2007). An excellent critical approach to the common arguments about blame for 9/11 is Paul R. Pillar, *Intelligence and U.S. Foreign Policy: Iraq, 9/11, and Misguided Reform* (New York: Columbia University Press, 2011). The list of articles on this topic is extremely extensive. I will cite them throughout the remainder of the text.

<sup>33</sup> The most commonly cited work on executive control is William J. Daugherty, *Executive Secrets: Covert Action and the Presidency* (Lexington: University of Kentucky Press, 2008) but has numerous flaws of fact and is journalistic, rather than scholarly. A second, dated work that includes executive decision-making regarding intelligence is John M. Oseth, *Regulating U.S. Intelligence Operations: A Study in the Definition of the National Interest* (Lexington: University of Kentucky, 1985). Other works address executive decision-making in terms of covert action, but rarely describe the details of internal control in any depth. The limited nature of external contact with internal executive process was demonstrated by the behavior of a former senior CIA official who became incredibly anxious that he had given me confidential information on internal practice. He pointed out that these matters were never discussed by CIA officials outside of their community.

<sup>34</sup> Morris S. Ogul, *Congress Oversees the Bureaucracy: Studies in Legislative Supervision* (Pittsburgh: University of Pittsburgh Press, 1976), 153-180.

activities.<sup>35</sup> This particular bifurcation brings up interesting issues in terms of my earlier discussion of the relationship between accountability and the assumption that accountability occurs only *post facto*, whereas I argue that there are three stages of mechanism engagement. The temporality varies across the branches of government but they include prior review of programming, current monitoring, and *post facto* review. This broader conception of temporality is key to the criteria for external accountability, and more realistic for help in explaining the variation in how oversight is actually conducted.

Ogul points out in his text that deals with legislative oversight generally several factors that ultimately have great relevance for an explanation of a weakness of legislative oversight over intelligence. They focus on individual incentives to engage in active oversight, as well as the characteristics of the subject matter of the oversight that hinders engagement. He argues that oversight suffers when the matter to be supervised is technical and complex. In the distribution of time and resources, a complex matter such as intelligence will suffer. In his words: “Fulfilling the obligations of a congressman requires more time than a member has available. Ease of immersion into a subject will then be one factor governing his activity. What is particularly important is how complex the subject seems to be to the participants involved.”<sup>36</sup> He also points out that congressmen tend to engage when the subject matter is visible and public—not two attributes that are characteristic of intelligence—and when the agency overseen is unified and straightforward in its organization—not something the intelligence community, with its 17 distributed agencies can boast.<sup>37</sup>

Aberbach, in his seminal text on the issue, argues that there are two different types of congressional oversight—either advocacy or adversarial investigation. He argues the point that as Congress acts in a dynamic political environment, environmental factors and the institutional characteristics of government interact to affect the conduct of congressional oversight.<sup>38</sup> His argument rests on the well-accepted theory that overseers act based on personal incentive structures. This argument is supported by the classic literature on congressional committee behavior. For example, the core literature on congressional committees points to two factors that effect committee activities: member incentives and external (environmental) forces. In terms of member incentives, the classic argument is that members act in order to ensure their re-election.<sup>39</sup> With reference to the common theme of incentives, in his classic work, Fenno points out that committee work is not the primary objective of members, but that they each want committee service to bring benefit to themselves as individual congressmen.<sup>40</sup> Davidson points to the external forces that affect member behavior; these come from a range of sources, including from the chamber, the executive-branch agencies, clientele groups, and political parties.<sup>41</sup>

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<sup>35</sup> Morris S. Ogul and Bert A. Rockman, “Overseeing Oversight: New Departures and Old Problems,” *Legislative Studies Quarterly* 15 (1990): 6.

<sup>36</sup> Ogul, *Congress*, 14.

<sup>37</sup> Ogul, *Congress*, 14-15.

<sup>38</sup> Joel D. Aberbach, *Keeping a Watchful Eye: The Politics of Congressional Oversight* (Washington DC: Brookings, 1990), 14.

<sup>39</sup> Roger H. Davidson, “Congressional Committees as Moving Targets,” *Legislative Studies Quarterly* 11 (1986): 21.

<sup>40</sup> Richard F. Fenno, Jr. *Congressmen in Committees* (Boston: Little, Brown and Co, 1973), 1.

<sup>41</sup> Davidson, “Congressional Committees as Moving Targets,” 24.

One of the most commonly-referenced explanations for the behavior of congressional overseers is drawn from the oversight model developed by McCubbins and Schwartz to serve as a heuristic device and start of a conceptual framework. According to the authors, congressional oversight activities are dichotomized between “police patrols” and “fire-fighting”, as they seek to challenge the general criticism that Congress simply does not pay attention to oversight responsibilities.<sup>42</sup> According to their argument, the conduct of oversight activities is instigated by a more sophisticated calculus among decision-makers. Congress is not simply ignoring its oversight responsibilities and allowing the Executive to run wild, but rather has made a rational choice to use one type of oversight, fire alarm, over another, more inefficient and expensive, type, police patrol.<sup>43</sup>

“Fire alarm oversight” is relatively decentralized and requires less active oversight than police patrol oversight. As the authors describe it, Congress establishes rules, procedures and informal practices in order to allow citizens and interest groups to “examine administrative decisions . . . to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts and Congress itself. Some of these rules, procedures, and practices afford citizens and interest groups access to information and to administrative decision-making processes.”<sup>44</sup> According to this paradigm, Congress is reactive to external signals, that is, Congress prepares and organizes this external structure but other informed actors bring breaches to congressional attention. As the authors put it, “Instead of sniffing for fires, Congress places fire-alarm boxes on street corners, builds neighborhood fire houses, and sometimes dispatches its own hook-and-ladder in response to an alarm.”<sup>45</sup> In contrast to the fire alarm approach to oversight, “police-patrol oversight” involves centralized, active, and direct oversight instigated and controlled by Congress itself. Congress examines executive activities, responds to violations of legislative goals, and deters any further violations. According to the authors, an agency’s activities may be monitored by a review of agency documents, commissioned scientific studies, field observations, and hearings.<sup>46</sup> Within police patrol oversight, overseers are active, informed primary parties and thus must pay the cost for their more extensive involvement in direct oversight activities.<sup>47</sup>

The original purpose of this model and the argument supporting it was to prove that Congress does in fact engage in its oversight responsibilities, and that it bases its decisions regarding how to oversee on rational incentives, contrary to the assertion that it evades its mandate in this arena. In terms of my approach to the issues of oversight in terms of intelligence, the model provides a good parsimonious conceptual framework. While I agree with Aberbach’s criticism of the model—that it conflates the different dimensions: centralized vs. decentralized; active vs. reactive—I think these dimensions can prove especially useful with regard to the study

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<sup>42</sup> Matthew D. McCubbins and Thomas Schwartz, “Congressional Oversight Overlooked: Police Patrols versus Fire Alarms,” *American Journal of Political Science* 28 (1984): 165-179.

<sup>43</sup> McCubbins and Schwartz, “Oversight Overlooked,” 165.

<sup>44</sup> McCubbins and Schwartz, “Oversight Overlooked,” 166.

<sup>45</sup> McCubbins and Schwartz, “Oversight Overlooked,” 166.

<sup>46</sup> McCubbins and Schwartz, “Oversight Overlooked,” 166.

<sup>47</sup> Arthur Lupia and Mathew D. McCubbins, “Designing Bureaucratic Accountability,” *Law and Contemporary Problems* 57 (1994): 97.

of intelligence oversight.<sup>48</sup> On the first point, oversight of intelligence has been actively coalesced under the purview of one core committee in each chamber, thus it is reasonable to assess change in both institutional organization and oversight activity over time; on the second point, intelligence points to extreme measures in terms of reactive oversight, when the public—and scholars—know about intelligence oversight, it tends to be in reaction to a major scandal.

Ultimately, the literature on oversight provides a sound conceptual basis for understanding the oversight of “normal” agencies and the incentives that drive the overseers of these agencies, but can this argument be extended to include intelligence? If so, how, and which particular undiscussed variables intrude on these well-established explanations for the conduct of intelligence oversight? In terms of literature specifically addressing the mechanisms dedicated to intelligence oversight, while the broad literature on oversight tends to focus almost exclusively on congressional behavior, the quite slim scholarly research on intelligence oversight concentrates even further on a set of four main related themes: 1) How intelligence oversight is different from oversight over other agencies; 2) How Congress is not succeeding in supervising intelligence activities appropriately; 3) Why this is the case; and 4) What should be done differently and how this change should be conducted. This straightforward and basic set of problems has remained relatively unchanged as discussion points in the literature over the course of the three decades following the establishment of the House and Senate intelligence oversight committees. Further, coverage of other participants in intelligence oversight remained generally unaddressed. Drawing upon the themes introduced above, we now turn to a brief summary of the literature on intelligence oversight. Because the literature on this issue is so sparse, I address the contributions of intelligence scholars more individually than is the norm in a review such as this.

Similar to the literature on “regular” oversight, criticism of intelligence oversight activities tends to focus on the weakness, episodic and perfunctory nature of congressional oversight.<sup>49</sup> The assumption that Congress just doesn’t want to know what is happening within the agencies is a prevalent theme and a particular quote has emerged to illustrate this trend. Speaking on intelligence oversight in 1956, a CIA subcommittee’s ranking Republican member put it: “The difficulty in connection with asking questions and obtaining information is that we might obtain information which I personally would rather not have, unless it was essential for me as a Member of Congress to have it.”<sup>50</sup> This quote, alone, calls back to the concept of blame *sharing* between the agencies and overseers that I introduced earlier in this chapter. The implication here being Congress would prefer not to share the burden when it comes to matters of intelligence.

Loch Johnson, a senior scholar of intelligence with experience in investigatory committees of intelligence practice, including time as a staffer on the Church Committee, uses a behavioral approach to analyze overseers’ responses to intelligence oversight responsibilities by disaggregating the committees into specific individually chosen roles.<sup>51</sup> His approach mirrors the

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<sup>48</sup> See Joel D. Aberbach, “The Congressional Committee Intelligence System: Information, Oversight and Change,” *Congress and the Presidency* 14 (1987): 51-76.

<sup>49</sup> Robert Jervis, “Intelligence, Civil-intelligence Relations, and Democracy,” in *Reforming Intelligence: Obstacles to Democratic Control and Effectiveness*, ed. Bruneau and Boraz (Austin, TX: University of Texas Press, 2007), ix.

<sup>50</sup> David M. Barrett, *The CIA and Congress*, 3.

<sup>51</sup> Loch K. Johnson, “The Church Committee Investigation of 1975 and the Evolution of Modern Intelligence Accountability,” *Intelligence and National Security* 23 (2008): 198.

investigations of the early scholars of oversight, who focused on the dynamics of individual personalities and preferences to understand why there was a variance across the spectrum of oversight engagement. He explores the internal dynamic of the committees by grouping the members roughly into four categories: “ostriches,” who, according to Johnson, offer benign neglect by burying their heads in the sand; “cheerleaders,” who are wholehearted supporters of the intelligence community; “lemon-suckers,” who find much to criticize, particularly of covert operations; and, finally, “guardians”—an ideal-type dispassionate analyst of intelligence operations.<sup>52</sup> The purpose behind these characterizations is to understand the variation across behavior among overseers. Thus, Johnson joins the increasingly large group of contributors on oversight issues who aim to challenge the conventional wisdom that overseers neglect purposely, intentionally, and as an aggregate whole.

Variations upon this non-engagement theme appear throughout the literature on congressional intelligence oversight—much like the literature on oversight in general, as mentioned above. Smist, for example, discusses how the secret nature of intelligence creates specific challenges for oversight because of the inherent lack of public viability and access to information. He argues that in the process of “normal” oversight, a relationship based on information and iterative engagement is formed between overseers, the public, and the media. This dynamic does not exist within the realm of intelligence oversight.<sup>53</sup> Ogul, writing on congressional oversight in general, points to the idea that the job is simply too big to be done effectively. In his words: “The plain but seldom acknowledged fact is that this task, [as defined] is impossible to perform. No amount of congressional dedication and energy, no conceivable increase in the size of committee staffs, and no extraordinary boost in committee budgets will enable the Congress to carry out its oversight obligations in a comprehensive and systematic manner. The job is too large for any combination of members and staff to master completely.”<sup>54</sup>

Johnson challenges the total non-engagement theory by discussing “shock as a stimulus” for intelligence accountability, arguing that normally overseers’ focus on re-election, and thus the push for credit claiming and public recognition precludes active engagement in oversight action, particularly within the closed and secret realm of intelligence. Overseers only act energetically when there is a potential political scandal regarding intelligence.<sup>55</sup> This argument corresponds well with the McCubbins and Schwartz model contrasting “fire alarm” vs. “police patrol” approaches to oversight.<sup>56</sup> Other arguments made by intelligence officers themselves, interestingly in concert with Ogul, point to the fact that thorough oversight is simply too large of a job for Congress to complete effectively and that they, therefore, only react to emergencies. Lack of engagement is a function of the technical nature of the information, the brief amount of time overseers are able to allot to intelligence issues, and the process of agenda-setting regarding intelligence issues, which, they argue, tends to be catalyzed by controversy that could appear in

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<sup>52</sup> Johnson, “The Church Committee,” 199.

<sup>53</sup> Smist, *Congress Oversees the United States Intelligence Community*, 15.

<sup>54</sup> Ogul, *Congress*, 5. Ogul is responding to the definition of oversight drawn from the Legislative Reorganization Act of 1946: standing committees have the responsibility to “exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee”.

<sup>55</sup> Loch K. Johnson, “A Shock Theory of Congressional Accountability for Intelligence,” in *Handbook of Intelligence Studies*, ed. Loch K. Johnson (London: Routledge, 2009), 344.

<sup>56</sup> McCubbins and Schwartz, “Oversight Overlooked,” 165-179.

the press, rather than systematic process.<sup>57</sup> Aberbach supports this point by mentioning that members can be persuaded to pay attention to oversight responsibilities when there is a scandal that could result in political coverage or when constituents express complaints.<sup>58</sup> Interest within Congress, however, wanes quickly as public attention is diverted elsewhere. A further explanation for congressional inattention to intelligence matters posits that the lackadaisical attitude toward intelligence is a function of the absence of focused interest groups, subsequent lack of perceived public engagement in intelligence issues and thus lack of perceived political payoff for the overseer.<sup>59</sup>

Amy Zegart's latest work provides an updated discussion of the legislative approach to the oversight of intelligence, based on exactly these principles.<sup>60</sup> She discusses the weakness of oversight due to the lack of political *will* among legislators. She bases her argument on the arcane nature of intelligence work and thus an inherent lack of expertise among overseers, its distance from aiding legislators in re-election (one of the oldest rationales behind weak intelligence oversight), and the fact that it does not contribute to any internal gain for ambitious legislators. Her empirical work does move the discussion forward as she breaks down categories of congressional oversight into sub-categories in order to specify more accurately which particular type of activity was occurring. This is helpful to the degree that it provides a comparative device between *types* of oversight, but I still view counting hearings as missing the point in terms of intelligence oversight, when so much of the work involves informal relationships that inform the formal ones. Finally, Zegart argues that Congress impedes its own efficacy when it comes to intelligence oversight, an assertion with which I agree and which is a theme that will run through the chapters below.<sup>61</sup> Ultimately, Zegart returns to her primary critique that runs throughout all of her work—that the institutions themselves are simply not designed to operate effectively and that in this case, lack of internal political incentive reinforces a desire not to bother with engagement or reform.

While the literature grapples with these issues in terms of the realm of congressional oversight and its relevance, the limits here once again correspond to how oversight itself fits within the broader framework of accountability. Viewing oversight as a tool or lever to achieve a different, broader objective makes the enterprise itself seem to have greater purpose. Yes, the purpose of oversight is to supervise and correct behavior deemed unacceptable—but to what purpose? If the purpose is not clearly understood, how can observers tell whether it is effective or relevant at all? I argue that this problem is particularly acute when it comes to matters of intelligence because there is still little sense in academia of what constitutes effectiveness of the intelligence enterprise. This may sound odd within the recent overwhelming post-9/11 security environment, which asserted that the success of those attacks were due to intelligence failure, but in fact, failure occurs seldom, and a sense of a positive theory of intelligence would provide the framework for much more sophisticated analysis of what does and does not work within the intelligence community.

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<sup>57</sup> Point made by General Michael Hayden, personal communication, October 20, 2010.

<sup>58</sup> See Aberbach, *Keeping a Watchful Eye*, 30-34.

<sup>59</sup> Diana Evans, "Congressional Oversight and the Diversity of Members' Goals," *Political Science Quarterly* 109 (1994): 669.

<sup>60</sup> Amy B. Zegart, *Eyes on Spies: Congress and the United States Intelligence Community* (Stanford: Hoover Institution Press, 2011).

<sup>61</sup> Zegart, *Eyes on Spies*, 115.

To integrate these themes: some immediate questions arise when one considers the relevance of the more theoretical oversight trends to intelligence: how is the objective of oversight activity to be gauged when the activity is secret and there is no public pay-off for active involvement? What drives active oversight then? A sense of public commitment? How does the “value” of the pay-off change based on the vicissitudes of the political environment, and how does one test this change? What constitutes enough environmental change to catalyze oversight? More oversight is always considered good according to general consensus, but does this really hold? If “more” is gauged by counting congressional committee hearings and briefings, this seems to leave a lot out in terms of how to measure what constitutes success. First, does congressional engagement in oversight activities guarantee a particular outcome? If so, what should that outcome be and how should it be measured? Second, who should be doing the measuring? Can Congress be expected to measure its own success, or should this be the task of the public? Due to the closed nature of this type of activity, the public has much less leverage on the political process than is standard in other oversight *fora*. For example, there are few interest groups with real lobbying power and thus very little third party involvement. As Nolan points out, it is key to the functioning of the McCubbins and Schwartz model of oversight that there be an external party to “pull the fire-alarm.”<sup>62</sup> Thus, this absence of an external party passes the burden to other internal individuals, groups, or the catalyst of public scandals.

An understanding of this link between congressional oversight behavior, as well as the behavior of other oversight mechanisms, to broader objectives of accountability will help provide a framework for answers to these questions. It is clear from the limited scope of the literature that a more complete—and complex—picture of the full mosaic of oversight mechanisms is required. Further, my institutional approach lends itself to theorizing that is more generalizable than the current literature on intelligence oversight, focusing as it currently does so narrowly on individual behavior that tends to devolve into the analysis of individual personalities and preferences. Overall, this requires 1) detailed consideration of the mechanisms in all three branches of government and an understanding of: 2) what the objectives of each should be; 3) what constitutes success in terms of accountability; and 4) what causes change and development of the mechanisms. All four crucial—but conventionally ignored—components are addressed in my theoretical framework of accountability.

In terms of the relevance of my approach, analysis of the structure constraining intelligence activities in the United States is not purely an academic discussion, but rather has tremendous implications for both the active defense of civil liberties and the operational efficacy of intelligence. Change of these constraints tends to follow a pendulum-like pattern. In the face of political scandal, oversight mechanisms and legal structures intended to constrain and define what constitutes appropriate behavior on the part of intelligence operators are installed. Internal investigations and efforts to “re-establish propriety” are characteristic results of a political scandal.<sup>63</sup> Openness to the public and the importance of integrating intelligence agencies into

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<sup>62</sup> Smist, *Congress Oversees the United States Intelligence Community*, 242.

<sup>63</sup> Genevieve Lester, “Societal Acceptability of Domestic Intelligence,” in *The Challenge of Domestic Intelligence in a Free Society: A Multidisciplinary Look at the Creation of U.S. Domestic Counterterrorism Intelligence Agency*, ed. Brian A. Jackson (Santa Monica: RAND, 2009), 81. For a broader discussion of this trend, see also Peter Gill,

regular government become dominant rhetorical themes directed at the population.<sup>64</sup> Conversely, when there is an operational intelligence failure—such as a successful attack that is perceived to be the result of a failure of intelligence information dissemination—the opposite cycle takes place. Restrictions on intelligence activities are loosened, structures intended to constrain are adapted to absorb the exigencies of the emergent threat, and citizens are exhorted to *trust* their government. In both sets of circumstances, public acquiescence to government decision-making is key to sustainable security policy, and thus, indirectly to the continuity of intelligence activities.

### **Internal Accountability**

- **Hierarchical Authority**
- **Organizational Complexity**
- **Bureaucratic Process**
- **Legality**
- **Recourse**
- **Internal Independence**

My objective for introducing the internal component to this study has many facets. First, arguments about intelligence and supervision tend to focus on the idea that intelligence agencies must be overseen by external mechanisms because they are “rogue,” uncontrolled, or conduct activities that are illegal. Usually these criticisms are aimed particularly at the CIA, the focus of this project. Misunderstandings about the goals and management of intelligence activities are active in the public imagination, and thus it is integral to an advanced study of the subject to grasp not only the internal institutions and constraints, but also to understand how activities are constrained by internal structures, cultures, and fail-safes. Intelligence agencies conduct activities that break foreign laws; this is the cornerstone of all intelligence information gathering. Thus, internal structures provide multi-faceted services. They organize the tasks and output of the organization as do regular bureaucracies, but they also provide a framework for conducting activities that are outside domestic legal constraints. The constitutive characteristics of internal accountability also take issues that are problematic for external accountability for granted, for example, knowledge conditions. The problem of acquiring intelligence information—the most penetrating issue for external accountability—is not a fraught issue in internal accountability. There are variations to this, of course, and I will describe where compartmentalization can hinder appropriate internal accountability due to organizational complexity, as well, but information is accessible internally in contrast to the massive asymmetry with regard to the flow of intelligence information to the rest of the government.

Another matter that bears some attention is the difference between external accountability and the rather limited spectrum of recourse channels available to it, and the very direct management or *control* of internal activities. There is variation across how this works internally:

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*Democratic and Parliamentary Accountability of Intelligence Services After September 11*, presented at Workshop on Democratic and Parliamentary Oversight of Intelligence Services, Geneva, October 2-5, 2002.

<sup>64</sup> Gregory F. Treverton, “Intelligence: Welcome to the American Government,” *A Question of Balance: The President, the Congress, Foreign Policy*, ed. Thomas E. Mann (Washington DC: Brookings Institution, 1990), 70-108.

for example, internal institutions within the CIA review the facets, including legality, of covert actions very carefully. Programs proceed through several layers of legal and operational review, and can be altered, cancelled, etc., at any stage. As will be discussed in further detail below, the National Security Council conducts a similar programmatic review process that engages with programs prior to conduct, during, and after the program has concluded. This monitoring process is very much management—or control—in comparison with the rather looser structure that comprises external accountability, reliant as it is on the openness and actual generosity of the intelligence community for its information. The difference between the external maintenance of accountability and internal control over activities is marked in the variables that cause change in the mechanisms. External mechanisms change because of political factors, scandal, changing threat environment, and executive *rule breaking*. This last category corresponds to several instances in which executive behavior crossed the boundaries of law and regulation, but was then later incorporated into changing institutional oversight mechanisms. Internally, change does not occur this way. Internal mechanisms change in response to presidential edict, an administration's ideological standpoint on matters of security, changing agency leadership, changing interpretation of the law, and the changing threat environment. While rule breaking of external constraints is an acceptable form of executive behavior; internal rule breaking within an agency, particularly the CIA, is swiftly punished, using the full spectrum of sanction, including the medieval, such as shunning.

These separate categories comprise the range of required elements in order for accountability to be effective. In the empirical chapters below I use the development of the oversight mechanism within each branch of government as a path to understanding how the set of categories either thrives or fails at a series of pivot points. The objective to breaking down the larger category of accountability into smaller constitutive parts is to understand in greater nuance which particular aspects of accountability are lacking or are particularly strong. This analysis will then provide the foundations for a series of recommendations on policy decisions for the future regarding intelligence and accountability.

- **Hierarchical Authority**

Authority and power are both fundamental issues in the study of political science and public administration. In terms of administration, one goal of authority serves to coordinate the individuals within that organization to serve specific goals. Authority, according to Simon, influences the decisions of the individual within an organization.<sup>65</sup> Authority gives an organization its formal structure and is *relational* property—that is, it is order constructed upon a relationships between two individuals, one, the superior, with the other, subordinate. My point for returning to the Simon classic here is to highlight the distinction between authority—or control—and influence that he makes in his text.<sup>66</sup> This dichotomy is clearly also present in the difference between internal accountability and external; the former being the result of direct management and the latter built increasingly on statute, but dependent on custom, normative expectations of transparency, and generosity of the overseen in terms of information sharing. In terms of the current project, authority incorporates several key factors: the importance of internal control and command for internal accountability; responsibility on the part of seniors for the

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<sup>65</sup> Herbert A. Simon, *Administrative Behavior* (4<sup>th</sup> edition) (New York: Free Press, 1997), 177.

<sup>66</sup> Simon, *Administrative Behavior*, 179-180.

behavior of their subordinates; and, finally, the integration of the entire organization into a chain of accountability. In terms of operational activity, the internal chain of accountability runs in both directions: from the superiors to subordinates through the use of authority and from the subordinate to the superior in terms of having individual recourse to correct perceived malfeasance through reporting up the chain of command. The legitimacy of the accountability chain can be demonstrated by whether there is legitimate corrective response. For example, sanctions delivered in response to reporting. As an interesting, relevant note, Simon states: “The notion of an administrative hierarchy in a democratic state would be unthinkable without the corresponding notion of a mechanism whereby that hierarchy is held to account.”<sup>67</sup>

- **Organizational Complexity**

The institution’s internal organizational structure has an effect on accountability. Information gathering about internal activities becomes increasingly time-consuming with greater internal organizational complexity. With many cycles of tasks being conducted concurrently, it is also much more difficult to maintain internal supervision over daily activities. Further, as is pointed out in the boundary crossing literature, increased complexity of internal technology creates an environment in which that technical core is highly protected, making even internal access to this core through oversight increasingly difficult. There is also variation across agencies in terms of how well managed they are, and whether their work is heavily compartmentalized and thus not transparent to even internal overseers.

- **Bureaucratic Process**

Bureaucratic process entails an orderly, institutionalized, and just manner by which to sanction behavior that does not correspond to the demands of internal accountability, both internal regulations and the overall objectives of the organization. The credibility of process rests on the even-handedness of the application of sanction. Beyond the theoretical, bureaucratic process in terms of accountability should include records taken of events, transparency of process, full knowledge of the charges leveled against one, and the right to respond to these charges. I would argue an additional point in terms of bureaucratic process and the CIA that is novel and relates to the relationship of the CIA with the external world, and the relationship between domestic and foreign law. In some cases, CIA officers have been tried in civil courts for the activities they performed at the behest of the Agency and the executive branch. This mismatch between internal expectations and *changing* external expectations on the part of the executive branch is unfair. The look back period tends to be seen as a time of incipient danger for intelligence officers. Bureaucratic process in terms of internal accountability should correct activities done within the requirements of the organization internally. In the case of the CIA, numerous senior officers have taken out personal liability insurance so that they may protect themselves should they be accused for acts performed while employed by the CIA.

- **Legality**

Legality as a category of internal accountability requires that internal activities be constrained by legal structure. This category should be very straightforward and it is, generally, but once again,

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<sup>67</sup> Simon, *Administrative Behavior*, 188.

when activities that are on the border of legality are required of an organization, infringements can happen both by accident and by design. The CIA is imbued with a layered and particularly dense culture of legality. Attorneys are involved at every stage of decision-making regarding covert action, and they are embedded within individual units to make sure that there is a current legal check at every decision point.

- **Recourse**

Recourse, internally, is the same as external recourse, although the available sanctions are quite different. Recourse is the authority and ability to correct behavior through the application of such sanctions. Internally, there is a much wider range of sanctions of behavior available to the mechanism, including both formal and informal correction, whereas external accountability is limited to specific pathways to change behavior. The dynamics and limitations of both processes will be discussed in detail in the empirical chapters below.

- **Internal Independence**

Internal independence is rather a unique category, and involves the independence of an internal mechanism from the rest of the organization. Statutory Inspectors General perform this role in government agencies. The CIA was exempt for many years from the requirement due to national security concerns, but the position has been firmly entrenched—not uncontroversially—over three decades. The boundary spanning position of the internal oversight mechanism is unique in terms of its dual role: internal and thus part of the internal hierarchy, but external in terms of its responsibility to the outside world and its freedom from internal sanction in terms of its professional activities.<sup>68</sup> The importance and controversy surrounding the IG highlights the complexities of competing incentives between the executive and legislative branches that according to my argument has driven the incremental development of congressional intelligence oversight mechanisms. The controversy also demonstrates where the chains of internal and external accountability conflict, and evaluates what the various outcomes of the conflict mean for accountability overall.

Internal independence and the boundary spanning capability of the Inspector General both illustrate a key point provided by the theoretical framework; there are fundamental differences in the roles and responsibilities of those within an intelligence agency and those without. The external world views the activities of the agency with skepticism and possesses an inherent desire to acquire more information on internal workings, while the agency protects itself from the external world through all information control avenues available to it: classification, compartmentalization, and in some cases, obfuscation. This is not to claim especially malevolent intentions on the part of the agency. The *most* crucial task of an intelligence agency is to protect the information it gathers. This information must be kept secret, in some cases, to protect programs, intelligence personnel, and agents.<sup>69</sup> In other cases, the use of intelligence information

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<sup>68</sup> Meyer and Rowan, “Institutionalized Organizations: Formal Structure as Myth and Ceremony,” 42. See also W. Richard Scott, *Organizations: Rational, Natural, and Open Systems* (Fifth Edition) (New Jersey: Prentice Hall, 2003) for a more in depth discussion of the nature of organizations and how boundary crossing functions.

<sup>69</sup> This point is obvious but to clarify, an intelligence *agent* is a source of intelligence information for an intelligence officer. It is incorrect to call, for example, a CIA employee an intelligence agent.

has crossed the border into illegality and abuses; this line is fine when it comes to behavior that customarily breaks foreign laws but must adhere to domestic legal constraints. Understanding where the dividing line in regard to this can be complex. Intelligence agencies are also sometimes pressed to push the boundary to perform tasks requested by the president or other members of the executive branch. The legality of activities will be discussed in detail in the chapters that follow this. This issue of crossing lines, though, has relevance for the perception of the difference between *internal* and *external* functions with regard to intelligence. My analysis creates a strict divide between the two spheres, arguing that culture, information asymmetry, expectations, and internal control make the internal and external worlds clearly differentiated from one another. My framework for accountability relies on this separation for its validity and for its explanation of the tensions between the overseer and the overseen. Boundary spanning behavior on the part of a small number of actors invades this space to a degree that has caused controversy on both sides of the divide.

The concept of boundary spanning is introduced in some depth in the organization theory literature, the contours of which are worth investigating here. Internal control requires that the units of an organization be subordinate to that organization.<sup>70</sup> The boundary spanning position requires not only that the expectations of the internal universe be met but also that external objectives be reached. In Thompson's words: "The crucial problem for boundary spanning units of an organization... is not coordination (of variables under control) but *adjustment* to constraints and contingencies not controlled by the organization—to what the economist calls exogenous variables."<sup>71</sup> A traditional concept behind the boundary spanner is that the position functions to bridge the gap to the outside world. The boundary spanner represents the organization to the outside world, but also protects the key internal functions of the organization, in the term of art, the position protects the technical core. In order to protect internal operations, the boundary spanner filters information from the external environment to avoid destabilizing internal processes and, accordingly, distributes appropriate levels of information outward.<sup>72</sup> In some cases, boundary spanners are used to enhance the legitimacy of an organization. An example of this would be through a prestigious board or directors or a law enforcement community outreach programs, and in others, they are responsible for more mundane tasks that support the organization's effort, such as purchasing, or recruiting.<sup>73</sup>

Openness to boundary spanning, numbers of personnel in the position, and responsibilities of the position vary across types of organization, tasks, and organization size. A further cause of role differentiation is technology, with different types of technology being buffered to varying to degrees. Openness to the external world varies across the type of technology being used by the organization.<sup>74</sup> The classic three types of technology in an organization are long-linked, meaning sequential, such as an assembly line; mediating, the

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<sup>70</sup> James D. Thompson, *Organizations in Action: Social Science Bases of Administrative Theory* (4<sup>th</sup> printing) (New Jersey: Transaction Publishers, 2006), 66. This classic, originally published in 1967, laid the foundations for the assessment of boundary crossing activity.

<sup>71</sup> Thompson, pp. 66-67.

<sup>72</sup> Howard Aldrich and Diane Herker, "Boundary Spanning Roles and Organization Structure," *The Academy of Management Review* 2 (April 1977): 218.

<sup>73</sup> Aldrich and Herker, "Boundary Spanning," 220.

<sup>74</sup> Aldrich and Herker, "Boundary Spanning," 222.

bringing together of different parties; and intensive, the complex engagement of multiple parts.<sup>75</sup> Why are these classifications meaningful for the current project? Intelligence is clearly an *intensive* technology. It requires the concurrent and full integration of a multiple moving parts. According to the theory, intensive technology is the most avidly defended from external forces. This is certainly the case when it comes to the intelligence enterprise. Linking this back to the section on the framework criterion, internal independence, creates an interesting analytical problem. The literature hypothesizes that organizations using intensive technology will separate those involved in boundary spanning from the technical core.<sup>76</sup> We see this occur with the position of Inspector General, but we also see an entire network of complexity regarding that position, both in terms of the organization theory literature and the internal culture of the CIA. The reasoning behind introducing the concept drawn from the literature is to reinforce how strong the difference between internal and external worlds is within the intelligence community, and thus to show how different a boundary spanner operates within that context, in contrast to the “regular” organizational paradigm. The regular organization relies upon the boundary spanner for mediation, prestige-heightening, and other forms of internal bolstering; the boundary spanner in the CIA—the statutory IG—is reviled, considered untrustworthy, and illegitimate. The details will be discussed in the chapters below.

### **A Context for Framework on Accountability**

I have described my criteria for both internal and external accountability above. They will combine to provide a theoretical framework that will guide the rest of the empirical of this project. I am not the first academic to use a theoretical framework to piece together the range of constituent characteristics of accountability, but I am one of the first to apply this method to intelligence, and I am the first to use this on both internal and external mechanisms within the US intelligence community and its overseers. Numerous scholars of accountability have developed frameworks specifying pieces of the accountability puzzle. Mark Bovens develops a conceptual framework on accountability, focusing on the European context. His work addresses what he terms the “accountability deficit” of European policy-making, by analyzing whether public officials or organizations are subject to accountability.<sup>77</sup> As he describes his own work, it is basically a mapping exercise, outlining the relationship between the players within the accountability relationships, to whom is accountability owed, and over which particular matters. He disaggregates accountability into types in order to find analytical traction on this nebulous concept of accountability. Bovens reinforces the importance of the relational aspect of accountability in his own specific definition of the term: “a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.”<sup>78</sup>

His approach to typologizing accountability involves individuating the types of accountability based on four factors: nature of the forum; nature of the actor; nature of the

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<sup>75</sup> Thompson, *Organizations in Action*, 16-17.

<sup>76</sup> Aldrich and Herker, “Boundary Spanning,” 223.

<sup>77</sup> Mark Bovens, “Analysing and Assessing Accountability: A Conceptual Framework,” *European Law Journal* 13 (2007): 447-468.

<sup>78</sup> Bovens, “Analysing and Assessing Accountability,” 450.

conduct; and nature of the obligation.<sup>79</sup> He also introduces different factors to determine the importance of accountability to ensure both direct and indirect results—standards by which to gauge the effectiveness of accountability. In terms of direct results, he refers to democratic control, countervailing powers, and improvement/learning. Indirect results he leaves aside. The first and third of these are self-explanatory; the second requires a little more unpacking and is much more relevant to the current project. By “countervailing powers,” Bovens means control through governmental checks and balances of power run amok—essentially power of the executive unconstrained.<sup>80</sup> This speaks most directly to the type of recourse important in the asymmetric relationship I am exploring with this project—in the case throughout, an extreme power imbalance between the supervisors and the spies. I would argue that intelligence is an extreme end-state in terms of institutionalized power that by its nature pushes back at any type of external control. The nuances of how this works will be discussed at length in the empirical chapters below. This concept, of course, forms the basis of this entire project. Bovens’ framework demonstrates one approach to how the concept of accountability can be divided up according to function and process.

While Bovens’ framework does provide a solid step forward in terms of gaining analytical traction on a more granular conceptualization of accountability, the categories remain broad and, as he proposed, “map-like.” While introducing the concept of evaluation frameworks to the study of accountability, they do not actually reduce any of the concepts of accountability listed into component parts that can be gauged separately from the broader concept, and thus actual measure of efficacy in any of the three categories is impossible. His description of the applicability of his own countervailing powers category is particularly weak, in that he steps back to broad generalizations when he had the opportunity to specify uniquely how accountability over the executive branch could be measured.<sup>81</sup>

Sinclair also develops the concept of accountability by defining five different types of accountability: political, public, managerial, professional, and personal.<sup>82</sup> The types themselves are self-explanatory for the purposes of this project but what is striking is that she analyzes her types in a much more constitutive way than the other models here, relying on shared social meanings and discourse analysis to assess the contours of each of these categories. While this method differs from mine and is definitely softer on the operational characteristics, the methodological approach highlights the relational, interpretive, and interactive importance of accountability. What I find particularly interesting in this project is the subjective understanding of accountability conveyed through the discourse analysis. It also demonstrates the overall and readily accepted need for differentiated specification of accountability as both concept and in practice.

Romzek and Dubnick, in their case study on the *Challenger* disaster, point to the common components of accountability that are used by public programs, defined by them as “the means by which public agencies and their workers manage the diverse expectations generated

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<sup>79</sup> Bovens, “Analysing and Assessing Accountability,” 461.

<sup>80</sup> Bovens, “Analysing and Assessing Accountability,” 463.

<sup>81</sup> Bovens, “Analysing and Assessing Accountability,” 466.

<sup>82</sup> Amanda Sinclair, “The Chameleon of Accountability: Forms and Discourses,” *Accounting, Organizations and Society* 20 (1995): 223.

within and outside the organization” and divide accountability into four types: legal, political, bureaucratic, and professional.<sup>83</sup> They further divide these categories into 1) whether the institutional expectations are derived—internally or externally; and 2) the degree of control that entity possesses in terms of defining institutional expectations. They then combine their accountability framework with a theoretical framework derived from organization theory literature that separates analysis into three separate levels: technical, managerial, and institutional. Their inquiry challenges the outcome of the Rogers Commission by asserting that the scope of analysis was too narrow in terms of fault-finding.

The results of their analysis suggest that the steps taken to ensure accountability at the technical and managerial levels were outmatched by the external pressures of the institutional system; in this context, the broader social environment in which NASA exists.<sup>84</sup> They raise an interesting point about the inter-relationship of the types of accountability:

We argue ... that institutional pressures generated by the American political system are often the salient factor and frequently take precedence over technical and managerial considerations. If this is the case, the challenge of managing expectations changes as institutional conditions change. If the environmental changes are drastic enough, they may trigger a different type of accountability system, one which attempts to reflect those new institutional changes.<sup>85</sup>

This case study is particularly relevant to the issues of intelligence with which this project grapples, as problems of technical detail, professional failure, and blame have plagued the investigation since the explosion occurred. While the details, of course, diverge, the basic tendency to find fault immediately is very similar to the processes that have been directed toward the intelligence community in situations of similar complex failure.<sup>86</sup> Further, the authors differentiate between internal and external accountability, a key contrast in the concept that I explore in my own framework and throughout this project. Finally, the authors attempt to reintegrate NASA into the normal spectrum of public organizations through their analysis.<sup>87</sup> By this I mean, as the authors point out, that while NASA is an exceptional organization, performing highly technical and exceptionally complex work, accountability still must run according to the acceptable norms of democratic governance. These characteristics correspond very well to the intelligence community.

My theoretical framework and the frameworks and typologies discussed above all build on a similar core approach. We explore methods to expand and detail accountability and apply it to concrete examples of organizations that are locked in the chain of accountability. My approach, of course, seeks to expand the actors involved and detail the complex relationships that involve both internal and external chains of accountability. A main function of this approach is to

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<sup>83</sup> Barbara S. Romzek and Melvin J. Dubnick, “Accountability in the Public Sector: Lessons from the Challenger Tragedy,” *Public Administration Review* 47 (1987): 229.

<sup>84</sup> Romsek and Dubnick, “Accountability in the Public Sector,” 227.

<sup>85</sup> Romsek and Dubnick, “Accountability in the Public Sector,” 230.

<sup>86</sup> The most definitive academic analysis of the complexities that led to the explosion is Diane Vaughan, *The Challenger Launch Decision: Risky Technology, Culture, and Deviance at NASA* (Chicago: University of Chicago Press, 1996).

<sup>87</sup> Romsek and Dubnick, “Accountability in the Public Sector,” 228.

add nuance to traditional principal-agent models, which while excellent formal tools, tend by their design not to grasp both details of specific relationships and change. In the section below I will explore some examples of the traditional formulation of principal-agent models to provide comparison and contrast to my theoretical framework.

## Principal–Agent Models

Democracy, in theory and practice, is rooted in the concept that the power of those who govern is checked by the governed; democratic process ensures that government represents the will of the people and that government is held accountable to the public.<sup>88</sup> In theory, the concept of a government controlled by the people is rooted in American political culture and process; in practice, there are complexities in terms of how the public actually “controls” the behavior of political actors, and to whom the public bestows authority to conduct these operations in its stead.<sup>89</sup> In theory, electoral politics constrain the activities of elected officials, the public registering approval or disapproval of behavior through the vote. In practice, however, the purity of this democratic ideal has been diluted through a realistic understanding of political behavior, and the complexities of modern government that make direct accountability impossible.<sup>90</sup> What does this scenario mean for the accountability of the intelligence services not only to the public, in this case, but also to the other branches of government that the services are required to serve?

Principal–agent models are a valuable analytical approach to illustrating the power relationship between the public and its elected officials. This approach is convenient for the current project as it disaggregates the series of relationships composing the sequence from public to bureaucracy, and thus illustrates how power is delegated and responsibility for activities either maintained or distributed to others. It also demonstrates how best benefit can be achieved by delegating something too costly or complex to an agent.<sup>91</sup> As a brief conceptual overview, principal–agent models are used to demonstrate the delegation of power from one actor to the next in the governing process. This approach, described by Bovens, as a “concatenation of principal–agent relationships” has deep roots in the theory of democratic systems.<sup>92</sup> Based on a contract of delegation from citizens to public actors, the assumption is that power is given up to

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<sup>88</sup> Adam Przeworski, Susan C. Stokes, and Bernard Manin (eds), *Democracy, Accountability, and Representation* (Cambridge: Cambridge University Press, 1999), 4.

<sup>89</sup> See Arthur Lupia and Mathew D. McCubbins, “Designing Bureaucratic Accountability,” *Law and Contemporary Problems* 57, no. 1, (1994): 91-126. Specific questions usually guide the relationship between the public and policymakers regarding direct accountability. Among them, are elections themselves enough of a forcing mechanism to ensure that leaders carry out the will of the people? Does the public have a coherent “will”? Are citizens informed enough to engage with policy problems? Is it possible to disseminate appropriate levels of information regarding policy choices to the public, and what do citizens do with this information? When and how does the will of the people actually get conveyed to the policymaker, and what is the impact of public will on the policymaking process

<sup>90</sup> Michael W. Dowdle, “Public Accountability: Conceptual, Historical, and Epistemic Mappings”, in *Public Accountability: Designs, Dilemmas and Experiences*, ed. Michael W. Dowdle (Cambridge: Cambridge University Press, 2006), 4. In scholar of accountability, Michael Dowdle’s words: “[In installing rationalized bureaucratic frameworks] it was a vision of public accountability that worked by subjecting political behavior to the oversight of an organizational environment specifically designed to recognize and pursue the public good as opposed to one that relied primarily on corruptible electoral impulses.

<sup>91</sup> David E. M. Sappington, “Incentives in Principal-Agent Relationships,” *Journal of Economic Perspectives* 5 (1991): 45.

<sup>92</sup> Mark Bovens, “Analysing and Assessing Accountability: A Conceptual Framework,” 463.

experts in order to maximize utility, that is, by parceling out individual power to public actors, comparative advantage is achieved. The private citizen can manage his personal sphere while those delegated power may handle the public decisions. By allowing responsibility to be taken by agents, though, the public—the principal—gives up not only a level of decision-making agency, but also allows that the agent to have greater access to information, and the decision-making apparatus, and, thus, power. Institutionally, the principal in this relationship possesses few mechanisms through which to punish or reward the behavior of the agent.<sup>93</sup> An asymmetrical relationship is thus built.

A second “concatenation” of the principal–agent relationship concerns the relationship between the legislative branch and the executive, with the legislature serving as the principal and executive agencies as the agent. The legislature delegates power to the executive agencies; the agencies focus their activities on their specific areas of expertise. The principal in this case once again suffers from an informational disadvantage, but one less extreme than the general public. As Ferejohn points out, the legislature can wield unified political will more effectively than the general public and possesses more tools for correcting misbehavior on the part of the agents.<sup>94</sup> This latter point—the efficacy of the legislature to discipline its agents—has been discussed at some length in the literature and obviously is a major theme that runs throughout this project. Again, a core matter that runs throughout these models is information asymmetry and the power that is inherent to the crucial control of information. To return to the focus of this project—intelligence—the secrecy of intelligence information pushes to extremes these types of models, exacerbating the already present inequity of information between the two parties. As Max Weber argued, “Every bureaucracy seeks to increase the superiority of the professionally informed by keeping their knowledge and intentions secret.”<sup>95</sup> A function of the information asymmetry is that government agencies have far greater knowledge of information flows than both overseers and the public, thus requiring that the officials themselves choose to submit to a process that makes transparent that which they could most likely keep opaque if they chose. This brings up the interesting phenomenon regarding variation in how transparent government officials choose to be about their activities, and what causes the level of transparency to vary over time and in response to which particular catalysts.<sup>96</sup>

In Ferejohn’s words: “Accountability is, on this view, a property of institutional structures, whereas responsiveness is a consequence of interaction within such structures. Put another way, responsiveness is a measure of how much accountability an institutional structure permits.”<sup>97</sup> Ferejohn raises some interesting points to the negative when it concerns responsiveness. While certain public services and policies should respond to public wishes, others remain outside the realm of public expertise. In some cases, such as within the national security enterprise, public access can be dangerous to the success of intelligence programs and missions. What role does responsiveness thus have in the more constrained universe we are

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<sup>93</sup> See John Ferejohn, “Accountability and Authority: Toward a Theory of Political Accountability,” *Democracy, Accountability and Representation*, ed. Przeworski et al. (Cambridge: Cambridge Univ. Press, 1999), 131-153.

<sup>94</sup> Ferejohn, “Accountability and Authority,” 131.

<sup>95</sup> Max Weber, *Bureaucracy*, quoted in Arthur Lupia and Mathew D. McCubbins, “Designing Bureaucratic Accountability,” *Law and Contemporary Problems* 57 (1994), 91.

<sup>96</sup> See Ferejohn, “Accountability and Authority” for a discussion of officials’ interests in opening their activities to the public.

<sup>97</sup> Ferejohn, “Accountability and Authority,” 131.

addressing here, of intelligence, covert activity, and required public absence from the space? Finally, to draw on one of Ferejohn's later points, the information asymmetry inherent to the principal-agent relationship limits the responsiveness that rational thinking would *expect* from the agent; in this case the intelligence community.

McDonald brings up an interesting critique of the relevance of principal-agent models in her piece on accountability and non-profits. While the topic she grapples with is far different from the focus of this project, she problematizes the relationship between the principal and agent in a way that could be useful for our understanding of its application to the intelligence community.<sup>98</sup> She asserts that the use of the model is incomplete because it does not engage with the political dynamics that underlie the relationship. These could easily affect the responses of both sides of the relationship. Further, she argues that most literature using the model focuses on the behavior of the *agent* rather than the principal. In the case of intelligence accountability provided through intelligence oversight, this highlights a serious point on the importance of the behavior and development of the mechanisms in each branch of government. Overall, I believe the principal-agency structure is a useful model for understanding conceptual relationships but is an insufficient approach to the study of intelligence because the issues of intelligence are so far outside the "normal" government that the model describes, and the behavior of which it explains.

### **Data-Gathering Methodology**

A deep problem with the study of intelligence within political science is how to develop a sound methodological approach. Most of the usual social science methods fail when faced with the secrecy and closed off nature of the intelligence community. Experiments cannot be conducted and data sets without large holes are impossible to generate. Those who have experimented with quantitative approaches to intelligence and intelligence oversight tend to find their work reduced in scope to descriptive statistics of legislative activities. This leaves qualitative methods as the predominant tool in this sub-field, usually involving extensive interviewing of those involved both in the intelligence community and the oversight mechanisms. While these interviews yield interesting anecdotes and good descriptions, they are beset with the usual issues of bias and subjective reporting, but also, in the case of intelligence, with secrecy, elisions, and problems of access. One unique of being a researcher of intelligence is that *quality* of analysis depends to such a great extent on access to the individuals involved.

I decided early in the development of this project that an ethnographic approach to the intelligence community would be a necessary starting point. Many recent works describe the community and CIA's history and inherent flaws, particularly organizational and analytical problems, but as I describe above, few assess how the CIA both controls itself internally and how it views external control, and what role institutional culture has in both of these processes. This gap in the literature is ascribed to the type and style of writing on intelligence activities. Scientific assessments are rare because scholars' access to the intelligence community is difficult to attain and, typically, reliant on personal connections if possible at all. At the other end of the spectrum, anecdotal accounts of experiences inside the intelligence community are descriptive and detailed but limited in their scope. Both sides bring their own biases; from the outside, it is

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<sup>98</sup> Catherine McDonald, "Government, Funded Nonprofits and Accountability," *Nonprofit Management and Leadership* 8 (1997): 62.

easy to blame the CIA for excesses or failures because it is hidden behind an opaque shell and is forbidden from defending itself publicly. From the inside, the perception is that the external world misunderstands the internal workings—and sacrifices—of the CIA in pursuit of a mission for the public good.<sup>99</sup>

I have made a small step toward bridging this gap. I am an outsider to the community, but have had the extraordinary good fortune to be mentored over the course of the past two years by four very senior intelligence officers.<sup>100</sup> This on-going mentorship has been in addition to the dozens of interviews I have conducted with a range of analysts, operators, and attorneys all related to the intelligence function. I have used this aperture to try to understand the institutional environment of the CIA because I feel that in order to understand how oversight works and explore whether it is effective in terms of ensuring accountability, it is necessary to have as complete a picture as possible of the actual activities that are being supervised. I cannot attest to having plumbed the depths of the CIA's soul in my research, but I was provided a unique introduction to the culture and beliefs of individuals who have spent lengthy careers in the Agency. I also was able to interview several members of the House and Senate oversight committees and numerous legal officials and attorneys involved with the legal decisions related particularly to changes in judicial oversight.

The material for this project was drawn primarily from an extensive series of interviews with participants in the intelligence community, Capitol Hill staffers, and other attorneys involved in various aspects of intelligence oversight. The intelligence community interview subjects were generally drawn from the senior management ranks of the CIA, but also included several case officers from the National Clandestine Service, and some current and former intelligence analysts. I interviewed the majority of my subjects multiple times. I have included full names, positions, and dates wherever possible in the footnotes to this text; in some cases, a primary condition for the interview was to include position, date, and location only. The choice of interview subjects had two parts. First, I chose pivotal individuals based on historical periods, experience, and position. Second, I relied upon the snowball method to build my subject network. The interviews themselves were semi-structured and open-ended. Almost without exception, I followed up with at least one if not numerous further interviews after the initial contact. In some cases, I have been in very frequent contact with the interview subject throughout the process of completing this project.

The interview protocols vary but my process for interviewing was relatively similar across the range. My goal with the semi-structured interviews was not to focus on specific facts at the outset but to introduce broader, conceptual questions to allow greater freedom for affect and subjective perception. I then followed up with clarifying questions and specific data requests. Finally, due to the sensitive nature of the material, I have offered my interview subjects the opportunity to review the quotes attributed to them. The primary data gathered through these

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<sup>99</sup> Vulnerability and the attendant feeling of being misunderstood is a topic that came up in most of the interviews I conducted with intelligence officers.

<sup>100</sup> I was recipient of a research grant from the Department of Homeland Security (DHS) via the Center for Risk and Economic Analysis of Terrorism Events (CREATE) (University of Southern California) AY 2009-2010, and have been involved in matters of national security and counterterrorism that have included the agencies since 2003, but I am not and have never been an employee of the US government, and I do not hold a security clearance.

interviews was supported by a wide range of secondary literature, including statutes, the *Congressional Record*, government reports, press releases, analyses, monographs, journal articles, newspaper and magazine articles.

## Plan of Dissertation

This dissertation is unique in that addresses all three branches of government and their relationship to intelligence and accountability through the lens of an original theoretical framework. I have divided the work into three empirical chapters that focus on the relevant oversight and control work undertaken by the three branches of government. The framework will serve as a guide to institutional development within each branch, as well as a touchstone for a comparative approach to accountability among the branches. The first chapter is its own unique contribution as very few scholars address the import of the internal organizational culture of the *overseen* when working on issues of oversight and accountability. My original objective with this chapter was to reinforce my own understanding of the work activities, cultural constraints, and institutional mores of the CIA in order to provide a firmer picture of what the oversight mechanisms, to be blunt, are up against. I also explore internal control mechanisms within the CIA and other mechanisms within the executive branch that act in close concert with the CIA to guide, monitor, and control the CIA's intelligence activities. Internal control mechanisms are ignored in the broader debates about intelligence accountability, but investigation of them can help us unpack the apparent dichotomy between internally generated accountability and externally mandated *forced* accountability, transpiring usually as a result of a crisis or scandal.<sup>101</sup> The conventional wisdom suggests that intelligence, for example, only opens and becomes relatively transparent when forced to do so. It also assumes that transparency is integral to effective accountability. My framework generally agrees with this proposition but it may falter on the operational exigencies of secret work. I will explore this potential conflict in the chapter.

I chose the CIA as the focus of my research because it has tended to be, and is currently, at the nexus of many of the complex issues relating to intelligence in the United States and accountability: for example, the scandals of the 1970s were marked by the illegal domestic use of the agency, and current missions assigned to it have involved questionable practices, such as rendition, detention, and enhanced interrogation techniques—arguably torture. It has also been at the forefront in the series of reforms made after 9/11 and thus pivot points of institutional development stand out in bold relief. Further, its role as the coordinator of intelligence for the president—under the supervision of the DCI—has always placed it at the forefront of inter-branch relationships regarding intelligence. Finally, The CIA's internal controls are typically ignored in the literature on intelligence oversight or, at best, viewed with deep suspicion. I argue that they have had a serious and respected institutional constraining role on intelligence activities that both penetrates the internal culture of the CIA and links to other, external oversight mechanisms, and thus influences trends in accountability activity. I will apply the framework of accountability that engages with *internal* accountability to the processes introduced above. This will allow for analytical traction on the internal institutional development of the agency and will also provide an interesting analytical space for comparing the requirements of internal accountability with external requirements and mechanisms.

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<sup>101</sup> The foundations of this discussion are found in the McCubbins and Schwartz model of oversight, "Oversight Overlooked," discussed above.

The second empirical chapter engages with the development of legislative branch oversight mechanisms—namely the two congressional committees. In this chapter, I describe how these mechanisms have developed as the result of an oppositional relationship with the executive branch, with the branches of government pursuing divergent objectives and possessing different preferences. This process has been interrupted at specific moments of either political scandal or perceived operational failure. I describe how these pivot points have affected the development of legislative oversight of intelligence. The external framework of accountability allows us to see where weak points in the legislative oversight structure have persisted and what the mechanisms are that make this the case. The legislative oversight case exhibits all of the inherent pitfalls of the principal–agent relationship addressed above in this chapter, including the penetrating problem of information asymmetry.

In the final empirical chapter of this dissertation, I explore judicial oversight and intelligence activities. The purview of the judiciary in terms of accountability is much narrower than the legislative branch and the tools available are much more limited. The judiciary oversees issues of domestic intelligence so this chapter includes analyses of the complexities of overseeing the National Security Agency. The judiciary has also been faced with recent breaches of its oversight mechanism and has reacted by absorbing rule-breaking and adapting its structures. This dynamic poses a unique challenge for the theoretical framework and I analyze these developments throughout the text of the chapter. The concluding chapter of this project draws out the themes that have been highlighted particularly by the theoretical framework throughout the project. They will serve as the foundations for recommendations for policy changes regarding intelligence and accountability.

## Chapter 2:

### The CIA, Culture, and the Executive Branch: Internal Accountability

*Remember, we go where others never go!*<sup>1</sup>  
Charles E. Allen (CIA)

#### Introduction

For an agency that is remarkably insulated, the Central Intelligence Agency's vulnerability to the exigencies of changing political environment has had an inordinate impact on the development of its internal institutional culture. This is predominantly due to the unique, and dependent, relationship that the Agency has with the president and to the fact that it has no other interest groups or constituencies that can defend its interests openly.<sup>2</sup> The CIA is a creature of the executive, specifically, the tool of the president. This tight relationship changes over time, based on a range of variables, including the threat environment, the president's use of covert action, the personal relationship between the president and Director of Central Intelligence (now Director/CIA), and the political environment. It is held within a network of expectations in terms of operational capability, legality, and appropriateness. These expectations come from the President, from Congress, from the media, and, increasingly, the public.<sup>3</sup> Underexplored but crucial, questions of accountability and transparency arise as the intelligence community comes and goes in the public gaze.

The cycle of exposure of the intelligence agencies—particularly the CIA—tends to be very public during national crises, with accusations requiring that deeply secretive individuals come forth at moments of failure. When there is not a public drama, intelligence officers tend to fade into the national background. This dynamic creates not only a complex and varied relationship between the intelligence agencies and overseers, but also contributes to an off-kilter sense of intelligence identity and culture. Apertures that provide light to opacity only in moments of crisis skew public images of what the intelligence agencies actually do, how and when they are successful, and what internal and external forces constrain and guide them as they act in their roles of legitimate members of the government. This chapter presents a more balanced portrayal of how the internal operations of the CIA function. The point here is to gain a deeper understanding of what makes the operational culture of the Agency important to those within it, and by extension to understand how this internal view has an impact on external expectations.

Theories of accountability focus on the relationships between the “overseen”—the agencies supervised by external bodies—and the overseers themselves. Most of this project does as well, defining efficacy in terms of external accountability. This chapter, in contrast, builds on

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<sup>1</sup> Charles E. Allen, personal communication. October 7, 2010.

<sup>2</sup> Interview with former Deputy Director of the CIA, Stephen R. Kappes, May 12, 2011.

<sup>3</sup> Interview with former Senator Chuck Hagel (R-NE), June 27, 2011.

the disaggregated conception of accountability introduced in the first chapter of this project to include *internal accountability*, arguing that it is difficult to understand how external accountability can be effective when internal determinants dictate standards of internal appropriate performance and behavior. Internal accountability of the CIA is strong and breaches of it are noticeable and quickly punished; external mechanisms of accountability falter at the limits of asymmetric information regarding intelligence information, insufficient skill on the part of overseers to decipher the technical details of the programs, and the complications of political preferences on the part of legislators.

Scholars of oversight focus very little on the internal dynamics of the agencies that are being supervised, particularly when it comes to something as removed from normal politics as intelligence. Scholars of intelligence, on the other hand, make few attempts to understand the complexities of the relationship between the intelligence community and its overseers. Neither group focuses on internal accountability, including what constitutes it, and how breaches of it are corrected, in terms of the overall discussion of accountability and oversight. This project adds uniquely to the literature by defining the concept, differentiating it from external accountability, and arguing that understanding this complex internal environment is integral to gauging accurately how external oversight is conducted, and thus how accountability is maintained. The relationship of CIA personnel with oversight remains almost entirely unaddressed in the conventional literature on intelligence oversight. This chapter not only advances this integration by providing internal nuance, it also reflects an extremely unusual level of access to senior intelligence officers, all of whom actively contributed their views to the project.<sup>4</sup>

This argument points out that the intelligence oversight literature has missed the point by focusing all discussion of intelligence oversight complexity as a function of the “brokenness” of the system in Congress, as it has limited its focus not only to the legislative branch but also to a narrow, operational interpretation of accountability. In traditional terminology, as described in the introductory chapter of this project, oversight is a function that the legislative branch performs, but in actuality, *intelligence* oversight is unique—it occurs in three different branches of government, and a wider understanding of how the parts interact with each other provides insight into whether oversight is, indeed, “broken”, or rather, whether the system of monitoring intelligence is entirely misunderstood by those of us who attempt analysis. This suggests that a different frame of reference may aid in understanding the unique requirements, not only of the intelligence services, but of the particular balance of government in an area fraught with contradiction, ambiguity, politicization, danger, and threat. An internal investigation of the CIA highlights institutional structures that have contributed to the information asymmetry inherent to the nature of intelligence activities. Institutions, rules, and culture contribute to the secrecy of internal CIA operations. The maintenance of accountability of the intelligence community is an attempt to recalibrate this information asymmetry vis à vis other government institutions and the public. The oversight mechanisms are the tool used to leverage the relationship. Each step of mechanism development in all three branches pivots around re-balancing an asymmetry that will never completely balance due to the specialized tasks, requirements, and characteristics of the intelligence services.

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<sup>4</sup> The gratitude I owe to the intelligence officers who worked with me on this project is beyond words. The openness, collegiality, mentorship, and genuine interest in helping my work are beyond anything I have ever experienced. They have requested that I not list their names.

This chapter describes CIA institutional structure and process, and organizational culture and control mechanisms. Beyond the structural and institutional characteristics of the CIA, this chapter aims to provide an internal context for the behavior of intelligence officers and an understanding of internal accountability processes within the Agency. It contributes to an understanding of how officers align their behavior with expected institutional behavioral norms in an environment where extra-legal activities are core to the mission, and explains how deviations from these norms are corrected. In pursuit of this understanding, the main themes this chapter introduces to the discussion of intelligence oversight are, first, the importance of internal agency organizational culture in both understanding internal mores, and in understanding how implicit and explicit norms control the behavior of intelligence personnel; second, in exploring how this internal cultural control maintains internal standards that may deviate from external societal norms; and third, how those who challenge the dichotomized universe of the CIA—within and external to the Agency—are treated. The five characteristics used to explain both the change and efficacy of *external* mechanisms throughout this project are knowledge conditions; external independence; organizational complexity; temporality; and transparency. In contrast, this chapter elaborates on internal accountability by focusing on six *internal* characteristics: hierarchical authority; organizational complexity; bureaucratic process; legality; recourse; and internal independence. The inflection point for these five characteristics is most salient in the position of the statutory Inspector General.

After a short introduction to the history of the CIA, I provide a brief overview of the criticism levied at the Agency in the years immediately following the attacks on 9/11 in order to introduce the common discourse on internal CIA culture. Then I will present the internal culture of the CIA, describe how its responsibilities are organized, and explain how it is tightly interwoven into the fabric of the executive branch. Contrary to the usual assumption of the Agency being adrift without guidance, the CIA has actually matured under the close control of the executive branch. Thus, expansion of external accountability, I argue, requires opening new conduits of information flows to the other branches of government; it does not mean reining in an ungoverned and ungovernable beast.<sup>5</sup> I will discuss how internal accountability mechanisms originally developed, and continue to function within the CIA, and will address the core question introduced above – how the organizational culture of the CIA affects how officers perceive and interact with external oversight mechanisms. After a discussion of the intra-CIA characteristics contributing to accountability, I broaden the scope to place the CIA in relationship to control mechanisms within the executive branch, as although the CIA is a closed off world, it has always operated in tight concert with the president and his national security staff. These themes serve to underscore the core conceptual issue of the project of understanding what specific challenges external oversight of intelligence faces when the Agency has not only a unique, closed, internally controlled culture, but is also closely aligned with the executive branch.

### **The Genesis of the Central Intelligence Agency: Rooted in Wartime Capability**

The foundations of the CIA were established in the Office of Strategic Services, developed and run by William J. “Wild Bill” Donovan during World War II. Donovan, observing the piecemeal

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<sup>5</sup> Prados articulates this relationship well. John Prados, *Safe for Democracy: The Secret Wars of the CIA* (Chicago: Ivan R. Dee, 2006), xiv.

and disorganized intelligence components serving the Departments of War, the Navy, State and other smaller operations, recommended to President Roosevelt early in 1941 that information drawn from the various intelligence services be coordinated under a single organization.<sup>6</sup> He also suggested that the organization integrate collection, analysis, and operations.<sup>7</sup> Up to the point of the Pearl Harbor attacks in December 1941, seven intelligence agencies reported to President Roosevelt but there was very little coordination among them. Even the information drawn from Magic, a code-breaking capability, was not coordinated between the intelligence components of the Army and Navy. The services actually reported this intelligence information to the president on alternate days because they were unable to work together smoothly.<sup>8</sup> The attacks on Pearl Harbor, viewed as the outcome of disaggregated intelligence information as well as too much raw information compared to finished analysis, reinforced the need for a more unified system with which to convey intelligence information to the executive branch in support of wartime decision-making.<sup>9</sup> When it was established in June 1942, OSS tasks included espionage, covert action, counterintelligence, and intelligence analysis.<sup>10</sup>

Populated by highly educated, generally upper class men—a “league of gentlemen” as Donovan called his rapidly growing team—the OSS was a small and extremely elite club whose experience and skill in tradecraft was usually outweighed by enthusiasm and a sense of entitlement.<sup>11</sup> The culture that went along with this slice of society carried over into the new organization, CIA, probably only beginning to dissipate after the investigations of the 1970s that occurred simultaneously with vast changes in American civil society. CIA’s organization also reflected the internal structure of Donovan’s agency, which by mid-1942 was divided into four branches: Secret Intelligence, focused on espionage and collection; Special Operations, responsible for propaganda, guerilla warfare, and other types of covert action; Foreign Nationalities, focused on gathering information and potential covert action recruits from ethnic groups present in the United States; and Research and Analysis, the analytic section.<sup>12</sup> Donovan even developed projects that have later analogues to controversial responsibilities of CIA’s Science and Technology Division, for example, investing in research on truth drugs and even conducting experiments on unsuspecting individuals—presaging programs such as the CIA’s MKULTRA.<sup>13</sup>

Further, the office created a pattern of intelligence sharing, particularly with the British, that set the precedent for later liaison work between the CIA and foreign intelligence agencies. Overall, the office was imbued with a culture of adventure and irreverent experimentation. This was due to the nature of the work, but also to the elevated social position of the majority of the

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<sup>6</sup> Amy B. Zegart, *Flawed by Design: The Evolution of the CIA, JSC, and NSC* (Stanford: Stanford University Press, 1999), 166.

<sup>7</sup> Douglas Waller, *Wild Bill Donovan: The Spymaster who Created the OSS and Modern American Espionage*, (New York: Free Press, 2011), 70.

<sup>8</sup> Waller, *Wild Bill Donovan*, 78.

<sup>9</sup> See the classic by Roberta Wohlstetter, *Pearl Harbor: Warning and Decision* (Palo Alto: Stanford University Press, 1962).

<sup>10</sup> Jeffrey T. Richelson, *The US Intelligence Community* 5<sup>th</sup> Edition (Boulder, CO: Westview, 2008) p. 17.

<sup>11</sup> Waller, *Wild Bill Donovan*, 93.

<sup>12</sup> Waller, *Wild Bill Donovan*, 96.

<sup>13</sup> Waller, *Wild Bill Donovan*, 103. MKULTRA is described briefly in the Family Jewels; its context is explored in the congressional chapter of this project.

officers. Taking risks and breaking rules was part of a dynamic institutional culture, a culture much at odds with conventional government practice and, particularly, the military mores of the time. In the words of General Macgruder, Donovan's deputy at the end of the war, "Clandestine intelligence operations involve a constant breaking of all the rules. To put it baldly, such operations are necessarily extra-legal and sometimes illegal."<sup>14</sup> This sense that breaking the rules creatively is part of the job has continued, to some extent, in the present-day incarnation of the Special Operations division of the OSS, the National Clandestine Service (more commonly known by its decades-long title Directorate of Operations). Some argue that the CIA's current emphasis on paramilitary activities is a return of the CIA to its OSS roots.<sup>15</sup>

Donovan argued strenuously after the war that it was critical for the United States to keep a central intelligence agency even in peacetime.<sup>16</sup> Donovan was sidelined from the intelligence business after the war, but after a two-year gap, during which a rather anemic Central Intelligence Group (CIG) struggled to find its way during postwar demobilization, the Central Intelligence Agency was created in 1947. The CIA was originally intended to focus on coordinating, analyzing, and disseminating intelligence information, but not to have as a primary mission the collection of intelligence.<sup>17</sup> The structure and mission of the CIA were the outcome of the bureaucratic infighting of a large number of government players, each of whom had a vested interest in maintaining their section of intelligence "turf." An example of this is the domination of the FBI over any domestic intelligence gathering. It was not only due to a fear of an "American Gestapo" that the CIA was not and is not permitted to operate within the United States, but rather also to the ferocious hold J. Edgar Hoover and the FBI had on the domestic sphere of law enforcement.

The statute that created the CIA—the National Security Act of 1947—is notable for its vagueness regarding matters of the CIA. The main focus of the Act was the military; it created the Air Force and established the National Security Council and the position of Secretary of Defense. Congress, intently focused on the military unification, did not pay much attention to the new "central" agency; however, existing intelligence operations in War, Navy, Justice, and State Departments opposed the new agency fiercely, setting the stage for decades of future turf wars.<sup>18</sup> The sections of the Act on the CIA were ambiguous, with no mention at all of covert operations.<sup>19</sup> The authority that allowed the CIA to operate secretly all over the world was extrapolated from a vague "Fifth Function" of the National Security Act (1947), which ordered the CIA "to perform such other functions and duties related to intelligence affecting the national security as the [NSC] may from time to time direct."<sup>20</sup> This is the entire original basis for the authorization of CIA covert action. The ambiguity of the Fifth Function continues to plague the practice of the oversight of covert action to this day, not least because without a firm definition of covert action, it is difficult to determine which oversight processes apply to a particular action, and is even difficult to confirm *who* should be conducting that action.

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<sup>14</sup> Tim Weiner, *Legacy of Ashes: The History of the CIA* (New York: Doubleday, 2007), 12. This book is biased and sensationalist; it engages, however, interestingly with historical records, when viewed with the skepticism it is due.

<sup>15</sup> Interview with former HPSCI staffer, March 13, 2011.

<sup>16</sup> Waller, *Wild Bill Donovan*, 333.

<sup>17</sup> Zegart, *Flawed by Design*, 163.

<sup>18</sup> Zegart, *Eyes on Spies*, 46.

<sup>19</sup> Weiner, *Legacy of Ashes*, 25.

<sup>20</sup> 50 U.S.C. § 403(d) (1988).

The armed services had never supported a centralized intelligence apparatus and were intent that the new agency would be weak. The strenuous opposition of the armed services is marked in terms of the fact that the services kept their individual intelligence components even after a “central” agency was established.<sup>21</sup> Disinterest in the creation of a new intelligence agency extended to other branches of government; Congress, for example, had a minimal role in the genesis of both the CIG and the CIA. As Amy Zegart points out, Truman disbanded the OSS and created the interim CIG without any input from Congress.<sup>22</sup> Both the House and Senate passed the National Security Act (1947) with very little comment, as well, deferring to the executive branch.

These early bureaucratic issues: fragmented intelligence responsibility, a heavy asymmetry toward the military intelligence apparatus, and an ambiguous and changing mission remain to this day. Within the institution, the irreverence, expectations of rule breaking and risk taking that characterized the OSS are all embedded in the culture of the clandestine side of the CIA. While the “rogue” characteristics of the OSS fit the operations side of the CIA, the analytical side has always had a different culture, focused on logic, rationality, and analytical prowess. The two sides have evolved side by side but with different values, and attitudes toward risk, success, and failure. Both sides constitute a closely held tool of the presidency, evolving in response to presidential need and with the full support of administration after administration.<sup>23</sup>

Covert action was only actually defined clearly two decades ago; thus the executive has used the ambiguity of the CIA’s original charter to forge a mission for it—one clarified in terms of emerging need, not one explicitly established by statute. This contrasts with the analytical side of the Agency, which has received much less attention and support, and which, it could be argued, has actually suffered because of the ambiguity of the CIA’s position in the intelligence community.<sup>24</sup> Many argue that although the DCI was intended to be the coordinator of intelligence information in the community, that his (always a he) authority continues to be undercut by the asymmetry of the budget authority vis à vis the Pentagon. This has left his role somewhat ambiguous and dependent on his relationship with the president.

As Zegart writes, once it became clear that the Agency would not, in fact, perform a thorough coordinating role of the intelligence community, it began to focus on developing its own analytic side. Unfortunately, while a burgeoning covert side could clearly add value to the intelligence mission, in the eyes of decision-makers, an additional analytic capability merely added to the vast overlapping and competing voices on any particular issue.<sup>25</sup> This has proven to be true up to the current period. Currently, with 17 agencies focused on creating finished intelligence for their particular consumer, any sense of actual coordination—even with a Director of National Intelligence—has proven elusive. I would not argue to the extreme that Zegart does, that the analytic side has withered, but I would suggest that it does not have the same exceptional role within the intelligence community that the operational side has. This is a function not only

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<sup>21</sup> Zegart, *Flawed by Design*, 171.

<sup>22</sup> Zegart, *Flawed by Design*, 172.

<sup>23</sup> Zegart, *Flawed by Design*, 186.

<sup>24</sup> Zegart, *Flawed by Design*, 186.

<sup>25</sup> Zegart, *Flawed by Design*, 190.

of it being one of many analytic services but also of the reality that the operational side of the CIA holds a monopoly on covert action, has a storied history cloaked in mystery and danger, and, after the killing of Osama bin Laden, tremendous political cachet and strategic value, both in the operational theater and the political arena.

While the operations side of the CIA is sexy and favored (in myth as well as in reality), it also is the focus, rightly, of the bulk of intelligence oversight activities. The amorphous definition of the bounds of mission has caused the reactive development of both sides of the CIA, and also, more importantly for the purposes of this project, caused a jagged mirror image development of oversight mechanisms, as they adapt to incorporate new extensions of the primary mission, to absorb rule-breaking, or, alternatively, to react and correct for rule-breaking. This variation has much to do with the nature of covert action as a tool and the highly pragmatic and practical concerns that surround its use. Regardless of the safeguards put upon this tool to ensure that laws aren't broken, that appropriate individuals are kept informed, and that Americans aren't harmed by the action, at root it holds a quirky but virtually sacrosanct role in American foreign policy. This role has remained virtually untouched in practice, although external structures for notification of its use have been developed over the decades. This stability—while sound operationally—introduces a broad range of questions in terms of the role of covert action in a democracy, the dialectical tension between executive privilege and legislative oversight responsibilities, and the appropriate level of transparency of the United States government.<sup>26</sup>

### **Organizational Culture and the CIA: Culture to Blame?**

The organizational culture of the CIA has been blamed for a calcifying and tedious bureaucratic process that among other things, has been argued, led to the failure to prevent the attacks on 9/11. This criticism has been repeated often throughout official commission reports and briefings in the last decade, but it is not understood in any nuanced fashion. Critics of the intelligence community, particularly of the CIA, want it both ways: they want to argue that the culture leads to an institutional rigidity, risk aversion, and failure to achieve operational success, while simultaneously arguing that the CIA is rogue and uncontained by the rule of law. This project tackles both sides of this issue in an attempt to understand the composition of the organizational culture, how the culture changes, how it regulates itself, and how it relates to external influences—thus, how it interacts with the external mechanisms charged with overseeing and regulating it.

While the CIA operates remotely from “regular government,” it is still an institutionalized bureaucracy with cultural norms, tasks, and performance objectives. In terms of our model of internal accountability, there is a strict hierarchical authority, standard operating procedures, and a layered review system for every piece of analytical work, as well as for every operational program. In fact, perceived problems with rigid bureaucratic operating procedures and organizational culture have formed the core of criticism of the Agency in post-9/11 analysis, contrasting with earlier criticisms of rogue behavior. While it is facile to blame something as ambiguous as “culture” for a systemic breakdown, over the years the CIA’s institutional culture has been blamed for problems as diverse as excessive secrecy, “rogue” behavior outside the

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<sup>26</sup> This introduction to the history of the CIA has been very brief. There are numerous histories of the Agency that are worth investigation for further detail.

bounds of law, risk aversion, failure to adapt to a dynamic threat environment, and analytical failure. Other criticisms have included a weak culture of collegiality and consensus within the community, balkanized, atomized and overlapping organizations and tasks, groupthink, and cherry-picking; the latter two the most common criticisms regarding the analytical components.<sup>27</sup> Further inspections revealed the complexities of analysis in a state of constant information overload and failures of agency coordination and integration.<sup>28</sup> Finally, other organizational and cultural critiques include stove-piped information—that is information proceeds through the intelligence cycle within a specific intelligence discipline, potentially leaving out alternative explanations.<sup>29</sup> Ownership of the information and delivery is thus very limited, and tends to play out in a competitive relationship between the intelligence disciplines. As can be noted from some of the examples listed above, an inordinate amount of time was spent assessing information-sharing failures and developing new approaches to inter-agency communication, with the intention of the commentary being to point to where efforts toward reform must be made. Indeed, several commentators have pointed out that there was no call for personal responsibility among the community, or from the investigators appointed to clarify how the Intelligence Community failed to stop the attacks.

While many of the investigations into recent failures, such as the 9/11 and WMD (Silbermann-Robb) Commissions, have tried to pinpoint blame, they have generally ended up with systemic critiques of the Intelligence Community overall. This means that rather than focusing on individual failures, criticism has been focused on failed connections between agencies, organizational cultures so diverse from one another that entirely different lexica and even software are used to perform similar tasks, and has also focused on the complications of communication within this framework that have made achieving mutual interests impossible. Further, even when analytical failures are discussed, failures, which could be seen as individual, the *culture* of the agency has been blamed in these analyses. Bean notes, rightly, that criticism during the post-9/11 phase of investigations focused on system or agency-level problems, never on the failure of particular individuals.<sup>30</sup> Focus on individual “failure”, such as by the CIA Inspector General on DCI Tenet and 12 other CIA officers met with severe resistance from both DCIs Goss and Hayden. The 9/11 Commission, it has been argued, strenuously avoided any mention of personal responsibility.<sup>31</sup> *The 9/11 Commission Report*, for example, pointed to the limits that a failure to share information between the FBI and CIA placed on the effective transmission of key data prior to the attacks, attributing this failure to competing and

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<sup>27</sup> Philip H.J. Davies, “Intelligence Culture and Intelligence Failure in Britain and the United States,” *Cambridge Review of International Affairs* 17 (2004): 503. See also Paul R. Pillar, “Intelligence, Policy and the War in Iraq,” *Foreign Affairs* (March/April 2006); Peter Gill, “The Politicization of Intelligence: Lessons from the Invasion of Iraq,” in *Who’s Watching the Spies*, ed. Born et al. (Washington DC: Potomac Books, 2005), 12-33. Richard K. Betts, *Enemies of Intelligence: Knowledge and Power in American National Security* (New York: Columbia University Press, 2007), 104-123.

<sup>28</sup> Davies, “Intelligence Culture,” 507.

<sup>29</sup> Mark M. Lowenthal, *Intelligence: From Secrets to Policy* 4<sup>th</sup> edition (Washington DC: CQ Press, 2009), 77.

<sup>30</sup> Hamilton Bean, “Organizational Culture and US Intelligence Affairs,” *Intelligence and National Security* 24 (2009): 483.

<sup>31</sup> See, among others, Philip Shenon, *The Commission: The Uncensored History of the 9/11 Investigation* (New York: Twelve 2008).

incompatible organizational cultures; it also issued the damning “failure of imagination” critique, a thoroughly ambiguous and contemptuous statement if there ever was one.<sup>32</sup>

These critical statements have some merit but are simplistic; an attempt to find an easy way to attribute blame and to derive an answer to the failure on 9/11. Having said that, culture does, in fact, play a role in terms of the institution itself, how it organizes its activities, and how it regulates internal behavior. The perceptions of insiders highlight a unique and insular world, one that has found a way of making extralegal and dangerous activities part of a code of siblinghood that several officers described as a “family.” This extreme level of closeness is extremely rare within bureaucracies and its importance was repeated over and over again in my interviews. This connectedness—or in military terms, cohesion—is very important in terms of creating trust within teams in order to enable them to complete risky missions, or even to sacrifice themselves to the objectives of their assigned missions.<sup>33</sup> Along with this cohesion, there is a strong sense of authority, leadership, and expected propriety in terms of behavior toward leadership. The culture fosters closeness first through rigorous self-selection; the CIA is not an organization one joins accidentally, and then through extremely high barriers to entry, including polygraph and full background check once the first phases of employment are achieved. Tradecraft is taught, either analytic or operational, and the Agency’s message of sacrifice, focus on mission, and patriotism is inculcated continually. Further, while most positions no longer require lying to one’s family about one’s employer, extreme secrecy about tasks and travel is still very much the operational norm, and open discussion about one’s employer still usually off limits. Limits are also placed on public appearances, public statements, publications, travel, outside employment, and mixing with foreign nationals.<sup>34</sup>

Among my numerous interviews, there has been an interesting repetition on the theme of “normalizing” the exceptionalism of the CIA, while at the same time highlighting the uniqueness of the Agency. I think the rationale behind this perspective stems from General Michael Hayden, who made a concerted effort to make the Agency more transparent and more “normal” in the eyes of Americans.<sup>35</sup> Thus, he personally reiterates his modest, non-Ivy League beginnings, his military service, and his devout Catholic faith frequently in order to connect with his audience. He also is renowned for using an unending number of sports metaphors to describe the

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<sup>32</sup> *9/11 Commission Report*, see ch. 11, 339-360 for a specific list of criticism regarding the Intelligence Community’s behavior leading up to the attacks on 9/11.

<sup>33</sup> The sentiment I heard repeated in almost every interview resembles Wilson’s definition of mission – “When an organization has a culture that is widely shared and warmly endorsed by operators and managers alike...” James Q. Wilson, *Bureaucracy* (New York: Basic Books, 1989), 95.

<sup>34</sup> In an interesting personal example, my co-instructor for a minor elective course at the University of California Washington Center was required to check with his ethics board on whether he would be allowed to teach, was not allowed to be paid due to fears of conflict of interest, was required to be listed as a CIA officer, lest he should try to recruit, and was not allowed to be listed as an actual instructor for the course. In a second example, my students writing Masters theses who were employed by the CIA were required, in some cases, to submit every assignment to the internal publication review board to check for classified material. In several cases, they were forbidden from writing on anything close to their areas of expertise, as well as forbidden from publishing any material drawn from the theses. As a result of this range of strenuous prohibitions on openness in academic work from the intelligence community, the program has cancelled its thesis program.

<sup>35</sup> This focus on perception is a function of interviewer intervention -- my being an outsider to the community, I believe.

exigencies of the service as well as to connect with his audience.<sup>36</sup> Finally, I would argue that his military persona and bearing contributed to the legitimacy of authority in leadership. It is interesting to note that the current D/CIA, General Petraeus, also represents these characteristics. This combination of tightly networked relationships and an intense mission focus also can introduce complications into the operational side. One former senior officer pointed to the Khost, Afghanistan case as a demonstration of the risk-taking inherent to internal operational culture. As he put it, the diligence and intent of the team led to extreme risk-taking and disaster, as eager focus on the mission objectives combined with inexperience led to sloppy security measures and the deaths of seven CIA officers.<sup>37</sup> My interview subject, a former very senior CIA official not known for outward displays of the softer emotions, had tears in his eyes when he described how the Khost disaster happened and what would have been done to prevent such occurrences in an earlier generation, the generation of the CIA's Cold War veterans, of which he was a stand-out member.<sup>38</sup>

The obverse of this closeness, insularity and hierarchical authority is not as congenial; trespassers of institutional mores and norms, particularly those dealing with confidential information, are not only punished bureaucratically, but in some cases shunned and prosecuted. Those who cross the boundaries between the "inside" and "outside" worlds are met with a great deal of suspicion, even if the role, such as the Inspector General, is instituted by statute. The CIA operates within a very Manichean universe, unsurprisingly, but organizationally, this means that it operates within a series of very clearly demarcated spheres within spheres. These spheres do not just enclose and protect the activities of the CIA from the outside world; they also exist within the Agency, most obviously through the organization of work—in divisions with very disparate cultures—and through the management of information—the compartmentalization of secret information into categories to which only select individuals have access (based on "their need to know").

Activities within the CIA are divided into two spheres: collection and covert action. Four directorates divide this work among them. Each of the directorates has a very distinct culture and incentive structure. The two most well known divisions are the Directorate of Intelligence (DI), responsible for intelligence analysis, and the Directorate of Operations (DO), recently re-named the National Clandestine Service, responsible for covert activity. The Directorate of Science and Technology focuses on technical development and has, in the past, engaged in a range of experiments as well as developed the technical mechanisms that support espionage. The Directorate of Support provides infrastructure and other logistical support at home and abroad. In terms of internal organizational structure, the divisions within the CIA each have different incentive structures, making internal oversight extremely complex. In the words of former DCIA

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<sup>36</sup> Some of these metaphors are scattered throughout this project; almost all of Hayden's senior staff used one or more in the several interviews I conducted with each of them, making me think that they admire him greatly – as all of them assert – but also that there was a strong ethos that united them when they served together. This reinforces the strength of institutional culture argument introduced here.

<sup>37</sup> Interview with Charles E. Allen, September 22, 2011. The Khost incident was ruled a failure of security when a double-agent killed seven CIA officers in a suicide attack. The double-agent had not been properly vetted, standard security measures at the base had not been taken, and the physical security of the base was compromised. To add to the tragedy, a number of those killed were the Agency's best experts on Al-Qaeda.

<sup>38</sup> Interview with Charles E. Allen, September 22, 2011.

Hayden: “CIA is not *the CIA*, it is several CIAs.”<sup>39</sup> The cultural differences between CIA divisions are clear and have been remarked upon often. The sense of a strong division in terms of potential blame and liability for retroactive criminal acts is profound, resulting in resentment among the DO against not only the OIG but also other Divisions within CIA.<sup>40</sup> Anecdotally, the film *Rendition* (2007) about a CIA situation differentiates between the “knuckle draggers” (DO) and the “pencil pushers” (DI). The nature of the different responsibilities of these divisions will be discussed in greater detail below. In more detail, General Hayden responded to the question of what had surprised him – a career intelligence officer – the most about the CIA. His response:

Actually, I was pretty familiar with it [the CIA], but there was one thing that struck me. I kind of expected it but didn’t understand how deeply important it was. And that was the fact that there were multiple cultures inside CIA. I frequently talk about when looking at the Agency from Route 123, you think it’s a singular noun. But on most days, at best, it’s a collective noun, and on some bad days it’s a plural. Each of the four big directorates has its own culture. But I respected the cultures; they were there for a reason. And I didn’t want to destroy them or threaten them, but I wanted to overlay them with a stronger Agency culture. You could have the kind of “fighter pilot” mystique in the National Clandestine Service (NCS), or the “tenured faculty” mystique in the Directorate of Intelligence (DI), but there were still some unifying themes that made you a CIA officer. And we set about to do that, fairly gently, but I thought it was important.<sup>41</sup>

Strict adherence to the constraints of the spheres is required; deviation, even in a self-proclaimed innovative agency, is permitted much less than an outsider, used to considering the CIA as rogue, wild, or evil, would expect. Methods to discover and correct questionable behavior, such as polygraphs, oaths of secrecy, required internal publication review, travel and interaction with foreigner constraints, security investigation, and even counterintelligence investigations, would be considered extreme in the outside world. With one mind, we are accustomed to considering the wild stories of counterintelligence operations, usually from the Soviet era, that sometimes occurred through the streets of Washington. It is quite different, however, to consider what such an investigation directed at an officer suspected of being a mole would look like in contemporary America. Counterintelligence will be discussed in greater depth later in this chapter; my main point here is to introduce the reader to the bifurcated mindset required to understand intelligence in this country, particularly as conducted by the CIA. This will be made clear below, but to begin: on the one hand, this is an American bureaucracy organized to be efficient and effective in completing its various tasks; on the other, the exceptional nature of those tasks, as well as the secrecy and danger involved, create a culture of control, order, and delimitation from the open democratic society the officers are, according to their mantra, dedicated to protecting.<sup>42</sup>

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<sup>39</sup> Interview with General Michael Hayden, March 9, 2011.

<sup>40</sup> Interview with case officer, March 1, 2011.

<sup>41</sup> Mark Mansfield, “A Discussion on Service with Former CIA Director Michael Hayden,” *Studies in Intelligence* 54 (2010): n.p.

<sup>42</sup> On a personal note, literature has engaged at great length with the mystery of espionage, usually conflating intelligence gathering with sexuality and high tech gadgets. Through the course of my interviews, the institutionalized bureaucratic banality of extreme activities –lying, stealing, cheating, drugging, betraying, killing -- in the name of intelligence and country was almost more shocking than anything James Bond could do, and I am not the least bit naïve about what constitutes intelligence operations.

Burton Gerber, a senior CIA operations officer who was Chief of Station in Moscow, Berlin and Belgrade during the Cold War, returning to Langley to run the Soviet Union and Eastern Europe Division, pointed out that, in his view, institutional mores required superlative professionalism and ethics as so many of the operations of officers were unsupervised, dangerous, and replete with cash, particularly during the Cold War.<sup>43</sup> Or put more directly, "As a case officer... a guy who goes out and recruits other spies abroad, I was lying and cheating and stealing," Gerber explained. "All of you were taught as youngsters not to lie, or cheat or steal. But yet we expect the people who are going to be the case officers for our intelligence agency to do those things... The question in the business of spying is, for what ends are you doing it? You are lying, cheating and stealing but it's your job and it's for the good of the country."<sup>44</sup> As David Aaron, a Church Committee task force leader and the architect of the Church Committee recommendations, which led to the current intelligence oversight system, put it, "There is a lot of internal accountability because [the CIA was part of a] culture that suggested that if you're doing illegal things, you must keep meticulous records."<sup>45</sup> Another former senior Operations officer made a strenuous point about the importance of covert actions abiding by US legal constraints; in contrast, he pointed out, "we break *their* [foreign] laws all the time."<sup>46</sup>

Former CIA Director Michael Hayden reinforced this point: "If you're doing 'illegal' activities, you need to be extra honest."<sup>47</sup> Both General Hayden and long-time CIA officer, Charles E. Allen, have made the point that the appropriate position for the CIA is to be at the extreme margin of what is acceptable. As they, and others put it, using General Hayden's phrase, the CIA should have "chalk on the cleats."<sup>48</sup> General Hayden points to a moral obligation or ethical responsibility to push to the edge of the boundaries of authority in order to keep the country safe. He has emphasized on multiple occasions that this is, in fact, a personal responsibility of Agency leadership, and an overall aspect of the institutional culture. In multiple cases, officers pointed to the visceral reactions of officers to the attacks on 9/11—not just the general shock and horror felt by many, but a feeling of shame at having let the country down.<sup>49</sup> Along these lines, then, it could be argued that the CIA has developed its own culture and internal incentive structures to support behavior that could be deemed insupportable externally – at least according to common American societal mores, but are considered necessary within the organization in order to complete the mission. In response to requirements of extremity—both of activity and legality—the internal structures and decision-making processes that contain these law-breaking activities are rigorous, well defined, and hierarchical.

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<sup>43</sup> Interview with Burton Gerber, April 13, 2010. This dynamic is well described in the book by Milton Bearden and James Risen. *The Main Enemy: The Inside Story of the CIA's Final Showdown with the KGB* (New York: Random House, 2004), which also, incidentally, stars Burton Gerber as one of the main protagonists.

<sup>44</sup> Burton Gerber, "The Ethical Aspects of Intelligence Work: The Cold War and Beyond," DePauw University, March 22, 2001.

<sup>45</sup> Interview with David Aaron, April 6, 2010.

<sup>46</sup> Interview with Stephen R. Kappes, September 22, 2011.

<sup>47</sup> Interview with General Michael Hayden, March 9, 2011.

<sup>48</sup> Interview with General Michael Hayden, April 7, 2010; presentation by Charles E. Allen, University of California Washington Center, Washington DC, Nov. 12, 2009. Interview with Charles E. Allen, Feb. 4, 2010.

<sup>49</sup> Interview with senior CIA official, September 21, 2011.

Much is made of the insularity of the CIA and its elitist attitude with respect to other agencies within the Intelligence Community. Some of the elite attitude has roots in the foundations of the Agency, when it was the bastion of the northeastern elite, with members recruited from the universities of the Ivy League. One former very senior CIA officer highlighted this attitude in a statement that CIA officers view themselves as the “chosen ones, with access to the deepest secrets, who write the best assessments.”<sup>50</sup> This official also pointed out that the CIA views itself as something *sui generis*, with a mission-focused, innovative culture based on the view that the members of this elite group are a tightly knit family that serves the President and makes sacrifices to keep the country safe.<sup>51</sup> This view was extended by a former senior operations official who views the bond between officers as one created by the willingness of active sacrifice in support of a greater good.<sup>52</sup> This operator pointed to a culture “Jesuitical in nature, with a focus on a greater mission and a clear understanding of good and evil.”<sup>53</sup> General Hayden reinforced this point in a comment about CIA personnel: “They’re just solid Americans who are very talented, doing things no one else is asked to do, and no one else is allowed to do. That’s a special vocation. And I mean that in the religious sense of the word. It’s a vocation.”<sup>54</sup>

### **Understanding Internal Process: The Intelligence Cycle**

The above was a compact overview of organizational culture within the CIA. Below, I will describe in more concrete detail how the bureaucratic tasks of the Agency are organized and conducted. This section will begin with the broadest aspect of intelligence – its work cycle, and then will progress to include oblique aspects of the intelligence enterprise, such as covert action and counterintelligence. The intelligence cycle diagrammed below is radically over-simplified, as will be discussed in the text. Rather than providing a literal roadmap for the progress of intelligence, it contributes a rather vaguer conceptualization of how it *should* look, and limits the messiness of iterations and re-drafts that cut across the clean shape represented here.

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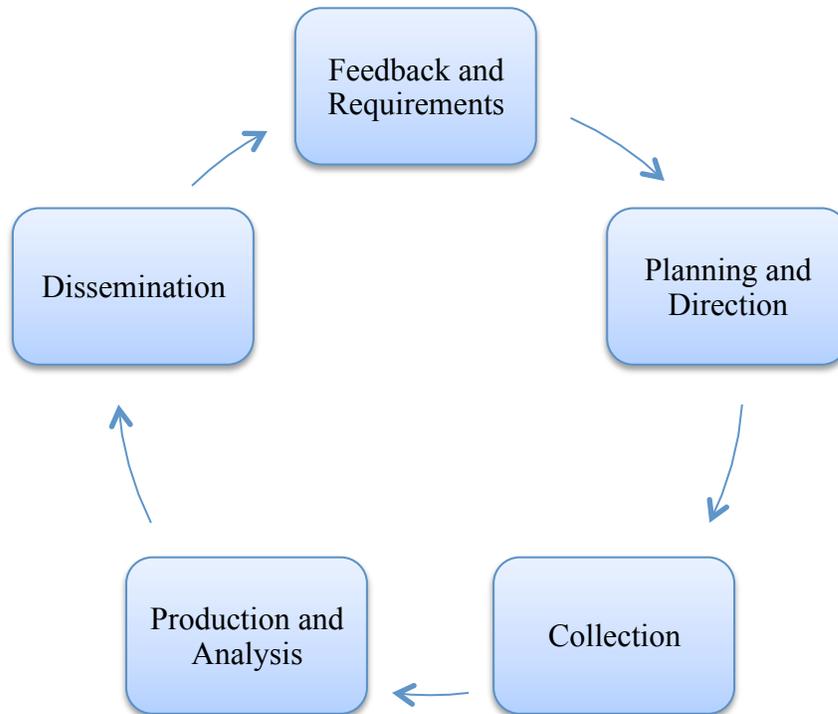
<sup>50</sup> Interview with Charles E. Allen, September 22, 2011.

<sup>51</sup> Interview with Charles E. Allen, September 22, 2011.

<sup>52</sup> Interview with Stephen R. Kappes, September 22, 2011.

<sup>53</sup> Interview with Stephen R. Kappes, September 22, 2011.

<sup>54</sup> Mansfield, “A Discussion on Service with Former CIA Director Michael Hayden,” np.



**Figure 2: Conventional Intelligence Cycle**

In almost every thorough discussion of intelligence, readers are introduced to the “intelligence cycle,” the work cycle that defines the process through which raw intelligence information is collected, processed, analyzed and returned to the decision-maker who originally required the information. Intelligence as a process can be broken down into a series of functions: planning and direction, collection, processing and analysis, and dissemination.<sup>55</sup> This “cycle”, its linearity broken by feedback loops and iterations between the segments, is a conceptual framework for the process of intelligence. As Johnson points out, “In reality, the intelligence ‘cycle’ is less a series of smoothly integrated phases, one leading to another, than a complex matrix of interactions among intelligence officers (the ‘producers’ of intelligence) and the policy officials they serve (the ‘consumers’). This matrix, a composite of intricate human and bureaucratic relationships, is characterized by interruptions, mid-course corrections, and multiple feedback loops.”<sup>56</sup> While perhaps a bit messier than some descriptions would allow, the cycle provides a useful conceptual structure for a discussion of analytical requirements.

In concrete terms, the first stage of the cycle consists of planning and direction, this is where strategic focus is chosen and resources allocated for the next step in the cycle, the collection of raw intelligence information. Subsumed under the broader tasking of collection,

<sup>55</sup> William E. Odom, *Fixing Intelligence for a More Secure America* (2<sup>nd</sup> edition) (New Haven: Yale University Press, 2003), 12-13. Loch K. Johnson, “Bricks and Mortar for a Theory of Intelligence,” *Comparative Strategy* 22 (2003): 2. Richelson, *The US Intelligence Community*, 3-4.

<sup>56</sup> Johnson, “Bricks and Mortar,” 2.

collection targets are selected, methods of collection, such as using human spies (HUMINT), or technical assets, such as satellites (TECHINT), are determined and specific assignments given to collectors. Collection during the Cold War required a different set of skills than those in demand now. Collectors, focused on the weaponry and secrets of the Soviet Union, focused on satellite photographs and secrets gained from embassy parties and electronic surveillance. Collection now requires flexibility to acquire information from non-state actors, expertise in a different set of foreign languages, and technical expertise.

After information is collected, the next stage, processing, consists of separating useful information from background “noise,” and distributing it to the next stage of the cycle, analysis. The analytical stage is where intelligence information is assessed for new developments and patterns, and “finished” into a product to be disseminated to appropriate decision-makers. Analysis is one of the most complex, uncertain and frustrating components of the intelligence cycle. Heavily dependent on subjective judgment, chance and ambiguous information, analysis must establish patterns and draw appropriate inferences out of a deluge of information that is increasing rapidly as technology develops. Wohlstetter’s classic text on the intelligence failure at Pearl Harbor points to the inherent difficulties of focusing on the “signals” amid a cascade of “noise.”<sup>57</sup> In the words of Richard Betts, “It is the role of intelligence to extract certainty from uncertainty and to facilitate coherent decision in an incoherent environment.”<sup>58</sup> During the two periods in which these two scholars were writing, the 1950s and the 1970s respectively, this problem of volume was clear; as a result of the technological developments of the past several decades, this problem is enormous and growing. The different responsibilities of the analyst include to help policymakers by: “addressing day-to-day events; apprising consumers of developments and providing related background information; assessing the significance of developments and warning of near-term consequences; and signalling potentially dangerous situations in the future.”<sup>59</sup>

While intelligence analysis was considered complex in the earlier eras, analysts now have to deal with a wider range of incoming information than ever before. While the end of the Cold War forced a change in emphasis from the Soviet Union to other states and non-state actors, the post-9/11 security environment has focused on increasing the sharing of information from a wider range of intelligence agencies—at the federal level but also descending to the local and regional level. The pressure to share, and fuse, intelligence information, while a lofty goal, has led to its own complexities, many of which must be dealt with by intelligence analysts. They must now integrate information flows from open source, other agencies, in this era of information sharing, and collectors. They also must provide specific and sophisticated intelligence reports to a wider range of consumers than ever before, exacerbated by the post-9/11 focus on increased information-sharing both horizontally and vertically among agencies within the intelligence community.<sup>60</sup> Managing these flows and assessing the information for levels of uncertainty, source credibility, and duplication is increasingly important as the volume of

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<sup>57</sup> See Roberta Wohlstetter, *Pearl Harbor: Warning and Decision* for the classic rendition of this intelligence failure.

<sup>58</sup> Richard K. Betts, “Analysis, War, and Decision: Why Intelligence Failures Are Inevitable,” *World Politics* 31 (1978): 61-89.

<sup>59</sup> Carmen A. Medina, “What to Do When Traditional Models Fail,” *Studies in Intelligence* 46 (2002): 1.

<sup>60</sup> John C. Gannon, “Managing Analysis in the Information Age,” *Analyzing Intelligence: Origins, Obstacles, and Innovations* (Washington DC: Georgetown University Press, 2008), 214-215, 217. See also Gregory F. Treverton, *Reshaping National Intelligence for an Age of Information* (Cambridge: Cambridge University Press, 2001).

information increases. This flood has exacerbated the complexities of “triaging data,” a point highlighted by several of our interviewees, that is, differentiating what the useful data is from the background volume of information.

The inflection point between analysts and decision makers exists at the next stage—dissemination—where finished information is provided to decision-makers. This is the point where the conduit of intelligence information performs its role as an information support for policy decision-making. The major challenges to the nexus between analysis and dissemination involve the matching of needs between analysts and policymakers. The relationship cannot become too close or the intelligence information can become politicized, focused on supporting a policy position rather than “objective” analysis. This dynamic can work in both directions: analysts would like to be relevant and thus would like to provide policymakers with information to support their needs; institutional culture also supports analysts’ objective of relevance—one of the gold standards of success as a CIA analyst has always been to contribute to the President’s Daily Brief (PDB), the most current and important intelligence information provided to the president each morning. The final step of the cycle is, of course, feedback from the decision-maker and thus adjustment of collection before the process begins again.

Most discussion of the intelligence cycle focuses on the weaknesses of the performance of each of the tasks as well as the weakness of the linkages between the separate task areas.<sup>61</sup> Commentary focuses on miscommunication between the actors in the various parts of the cycle, for example, between collectors and analysts, and analysts and policymakers. Examples drawn from recent political scandals highlight problems of objectivity in assessment, such as the failure of the National Intelligence Estimate (NIE) on weapons of mass destruction in Iraq, as well as the problems of politicization drawn from the same incident, when policymakers have selectively chosen intelligence information to support a policy position based on ideology rather than an objective intelligence assessment.

The weakness of the linkage between parts of the cycle is a function of human analytical fallibility, but also the inherent weakness of the parts themselves. Failure to collect enough information because HUMINT is unable to access specific types of collection targets, such as Al Qaeda cells, is one type of weakness; other weaknesses are technical, such as the inability to cover every part of the planet with satellite surveillance. Failure of analysis can result from incomplete information, analyst bias, or simple human intelligence fallibility: the infamous failure “to connect the dots” in the overused phrase drawn from the *9/11 Commission Report* is a prime example of the weakness that is inherent to the analytical part of the cycle, the core of the intelligence cycle.

### **Covert Action: the Core of Oversight Anxiety**

As described above, the intelligence cycle explains, roughly, the process through which intelligence information is processed to support the foreign policy decision-making process. This point is key to understanding the actual role that intelligence information has in the political environment. It is commonly stated that the study of intelligence is under-theorized; that there

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<sup>61</sup> Among many, see, for example, Loch K. Johnson, “A Framework for Strengthening U.S. Intelligence,” *Yale Journal of International Affairs* Winter/Spring (2006): 116-131.

aren't broad normative theories upon which theoretical literature has been built over generations of scholars. This is, perhaps, true; the literature on intelligence is remarkably thin, anecdotal, and descriptive, but as Richard Betts points out, there is no dearth of theories on intelligence failure.<sup>62</sup> Ultimately, though, most would agree that the purpose of intelligence is to support US foreign policy. All of these components are intended to work together a finished product of information that can support a specific aspect of the foreign policy portfolio.

Two other categories of intelligence operations exist outside of the intelligence cycle but are key to its effectiveness. These are covert action and counterintelligence. Covert action is at the very core of all issues of intelligence oversight and accountability because it stands outside not only regular law but can also be a tool of exceptional power in the hands of the executive. Counterintelligence involves discovering and counteracting the activities of foreign intelligence agencies in the United States who seek “to gather information about the United States that adversely affects U.S. national interests or goals.”<sup>63</sup> Counterintelligence will be discussed in the next section of this chapter and will help us return to how the tasks and culture of the Agency influence how both internal and external oversight mechanisms operate, as well as how effective they are.

Covert action is defined as “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly...”<sup>64</sup> Another description that addresses the operational detail of covert action states: “It is a program of multiple, subordinate, coordinated, interlocking intelligence operations, usually managed over a long period of time, intended to influence a target audience to do something or refrain from doing something, or to influence opinion (e.g., of the general public, business elites, or political or military leadership).”<sup>65</sup> As shown in figure 2, covert action as a category can be further subdivided into propaganda (the dissemination of non-attributable communications to affect foreign political environments); political action (assistance to individuals or groups in a foreign country—this could be through financial support, advice, or other assistance); paramilitary assistance (providing secret military assistance and advice to organizations or forces in foreign countries); and secret intelligence support (security assistance to a foreign leader to protect

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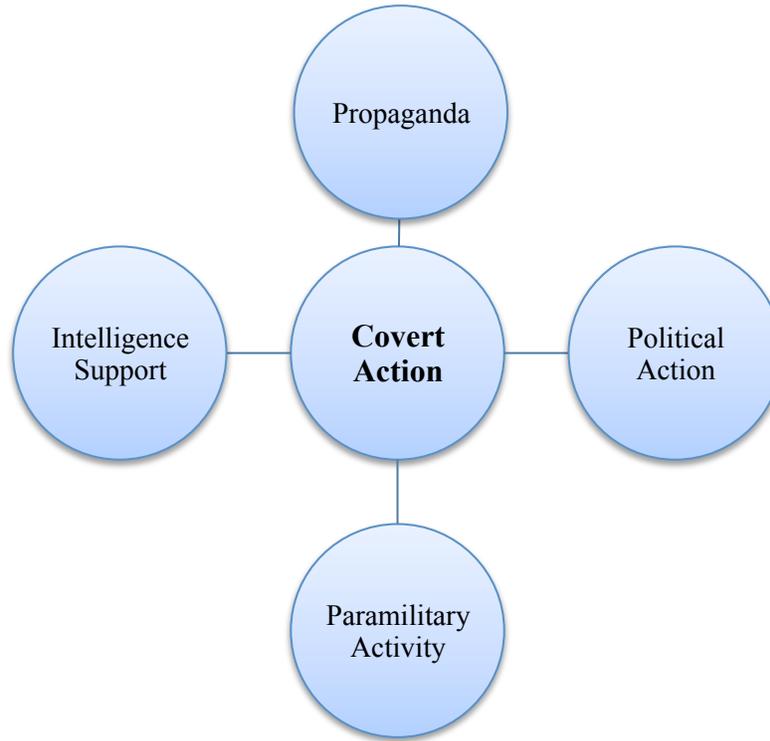
<sup>62</sup> Richard K. Betts, *Enemies of Intelligence*, 20.

<sup>63</sup> William E. Conner, “Reforming Oversight of Covert Actions After the Iran-Contra Affair: A Legislative History of the Intelligence Authorization Act for FY 1991,” *Virginia Journal of International Law* 32 (1991-1992): 876.

<sup>64</sup> Definition in Intelligence Authorization Act of 1991, Pub. L. No. 102-88, 105 Stat. 429 (1991) §503(e)

<sup>65</sup> Daugherty, *Executive Secrets*, 12.

him/her and to protect his/her government).<sup>66</sup>



**Figure 3: Covert action responsibilities**

Covert action utilizes the full range of human intelligence, including spies, militaries, aspects of the media, paramilitary activity, and more.<sup>67</sup> Some examples of covert actions include bribery, assassinations, attempts to influence elections, the overthrow of foreign governments, the dissemination of political propaganda, paramilitary activity, and, more recently, drone attacks.<sup>68</sup> Drone attacks and the use of the CIA for paramilitary purposes are worth highlighting. While paramilitary activities have had a significant role in CIA activities, stemming back to the days when the CIA was the Office of Strategic Services during World War II, there are changing trends of the military use of intelligence officers that could potentially have a significant effect on the conduct of oversight. Covert actions are organized in manifold ways. There are longer and shorter programs, programs that include officers taking risky action, and others in relatively safe locations. The programs can involve large numbers of individuals operating in multiple locations with a single central node, the hub and spoke model, or can be simpler, involving a small group focused on a single target.<sup>69</sup> While covert action now has the signal action of the killing of

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<sup>66</sup> These are common definitions but they are listed in Conner, “Reforming Oversight of Covert Actions After the Iran-Contra Affair,” 877. The subdivision of the concept of covert action is drawn from the Church Committee Final Report, Bk 1 at 141, n.2, 445.

<sup>67</sup> John MacGaffin, “Clandestine Human Intelligence,” in *Transforming U.S. Intelligence*, ed. Jennifer E. Sims and Burton Gerber (Washington DC: Georgetown University Press, 2005) 84.

<sup>68</sup> Johnson, “Governing in the Absence of Angels,” 65. Assassination has conventionally been outlawed, but recent wartime flexibilities have made it more palatable to the intelligence community, although questions of definition continue to plague legal analysis.

<sup>69</sup> Interview with Stephen R. Kappes, March 12, 2011.

Osama bin Laden as exemplar, many of the programs last for years and are focused on achieving multiple and much more wide-ranging political objectives.

Considered a method that cuts between diplomacy and overt military action, covert action has traditionally been a heavily relied-upon tool for foreign policy decision-makers.<sup>70</sup> In the words of Henry Kissinger: “We need an intelligence community that, in certain complicated situations, can defend the American national interest in the gray areas where military operations are not suitable and diplomacy cannot operate.”<sup>71</sup> The reasons for this trend are relatively self explanatory; covert action appears to allow a decision-maker to cut through bureaucratic process while allowing for distance from the activity should the operation fail. It also can be designed to achieve specific, targeted missions, minimizing risk. Because of its flexibility and deniability, it has even been said that covert action became an “addiction” for some policy-makers.<sup>72</sup> Further, as one scholar points out, it is not in the interest of the president to use restraint in terms of using covert action. In his words: “Once the hidden hand of the United States had been perceived in one event, it would be assumed to exist in every conceivable case, whether or not a particular president was observing a self-denying ordinance: if such a president did restore good faith, his successors, not he, would be the likely beneficiaries.”<sup>73</sup>

While attractive to policymakers, covert action has always been the controversial core of the requirement for intelligence oversight, and is the primary focus of external oversight activity. It is also here where friction between the executive and legislative branch has led to the creation of increasingly stringent reporting requirements. The oversight of covert activity is the primary friction point between the executive and Congress because it is perceived to infringe on the territory of both branches, and it tends to push the boundaries of what constitutes legitimate government behavior.<sup>74</sup> The issue of covert activity is also fundamental to the constitutional tension regarding how power should be shared between the branches, and is an inflection point where the asymmetric relationship between branches with regard to foreign intelligence arises. The CIA is the only US agency *officially* permitted to conduct covert action – there are caveats to this that will be discussed below. This role was not explicitly defined by statute until the 1991 Intelligence Authorization Act; prior to this point covert activity fell into a fifth directive – or “Fifth Function” of the National Security Act (1947), which ordered the CIA “to perform such other functions and duties related to intelligence affecting the national security as the [NSC] may from time to time direct.”<sup>75</sup>

According to Clark Clifford, an advisor to President Truman, this fifth function was left purposely ambiguous in order to provide room for unexpected contingencies. It also could be argued that it laid the groundwork for the plausible denial originally built in to the concept of covert action. Further, in his words, “We did not mention [covert actions] by name because we

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<sup>70</sup> MacGaffin, “Clandestine Human Intelligence,” 83.

<sup>71</sup> Henry Kissinger, NBC Evening News (1978) quoted in Loch K. Johnson, Covert Action and Accountability: Decision-Making for America’s Secret Foreign Policy,” *International Studies Quarterly* 33 (March 1989): 82.

<sup>72</sup> Rhodri Jeffreys-Jones, *The CIA and American Democracy*, 3<sup>rd</sup> edition (New Haven: Yale, 2003), 98.

<sup>73</sup> Jeffreys-Jones, *The CIA and American Democracy*, 98.

<sup>74</sup> Americo R. Cinquegrana, “Dancing in the Dark: Accepting the Invitation to Struggle in the Context of ‘Covert Action,’ The Iran-Contra Affair and the Intelligence Oversight Process,” *Houston Journal of International Law* 11 (1988-1989): 181.

<sup>75</sup> 50 U.S.C. § 403(d) (1988).

felt it would be injurious to our national interest to advertise the fact that we might engage in such activities.”<sup>76</sup> Covert action introduces moral ambiguity: In the words of Senator Frank Church in reference to covert action: “I must lay the blame, in large measure, to the fantasy that it lay within our power to control other countries through the covert manipulation of their affairs. It formed part of a greater illusion that entrapped and enthralled our Presidents—the illusion of American omnipotence.”<sup>77</sup> Further, “The moral issues attached to covert action are not unique, but they are sharper because of the presumption that the operation itself, not just the decision, can remain unconnected to the United States, thus suggesting that the larger moral questions might be evaded.”<sup>78</sup>

Finally, spies provide a range of services to policymakers far beyond their technical contributions. Most important, the spies would argue, they are a particularly convenient place to locate blame when activities go wrong, particularly as they are unable to defend themselves in public. From the perspective of former Director Hayden: “I often say the reality of the intelligence world is an element of the political leadership that wants to be free to criticize us when they feel endangered, for not doing enough, and they want to be free to criticize us for doing too much when they no longer feel in danger. That’s not just unfair and unjust, it’s inefficient. It’s no way to backstop an intelligence agency.”<sup>79</sup>

Reinforcing this viewpoint, one senior officer mentioned that the CIA is most likely to be “cut loose” in the event of a failure, political or otherwise. This officer argued that the rationale behind the CIA being a particular target of political blame is two-fold. First, as mentioned above, intelligence officers are generally not allowed to defend their actions in public. The voice of the CIA is not shared; it comes only from the Director’s office. Training, acculturation, and rules make sure this is understood by all CIA officers. Second, the CIA has no particular constituency protecting its interests, as the Department of Defense does in the form of congressmen willing to take up its cause. In terms of political use of the Agency, elective leaking of covert activities can also be used for political effect, intended to demonstrate government action on a particular issue without full-scale commitment. Public discussions of CIA activities against Al Qaeda and the Taliban in Afghanistan, and against the Qaddafi regime in Libya are three such recent examples.

The sections above have addressed the genesis of the CIA, the characteristics of its internal culture and the integration of bureaucratic authority and process into this culture. It has explained how standard operating procedures organize the many tasks of the Agency, and discussed how covert action fits within that context. The next section addresses how internal accountability is maintained by tight cooperation with the National Security Council within the executive branch.

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<sup>76</sup> David F. Rudgers, “The Origins of Covert Action,” *Journal of Contemporary History* 35 (2000): 249-262.

<sup>77</sup> Quoted in John Prados, *President’s Secret Wars: CIA and Pentagon Covert Operations Since World War II* (Morrow: New York, 1986), 337.

<sup>78</sup> Gregory F. Treverton, *Covert Action: The Limits of Intervention in the Postwar World* (Basic: New York, 1987),

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<sup>79</sup> Mansfield, “Reflections on Service, n.p.

## Covert Action and Executive Control: the National Security Council

This section begins by introducing executive branch control over intelligence, exploring how internal accountability is maintained by a strict set of procedures between the Agency and the president that determine the development and conduct of covert action. It particularly focuses on how the disconnect of plausible denial was maintained between the activities of the CIA and the president. The National Security Council is the highest—and closest—advisorial body for the president on national security matters. It is underestimated how important this distance was to early intelligence activities, and thus what a large step it was to tighten this relationship and remove the ambiguity concerning its activities, even if the circle of individuals privy to the most secret matters remained extremely small. Characterizations of rogue, ungoverned—and ungovernable—covert action run throughout coverage on the issue, both in fiction and non-fiction treatments. The truth of control and oversight of covert action is somewhat different from its portrayal, according to the operators, with strict protocols in place to govern program development and approval, regular reviews and audits by numerous supervisory bodies, and layer upon layer of legal review. As Treverton writes, “... I have been struck by the contrast between the free-wheeling image of covert action and the accountant-like auditing that is CIA practice.”<sup>80</sup> Increased oversight and multi-faceted project management have developed alongside the development of statute to clarify the practice and ensure lines of communication about the covert activities. A theme that runs throughout this project is very prevalent here: that the ends of covert action may be unsatisfactory to many on moral, ethical, or legal grounds, but the process of planning, coordinating, and undertaking a covert action is currently conducted in bureaucratic lock-step. This was not always the case, and I will illustrate this by describing briefly the history of National Security Council covert action supervision before turning to the modern implementation of executive control over covert activity.<sup>81</sup>

The NSC and CIA have worked closely together on covert action since shortly after the National Security Act (1947) was passed. As early as 1948, the CIA’s Office of Policy Coordination provided a forum where representatives from external departments such as the Department of Defense and State could convene to discuss covert action proposals.<sup>82</sup> Covert activities were authorized through Function V as well as a series of NSC directives that usually passed without much external commentary. As Johnson points out, during this early period it was not assumed that the NSC had approval authority, but rather that the CIA had appropriate approval through NSC directives such as NSC-4 and 4a, which focused on the importance of covert action in defeating international communism, as well as subsequent directives, this forum was perceived as place to exchange ideas and allow the external members to offer whatever guidance they felt appropriate, but they did not have veto power over a particular action.<sup>83</sup>

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<sup>80</sup> Treverton, *Covert Action*, 138. Interview with Stephen R. Kappes, March 12, 2011.

<sup>81</sup> As a point of interest, I asked one of my interviewees, a senior CIA officer who had served in the NSC as senior management over covert action, what term was used for the executive branch supervision over covert action. The term “oversight” was never used, in its place, management or control were used. Interview with former NSC Director of Intelligence Programs, November 14, 2011.

<sup>82</sup> Loch K. Johnson, “Covert Action and Accountability: Decision-Making for America’s Secret Foreign Policy,” *International Studies Quarterly* 33 (1989): 90.

<sup>83</sup> Johnson, “Covert Action and Accountability,” 90.

In 1954, Eisenhower created the 5412 Committee (known as the “Special Group”) to coordinate covert activity and review major covert actions. The Special Group was succeeded by a range of similar, but differently named, groups, such as the 303 Committee, and up to the Ford administration, the 40 Committee. These secret committees, composed of representatives usually from the Departments of State and Defense and relevant agencies, “oversaw” the development of covert action plans, but their impact as actual oversight seems to have been minimal. Jeffreys-Jones argues that the objective behind the new incarnations of the same mechanism was a function of its hybrid nature; it was intended to be secret, but also intended to carry the burden in place of the president if the action failed and became public. He argues that the changing names and composition of this mechanism was intended to deceive public opinion. If the group in one guise was exposed, it was quickly replaced by a reconfigured one, with a new name but generally roughly the same participants.<sup>84</sup> This, however, never proved to be very effective; the President could not usually turn to his amorphous NSC committee to take the blame when an action failed, the entity conventionally blamed for any such failure was and continues to be, the CIA. This is, at least, partially due to the unique and dependent relationship the CIA has with the president.<sup>85</sup> In support of this point, former DCI Robert M. Gates put it:

The CIA is a uniquely presidential organization. Virtually every time it has gotten into trouble, it has been for carrying out some action ordered by the president – from Nicaragua to Iran. Yet few presidents have anything good to say about CIA or the intelligence received.<sup>86</sup>

In terms of how effective early NSC mechanisms were at actually overseeing covert action, generally, participation in them was uneven and guidelines and expectations about their performance were unclear. For the most part, internal advice on covert action would be provided by a small group of close confidantes of the president, and this advice usually only given in the case of a major operation. The President and his staff, including the NSC, tended to be included only in deliberations regarding major, or particularly risky, covert actions. For the most part, the CIA had authorization to develop and conduct programs without even notifying the president as long as the programs were in line with the administration’s foreign policy objectives.<sup>87</sup>

As the Church Committee pointed out, “loose understandings rather than specific review formed the basis for CIA’s accountability for covert operations.”<sup>88</sup> Mirroring to some extent the path of legislative oversight of intelligence, this looseness and dependence on the CIA to develop and conduct covert actions with little external input seems to have lasted until the 1970s. According to the Church Committee’s findings, about 14% of covert actions between 1961 and 1975 had been approved by the NSC.<sup>89</sup> An objective behind this lack of connection between the CIA and the President on covert action was to protect plausible denial; to ensure that the

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<sup>84</sup> Johnson, “Covert Action and Accountability,” 90.

<sup>85</sup> Johnson, “Covert Action and Accountability,” 90. Interview with Stephen R. Kappes, March 12, 2011. This issue of blame being directed at the CIA due to convenience is repeated so often that it is impossible to cite the complete range of sources. More currently, this trend was very apparent during the investigation into the perceived intelligence failure on 9/11.

<sup>86</sup> Gates, *From the Shadows*, 567.

<sup>87</sup> Daugherty, *Executive Secrets*, 98.

<sup>88</sup> *Church Committee* 1976b, 50.

<sup>89</sup> *Church Committee* 1976b, 56, 57.

President could distance himself should an action go wrong. In fact, rather than constituting a check on covert activities, these early mechanisms were actually a convenient mechanism through which to deflect presidential responsibility for covert action.<sup>90</sup> In the words of former DCI Richard Helms, the early special group, under Eisenhower, “was the mechanism ... set up ... to use as a circuit-breaker so that [covert operations] did not explode in the President’s face and so that he was not held responsible for them.”<sup>91</sup>

Much like within the other branches of government, this loose, “gentleman’s agreement” format for intelligence oversight began to change in the early 1970s. During this period the activities of the CIA and the relationship of the Agency to the domestic population were very heated and contested political issues.<sup>92</sup> Part of this stemmed from the overall lack of faith in government during that period; another part was due to the opacity of the intelligence community itself. Most people knew very little about the purview and activities of the CIA, or the other intelligence agencies. Thus, when stories of domestic experimentation on unwitting individuals, harassment programs, and attempted assassinations began to percolate through society, it was difficult to understand the limits of this secret agency, particularly in terms of what the CIA was permitted to do domestically. As an example, when the issue of political assassinations was discussed in the committee hearings, even Congressmen were not entirely sure whether this type of assassination of political leaders were being conducted domestically in addition to abroad. They were not.

To begin at the start of this pivotal moment in the history of control of the CIA, President Ford, forced to cope with the Nixon resignation and an extremely tense political environment, replete with allegations of having misled the public and Congress regarding CIA operations in Chile, exposed the existence of the internal NSC oversight committee, the 40 Committee, while also focusing on the congressional role, not only in oversight, but also in the design of executive branch oversight mechanisms. Both of these moves were unprecedented in their inclusion of the public and Congress into the process of intelligence supervision. In Ford’s words:

That Committee reviews every covert operation undertaken by our Government, and that information is relayed to the responsible Congressional committees where it is reviewed by House and Senate committees.

It seems to me that the 40 Committee should continue in existence, and I am going to meet with the responsible Congressional committees to see whether or not they want any changes in the review process so that the Congress, as well as the President, are fully informed and are fully included in the operations for any such action.<sup>93</sup>

While this statement was intended to assuage any anxieties about inappropriate foreign intelligence conduct, it was released just prior to the biggest upheaval to hit the intelligence

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<sup>90</sup> Jeffreys-Jones, *The CIA and American Democracy*, 93.

<sup>91</sup> Quoted in Jeffreys-Jones, *The CIA and American Democracy*, 93.

<sup>92</sup> Jeffreys-Jones, *The CIA and American Democracy*, 194.

<sup>93</sup> Presidential Papers Ford, 1975, 150-51, quoted in Christopher Andrew, *For the President’s Eyes Only: Secret Intelligence and the American Presidency from Washington to Bush*. (New York: Harper Collins, 1995), 400.

community ever; the Hersh disclosure of decades of intelligence abuses and malfeasance conducted both *domestically* and internationally. The details of the disclosures as well as the revelations found in three separate government investigations will be described in depth in the next chapter, but what is key to the current discussion is how the political environment began to catalyze and shape legislative action with regard to oversight, as well as how the executive branch responded to encroachments on its perceived national security and, particularly, foreign intelligence territory.

Over the course of the decades following NSA (1947), covert action has been gradually defined and clarified through a series of statutes and Executive Orders. Development of oversight institutions in Congress has tended to be in reaction to public scandal that has occurred generally as a function of both perceived deviant intelligence activities and political environment, whereas the Executive has organized control based on administration policy objectives and political ideology. Executive guidance has also responded mildly to accusations of intelligence malfeasance. The following description varies between touching on the development of legislative mechanisms and executive policy decisions and orders in order to illustrate how the strands of control and oversight are intertwined.

Executive branch control of intelligence activities tends to focus on several main points: first, it usually endeavors to define covert action, including pointing out in detail what it is and who should conduct it. Second, it usually clarifies the particular administration's view of the role of the NSC vis à vis the CIA. This is a close relationship; the NSC is charged under NSA 1947 with responsibility over intelligence activities. Thus, beyond review responsibilities that are standard among legislative oversight mechanisms, the NSC is an equal partner, usually, in developing, monitoring, and correcting covert action programs.<sup>94</sup> The development of Executive Orders on covert action shows remarkable consistency even between widely divergent administrations. As is to be expected, they all guard executive privilege with regard to intelligence activities fiercely by carefully defining the activities conducted, limiting oversight within the executive branch, and carefully delimiting the terms by which they will allow outsiders access to intelligence information.

Most of the tension between the branches regarding oversight stems from the argument over how much, when and to whom this information is provided, that is, in the terms of the accountability framework—knowledge conditions. Overall, this isn't a fair debate because the relationship is entirely asymmetrical: the executive branch controls policy and controls the tools that inform policy—intelligence information—and thus, the argument is really not who is more effective at “overseeing” intelligence activities, particularly covert action, but rather, how the apertures of information that others are provided are used to provide external controls and whether and how this information is transformed into a useful flow for extra-executive decision-making regarding these types of activities. All of the explanations of policy choices regarding intelligence oversight below are deeply embedded within each president's policy framework.

While the executive branch is protective of its purview over intelligence, after the early 1970s, when intelligence activities were forced to be more transparent, it has also tended to pander slightly to the public mood of respective administrations' eras. Presidential statements

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<sup>94</sup> Interview with former NSC Director of Intelligence Programs, November 14, 2011.

regarding constraints on intelligence, particularly on covert action, could be considered almost a public relations device designed to communicate to the public diligent presidential control over intelligence activities, particularly over covert action. This nod to the requirement of public acceptance of intelligence activities appears in public statements but also in the executive orders themselves, and it all begins in the 1970s. Thus, there are two dominant themes when it comes to the information regarding covert action emanating from the executive branch; on the one hand there is the extreme executive prerogative to control this perceived natural tool of the executive branch; on the other, there is a sense that the executive should bend slightly to—not to the will of the people, which remains, as ever, ambiguous in terms of national security matters—but to a norm of responsibility and responsiveness to the American democracy and populace. This latter effect stems from the broader political environment, whereas the former stems from embedded executive privilege and the threat environment. I will illustrate this dual dynamic below in a brief exposition of relevant executive orders regarding covert action and intelligence. I have chosen to focus on three administrations—Ford, Carter, and Reagan—because they are the most relevant in terms of understanding the foundations of intelligence oversight. Their relevance stems from the fact that the turbulence of the 1970s catalyzed engagement with intelligence oversight that had ramifications for all three administrations during their respective tenures.

It is clear from the description of development above that the NSC holds a pivotal role with regard to the process of developing and approving covert actions; as mentioned throughout the text, the NSC is the highest executive branch institution responsible for guiding the president on intelligence matters, but the process itself varies—much like the NSC itself—depending on the administration. Control over covert action is an involved process, and based on my research, careful and rigorous, involving a wide range of stakeholder groups, with each step in development being carefully monitored by attorneys from the CIA, NSC, and Department of Justice.<sup>95</sup> It is very important to understand how the process of covert action approval functions in order to understand not only how intelligence oversight operates, but also to have a clear idea of the role that covert action plays in achieving foreign policy objectives, not only from the perspective of the policymakers, but especially from the side of the operators themselves.

Pre-1970s NSC control over covert action was relatively *ad hoc*, but began to be tightened incrementally after the scandals of the 1970s. According to current operators, the process is now regularized with tight iterations on proposed projects between the NSC and CIA. Authority is clear and the process of program development and review is thorough, disciplined, and thoroughly reviewed by legal staff in both the CIA and the NSC. There are at least two facets to this tight relationship: budget and legal structure. In the first case, solid support from the White House via the NSC is key to funding covert actions out of special budgets. The second aspect of this situation is more central to the oversight of covert action. Initiation of covert action projects stems from a range of agencies; it could be from a department such as State, from the NSC, or as the result of a larger, intelligence community-wide problem such as terrorism. Program initiation is usually never from the CIA itself, although this is a common misconception. While seemingly basic, the point of origin of covert action projects is a source of contention. Most of the controversy about from where the idea for an action stems is rooted in the idea that the CIA operates separately from normal modes of governmental control; that is, the assumption that operations are impromptu and conducted without review and without oversight.

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<sup>95</sup> Interview with Stephen R. Kappes, April 6, 2011.

In actuality, covert action is generated from a range of government policy *needs* and the program is developed to solve the problem that is embedded within those needs.

The first step after initiation is the passage of the proposal to Operations (now the National Clandestine Service) for project development.<sup>96</sup> Operators develop a plan to carry out the mission in a process that involves numerous CIA components, most notably the continual involvement of CIA attorneys. The actual practice of developing covert programs debunks two further misconceptions: that programs are unconstrained by legal structure and that the DCIA is not involved. In fact, lawyers are embedded throughout the Agency to determine at multiple levels where the legal line stands with regard to appropriate activity. A constant trend in all current analysis of the internal activities of the CIA is the role of attorneys and a pervasive culture of legality. Lawyers are present in all meetings. This leads all the way up to the Office of the General Counsel. One operator commented that it is not uncommon to have several lawyers from different layers of the Agency present in a meeting disagree about the legality of a particular program. Further, after review by CIA lawyers, the proposed action is reviewed by NSC lawyers, and then, most likely, lawyers in Congress after the Finding is sent to the Hill. The DCIA and DDCIA are integrally involved in the development of all programs. As the program passes up the layers of CIA hierarchy, the Director and Deputy Director of the CIA are integrally involved in the review and “scrubbing” of the proposal.

In terms of internal mechanisms, covert actions are considered, analyzed, and tested in two specific locations: the Covert Action Planning Group (CAPG) and the Covert Action Review Group (CARG). CAPG—a Directorate level working group—is convened by the deputy director for operations or the associate deputy director for operations and includes representatives from all of the components potentially involved in the action. This would include the component chief, the operations officer in charge of program management, an attorney assigned by the General Counsel’s office, component attorneys, budget managers, and other covert action specialists.<sup>97</sup> This group reviews the covert action proposal for goals, feasibility, costs, risks, coherence, and adherence to the tenets of administration foreign policy goals.<sup>98</sup>

Once any necessary adjustments are made to the program, it is then shipped up to the Agency-wide level of covert action review. The Covert Action Review Group (CARG) is particularly pertinent to the development of intelligence oversight mechanisms as, in addition to demonstrating critical and thorough involvement in the controlled development of covert action at the highest level, it was also the creature of the fallout surrounding the Iran-Contra scandal. It demonstrates the addition of another layer of internal check and control over covert action, and its creation seems to point to a high level understanding of the need for this check. Established by former DCI Robert M. Gates in 1986, the Group was originally intended to provide coordinated advice to the DCI and DDCI on “all aspects of proposed findings for covert action and changes to existing findings.”<sup>99</sup> At that time the group included the Executive Director, DDO, DDI, General Counsel, Comptroller and Director of Congressional Relations. In Gates’ words:

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<sup>97</sup> Daugherty, *Executive Secrets*, 104.

<sup>98</sup> Daugherty, *Executive Secrets*, 104.

<sup>99</sup> Gates, *From the Shadows*, 379.

While the group was created to streamline and improve the internal CIA coordination process, it was also intended to bring more intrusive oversight of covert action. Later, when he became DCI, Bill Webster would further strengthen this group and formalize its procedures. In any event, the clandestine service – I would later learn – was neither comfortable nor happy with such involvement by other parts of the Agency in its activities.<sup>100</sup>

Rooted in the covert action and political scandal of Iran-Contra, this group is still key to the development and review of covert action. Currently, it is composed of the relevant members of a range of internal CIA offices, which, in addition to Operations officers, includes the Office of General Counsel, Science and Technology and Support staff. Support Division staff plays a key role here, being the personnel required to provide logistical and other material support to the proposed operation. Congressional Affairs and Public Affairs representatives are also present, as are briefers pulled in from the relevant specialties. These members are voting members of the board, and they are responsible for approving, rejecting, or altering the operational plans presented to them by the Operations Division.<sup>101</sup> Plans are subjected to detailed scrutiny, revised if necessary, and in some cases sent back to the National Security Council with concerns.

As Kappes mentions, the CARG is a place of professional candor and is meant to be challenging and a rigorous test of potential operational plans. Core to the deliberations, according to former DCI William Webster, were answers to the following questions: “Is it [the proposed covert action] entirely consistent with our laws? Is it consistent with American values as we understand them? And will it make sense to the American people?”<sup>102</sup> Kappes revises this statement to suggest that the focus of program development is very much on whether the objectives of the proposed operation reflect policy objectives correctly. While legality is fundamental to the analysis of the feasibility of an operation, Kappes argues that a worry about public perception is less of a concern for the operators – as they leave this aspect to the policymakers. Pragmatically, questions of feasibility and effectiveness in meeting operational and policy goals are the key issues of covert program review.

One reason for the detailed scrutiny is in the nature of the type of activity. As Kappes put it, there is a level of uncertainty inherent to the conduct of covert activity. The best plans can go array and the activities are dangerous. In his words, “A lot of people can tell you how covert action starts, but no one can tell you how it ends.”<sup>103</sup> After approval by the CARG and the Director, the proposal is passed to the NSC. In process, NSC monitoring of covert activities fits into a normal bureaucratic pattern. Covert programs developed, traditionally by the CIA, come to the NSC “scrubbed” already by the CIA’s process of internal review. Covert action is perceived by the NSC, much like the NSC itself, as the “president’s program.”<sup>104</sup> Programs begin in the NSC with a working group review, upon refinement and approval, the proposal moves upward in

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<sup>100</sup> Gates, *From the Shadows*, 379.

<sup>101</sup> Interview with Stephen R. Kappes, April 6, 2011; interview with General Michael Hayden, March 9, 2011.

<sup>102</sup> William Webster quoted in James A. Barry, “Managing Covert Political Action,” *Guideposts from Just War Theory*, 21.

<sup>103</sup> Interview with Stephen R. Kappes, April 6, 2011.

<sup>104</sup> Interview with former NSC Director of Intelligence Programs, November 14, 2011.

the institutional hierarchy to the Deputies' Committee, to the Principals', and, finally, upon approval, to the president, for his signature and issuance of a finding of covert action to be sent to Congress.<sup>105</sup> As has been pointed out throughout, attorneys are involved in every step of this process, beginning with the CIA's lowest level and continuing up to the Director, before heading through the NSC's process, and, upon issuance of the president's finding, finally through congressional committee and, perhaps, legal review.<sup>106</sup> According to a senior CIA official, who had served as a director of intelligence programs at the NSC, this careful process was due to the political traumas involving the intelligence community of the 1970s and 1980s, meaning the congressional investigations of abuses in the mid-1970s and the Iran-Contra scandal of the 1980s.<sup>107</sup> The action can be denied at each of these levels, making the internal process toward approval more onerous, detailed, and controlled than is sometimes assumed.<sup>108</sup>

Findings, as has been discussed throughout this project, are a key component of intelligence oversight. As mentioned above, findings were a key step to the beginning of the institutionalization of a clear process for oversight, but also and extremely important, the cornerstone of a weakening of plausible denial. Findings themselves outline the scope and goals of the proposed activity. They outline who will be involved and the government agencies upon which the operators are authorized to call for assistance. According to one operator, the key to the writing of a finding is to find a middle ground between too broad and too specific and narrow. According to an NSC program reviewer, they also build in processes for internal review and status reporting as the program proceeds.<sup>109</sup> In order to integrate all relevant parties' opinions are sought from those potentially impacted, for example, Cabinet secretaries – and amendments are made to the Finding to incorporate them. The finding is a key legal document and is usually briefed to the president in person. Findings include four sections: Policy Objectives; Plan of Action; Risk Assessment; and Resources Required. If there could be loss of life of non-CIA personnel during the operation, the finding is known as a “Lethal Finding” and this information is conveyed to Congress.<sup>110</sup> Clear themes of iterative cleansing of programs through different levels of responsibility, overlapping responsibilities for the programs, and ultimate presidential control emerge from this description drawn from senior intelligence officers of control of covert action in the NSC.

### **An Additional Voice on Intelligence: President's Intelligence Advisory Board**

As discussed throughout this chapter, internal executive branch advisory and oversight mechanisms have a complex set of responsibilities for intelligence oversight. Whether explicit or implicit, executive branch internal overseers have a dual role: one side of their task is clearly to guide the president in decision-making regarding intelligence activities, while the other is to

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<sup>105</sup> Interview with former NSC Director of Intelligence Programs, November 14, 2011.

<sup>106</sup> Interview with former NSC Director of Intelligence Programs, November 14, 2011. Interview with Stephen R. Kappes, May 12, 2011.

<sup>107</sup> Interview with former NSC Director of Intelligence Programs, November 14, 2011.

<sup>108</sup> William E. Connor, “Reforming Oversight of Covert Actions After the Iran-Contra Affair: A Legislative History of the Intelligence Authorization Act for FY 1991,” *Virginia Journal of International Law* 32, (1991-1992): 885.

<sup>109</sup> Interview with former NSC Director of Intelligence Programs, November 14, 2011.

<sup>110</sup> Interview with Stephen Kappes, May 12, 2011; Daugherty, *Executive Secrets*, 110; Richelson, *The Intelligence Community*, 509.

provide another level of accountability for the intelligence community.<sup>111</sup> For example, the President’s Foreign Intelligence Advisory Board (PFIAB)—now known as the President’s Intelligence Advisory Board (PIAB)—composed of participants drawn from outside the intelligence community, is charged with the responsibility for advising on and helping oversee intelligence activities from within the White House. The purpose of this board is to provide an external voice to gauge the success of the intelligence community in meeting its core mission objectives.<sup>112</sup> In terms of the accountability framework, its power gradient varies dependent on the president’s pleasure. Thus, it falls outside the statutory framework that guides external accountability, but provides an added voice in review of intelligence programs internally.

By executive order, the members review intelligence performance by “assess[ing] the quality, quantity, and adequacy of intelligence collection, of analysis and estimates, and of counterintelligence and other intelligence activities.”<sup>113</sup> More specifically, the board examines the “adequacy of management, personnel and organization” of the agencies composing the intelligence community and assesses both their effectiveness and their adherence to the legal framework that constrains the community’s activities. Members have access to classified information and they are empowered to call upon intelligence officials to brief them on specific issues.<sup>114</sup> In terms of process, the PIAB reviews the activities of the intelligence community and reports its assessments directly to the president. Arguably, this board also provides a forum for the president to gather advice that will invariably be supportive to his perspective on intelligence matters. The PIAB has always served at the pleasure of the president and a position on the board is considered a plum job for those who have contributed to the president’s political ambitions and/or political party. Indicatively, in terms of their potential effectiveness, members of the board need not have any particular expertise in intelligence matters.<sup>115</sup>

This board has been in place since Eisenhower created it in 1956, calling it the President’s Board of Consultants on Foreign Intelligence Activities (PBCFIA) and hoped in a statement in his diary that it would “be able to satisfy the President, the Congress, and, if necessary, the public, on the value and suitability of our intelligence efforts.”<sup>116</sup> The influence of the PFIAB tends to vary based on the requirements and wishes of the executive it serves.<sup>117</sup> The PBCFIA, renamed the PFIAB by President Kennedy in 1961 and then the PIAB by President George W. Bush in 2008 focuses on issues of operational efficacy within the intelligence community and provides the president with outside, but experienced and cleared, opinions on where improvements can be made. As a side note, the 1950s foundations of the PIAB and the interaction between the executive and legislative branches of that time exemplify the continuous tension between executive and legislative branch sensibilities regarding oversight of the intelligence agencies.

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<sup>111</sup> Christine E. Hinrichs, “Flying under the Radar or an Unnecessary Intelligence Watchdog: A Review of the President’s Foreign Intelligence Advisory Board,” *William Mitchell Law Review* 35 (2009): 5109.

<sup>112</sup> <http://www.whitehouse.gov/administration/eop/piab>

<sup>113</sup> Executive Order No. 12, 863, 3 C.F.R. 632, 632-33 (1994), reprinted in 50 U.S.C. para 401 app. At 64 (2000).

<sup>114</sup> Quoted in Hinrichs, “Flying under the Radar,” 5110.

<sup>115</sup> Hinrichs, “Flying under the Radar,” 5110.

<sup>116</sup> Snider, *The Agency and the Hill*, 23. Eisenhower quoted in David M. Barrett, *The CIA and Congress*, 236.

<sup>117</sup> Hinrichs, “Flying under the Radar,” 5111.

In theory, the PIAB provides a useful dual purpose of advising the president and providing an additional oversight check on the activities of the intelligence community. It is, however, arguable how valuable the board actually is in terms of providing an actual productive and active oversight function. As Hinrichs points out, the board's influence is limited due to the political nature of its role; it is a tool of the executive branch subject to the vagaries of political appointment rather than a body insulated from political whim, and the fact that it has in the past had a far from frictionless relationship with the intelligence community.<sup>118</sup> As a former chief of staff of PFIAB pointed out, while PFIAB is provided valuable information and to some degree has resonance on the policy process, influence stems from relationships and persuasion, rather than on any stronger authorization to force compliance from the intelligence community.<sup>119</sup>

As current chairman, Senator Chuck Hagel confirms, the PIAB has no actual political power but rather any "so-called power" it has rests in its responsibility to advise the president, and thus to be heard by the president.<sup>120</sup> The direct connection and unadulterated access to the President does give the board some strength. As one commentator said: "If the Board had been involved in the review of anticipated covert action programs during the Iran-Contra affair, it could have advised the President of the irregularities of both the Iranian initiative and the contra resupply effort insofar as these activities circumvented established procedures."<sup>121</sup> Further, the president decides how to organize and how much to use the board, leaving its efficacy very dependent on presidential engagement. It can, thus, serve as warning device for the president, penetrating the insulation surrounding him and providing him with a divergent perspective from the agencies; can be entirely irrelevant; or can be seen as integral to the process of management of the oversight community.

While the value of critiquing intelligence community operations and strategic plans is clear, the more interesting internal oversight body for the purposes of this project is the Intelligence Oversight Board, a sub-committee drawn from the members of what is now known as the PIAB. The Intelligence Oversight Board was established in the wake of the 1975-76 exposure of widespread irregularities in intelligence operations domestically. In the on-going competition with the legislature, the IOB was intended to curtail extreme congressional incursions into executive territory. The IOB was intended to ascertain whether intelligence operations were adhering to the Constitution and to check abuses against Americans being committed by the intelligence agencies. It was charged with reporting activities that were "unlawful or contrary to executive order" to the President and Attorney General and reviewing internal agency procedures regarding the lawfulness of intelligence activities.

Procedures put in place in the 1970s created an additional reporting channel of information on intelligence activities. For example, the IOB was charged with overseeing the General Counsel and Inspector General of each intelligence agency, and it was the recipient of a mandatory report from the individual IGs every three months.<sup>122</sup> It is key here that the Inspector

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<sup>118</sup> Hinrichs, "Flying under the Radar," 5113.

<sup>119</sup> Interview with Gary Schmitt, Former Staff Director, PFIAB, April 29, 2011.

<sup>120</sup> Interview with former Senator Chuck Hagel (R-NE), Current Chairman, PIAB, June 27, 2011.

<sup>121</sup> Sciaroni, "The Theory and Practice of Executive Branch Oversight," 429.

<sup>122</sup> Executive Order #12863, President's Foreign Intelligence Advisory Board, September 12, 1993.  
<http://www.fas.org/irp/offdocs/eo12863.htm>

General—particularly of the CIA—provided a conduit of internal information to both Congress and the wider executive branch. In 2008, President George W. Bush limited the IOB’s power, terminating the board’s responsibility for reviewing the practices and procedures OGC and OIG of the agencies, and limiting its authority to refer matters to the Department of Justice.<sup>123</sup> It was argued by the administration that the powers of the IOB were limited to allow for the emergent supervisory role of the Director of National Intelligence. This is a remarkable step, however, in that the administration closed off even the most marginal independence of a highly dependent body. As the current chairman of the PIAB, former Senator Chuck Hagel, put it, President Bush “neutered the PIAB” but it was his prerogative to do so as the Board is purely reflective of presidential requirements.<sup>124</sup> It is worth pointing out here that there is mild controversy over how effective the PIAB is in terms of oversight, or in fact, in the opinion of Senator Hagel, whether the PIAB engages in oversight at all.

In October 2009, President Obama amended the Bush Executive Order and reinstated the IOB’s authority to report potentially illegal behavior relating to intelligence to the Attorney General. Interestingly, the amendment does not return review responsibility for the General Counsels and Inspectors General to the Board.<sup>125</sup> I would argue that the directing reporting mechanism to the president as well as the politicized selection process used to select board participants undercuts any objective role the board could ever have. Further, board membership tends to be seen as a symbolic role rather than a rigorous analytical responsibility. Members are chosen in some cases because of party contribution or other political donation.<sup>126</sup> Board procedure requires no regularity of meetings and the participants are not compensated for their time. It has no statutory independence from the intelligence community, and no mechanism, other than subtle advising, to change the behavior of intelligence agencies which it deems unacceptable. The participants have no established tenure or organized set of responsibilities beyond the will of the executive, and, above all, no required specific expertise in the highly technical and insular world of intelligence. Finally, there are no oversight checks on the overseers themselves within the context of this board. The PIAB is a dependent, advisory arm of the president; while it has power to query and investigate intelligence activities and I would regard it as important to include here as it does have influence on a more personal level, it is not a member of the oversight mosaic.

### **Internal CIA Mechanisms**

As has been described throughout this chapter, a strong internal culture guides the behavior of CIA officers and tight links with other executive branch entities, such as the NSC, guide specific types of intelligence programs, such as covert action, through a multiplicative legal review process. The intelligence community is imbued with this reliance on legal opinion, and this holds true for the internal structure of the CIA. Legality is also a fundamental pillar of the internal accountability framework that drives the analytical focus of this chapter. As Michael Scheuer,

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<sup>123</sup> Charlie Savage, “President Weakens Espionage Oversight: Board Created by Ford Loses Most of Its Power,” *Boston Globe*, March 14, 2008. Executive Order #13462, President’s Intelligence Advisory Board and Intelligence Oversight Board, February 29, 2008.

<sup>124</sup> Interview with former Senator Chuck Hagel, June 27, 2011.

<sup>125</sup> Executive Order Amending Executive Order 13462, EO# 13506, October 28, 2009. Text at <http://www.whitehouse.gov>.

<sup>126</sup> Interview with senior CIA official, November 8, 2010.

the former head of the Bin Laden unit at the CIA, put it: “There is no operation at the CIA that is conducted without approval of lawyers. I can’t go to the bathroom at CIA without a lawyer.”<sup>127</sup> This reliance on internal legal structure once again relies on differentiating the CIA from the outside world. The CIA’s legal culture focuses on internal structure to maintain adherence to American law, while breaking foreign laws. It is a unique arrangement, based on tight internal communication and attorneys present at all levels of CIA operations, as well as at every level of decision-making.

The Office of the General Counsel provides the CIA internal legal advice regarding the legality and appropriateness of its operations. As such, it performs an internal oversight role in terms of monitoring and guiding the operations of the CIA, particularly those of the National Clandestine Service. Internal mechanisms such as the OGC perform an interesting balancing act; they are charged with producing legal justification for Agency activities and yet they are reinforcing activities that are, in many cases, illegal. Most discussions on the internal legal capacity of the CIA focus on its role in creating a risk-averse culture among personnel. Too careful, too worried, the legal culture is deemed a hindrance to the effective conduct of necessary intelligence operations. On the other hand, the legal structure within the CIA is viewed as a fail safe for officers who are operating at the far reaches of the law. This fear of crossing over into illegality is not just present at the institutional level. Individual officers often feel that while their activities may be authorized by one administration, they may be penalized under the next for activities once judged entirely legal. This view that the political framework within which intelligence operations function is slightly unsteady runs throughout virtually all of the interviews I conducted. Many take out personal liability insurance to hedge against potential lawsuits should the next administration engage in a “look back” period.<sup>128</sup>

The General Counsel works with Director of the CIA, the Deputy Director of the CIA, and the Deputy Director of Operations. While the GC works for DCIA, he/she is a political appointee and not appointed for a term longer than the presidential election cycle. Thus the GC is bound to the political cycle and chosen, at least to some extent, based on loyalty to the president and party.<sup>129</sup> Attorneys have a range of functions within the CIA but the main purpose for all of them is to understand, decide, and explain exactly how far intelligence officers may go in their activities. It is often remarked that the role of the OGC (CIA) is to push legal constraints as far as possible in order to support the operations of the agency. As a former assistant General Counsel (CIA) points out: “Especially important are internal checks on officers who operate on the dark side. Lurking in the shadows, spymasters convince people from other countries - clerks, diplomats, soldiers, and hostile intelligence officers – to commit espionage. The challenge for U.S. clandestine operators is to induce and facilitate such lawbreaking despite the great risks that it involves.”<sup>130</sup> Further, in his oft-used metaphor, General Michael Hayden—former director of both the NSA and CIA—remarks that the proper place for the intelligence officer to operate is

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<sup>127</sup> Quoted in Jack Goldsmith, *The Terror Presidency*, 130.

<sup>128</sup> This feeling of potential risk runs throughout my interviews – not only with operators. Interestingly, the public relations officer under Tenet felt the same way – interview with Bill Harlow, March 28, 2011. General Hayden attempted to make a point to Congress by subsidizing liability insurance for his officers. Interview with General Michael Hayden, March 2, 2011. The point did not resonate.

<sup>129</sup> A. John Radsan, “*Sed Quis Custodiet Ispos Custodes*: The CIA’s Office of General Counsel?” *Journal of National Security Law and Policy* 2, (2006-2008): 210.

<sup>130</sup> Radsan, “*Sed Quis Custodiet Ispos Custodes*,” 204.

where he has “chalk on his spikes.”<sup>131</sup> This requires a legal team to understand and dissect where that changing line of chalk is.

In addition to providing legal advice to senior CIA personnel, the GC is also a sounding board for whistleblowers. CIA regulations require CIA employees to report to the GC or IG if they believe a CIA rule, executive order or the Constitution has been violated. “The General Counsel, along with the Inspector General, is supposed to provide a safe haven for employees with complaints.”<sup>132</sup> If the GC receives a complaint from an internal CIA whistleblower, it goes to the Inspector General, who will transmit the complaint to the DCIA. The DCIA then must send the complaint to the congressional oversight committees, or in some cases the employee will be allowed to appear before the committees directly.<sup>133</sup> Interestingly, a direct appearance before the committees must be coordinated with senior officers at CIA; a CIA employee cannot go straight to the Hill. The importance of whistleblowers and leaks in maintaining informal oversight over intelligence activities will be discussed in the next chapter, which engaged with the role of the public in controlling intelligence activities.

While attorneys are embedded throughout the CIA, supporting decision-making and programming, their role is internal control and not any type of oversight, in contrast to the Inspector General, the role of whom will be discussed in the next section. In the words of a former operator, while the OIG is an adversary, the OGC is definitely an ally and guide. Thus, in terms of this project, I would argue that the OGC provides a legal context and culture of legality within the CIA, helping determine appropriate behavior but not providing a check that has any sense of distance from the activity to be monitored. This culture of legality highlights, once again, the dichotomy inherent to the organization of the Agency. On the one hand, legal constraints imbue the organization with a rigid framework and set of operating principles, a practice common to most bureaucracies. On the other hand, mechanisms such as the counterintelligence function of the Agency clearly point to the exceptionalism—and strangeness—of the operations conducted there, as well as how internal control has a different role within the CIA in comparison with other agencies.

In order to understand internal control of the CIA’s intelligence operations, it is important to understand what *counterintelligence* is, how it works, and how its practice interacts with and affects the organizational culture and accountability of the Agency. The popular conception of counterintelligence tends to stem from the Cold War, a *Spy vs Spy* operation conducted through the streets of Washington or Moscow as one superpower tries to hinder the penetration of its intelligence services by the other. This image is a tiny part of the larger mosaic that constitutes the counterintelligence task. Counterintelligence is present in all aspects of the intelligence enterprise. As Lowenthal puts it: “Counterintelligence is not a separate step in the intelligence process. CI should pervade all aspects of intelligence, but is often pigeon-holed as a security issue. CI does not fit neatly with human intelligence, although CI is, in part, a collection issue. Nor does it fit with covert action. It is also more than security—that is, defending against or

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<sup>131</sup> This phrase is quoted multiple times in this project because it was used by several of my senior level interviewees, whom I had the luck to interview several times each. I believe I heard it from General Hayden himself at least three times.

<sup>132</sup> Radsan, “*Sed Quis Custodiet Ispos Custodes*,” 210.

<sup>133</sup> Radsan, “*Sed Quis Custodiet Ispos Custodes*,” 211.

identifying breaches—because successful CI can also lead to analytical and operational opportunities. In sum, CI is one of the most difficult intelligence topics to discuss.”<sup>134</sup> Lowenthal categorizes CI into three main types: involving collection and thus involving gathering information on an adversary’s attempt to collection on one’s own service; defensive counterintelligence, involving defending and countering foreign attempts to penetrate one’s service; and, offensive – direct attack on the adversary’s efforts against one’s own service. Attacks could include trying to “turn” an agent and convince him/her to spy for one’s service, or by manipulating the information given to the adversary.<sup>135</sup>

The three aspects of counterintelligence overlap and cross the boundaries of external and internal activities. What concerns us most here is how the internal use of counterintelligence can be used to maintain internal control. As mentioned earlier in the chapter, barriers of entry are high at the CIA. The polygraph is used not only to weed out undesirable potential employees, but also regularly to monitor current employees, as well as to follow up on allegations of wrongdoing among the staff. Personal behaviors are monitored carefully; these include changes in income or spending, increased debt, changes in behavior, such as increased alcohol use or deviant sexual behavior. While in earlier years, sexual issues, particularly homosexuality, would be a particular target for counterintelligence, currently finances tend to be a specific focus for internal investigation. Excessive debt could be a vulnerability for an officer; one that could make him/her susceptible to being turned by a foreign service. The increased focus on finances has come in the wake of two cases of moles within the FBI, Hanssen, and the CIA, Ames. Both spent excessively beyond their means and maintained lifestyles not deemed in accordance with their pay grades. In order to monitor finances, officers are required to submit financial disclosure forms at regular intervals. While, according to one senior CIA officer, the forms are so convoluted as to not convey much meaning, the point is the remarkable level of acceptability of invasive practices against personnel already “inside.”<sup>136</sup>

I mention the above as examples of what could be perceived of as personal infringements. There are, of course, numerous other methods by which personnel and information are controlled and tracked. The point here is, methods of counterintelligence, intended to ferret out those who are being disloyal to the US government—or, those who seem to be *at risk* of being disloyal—would be deemed transgressions of civil liberties outside of the CIA realm within which they are culturally accepted. They are accepted and, in some cases, extolled within that environment. Having said this, counterintelligence has a difficult history within the CIA and finding the appropriate balance of acceptable investigation and suspicion has proven difficult over the course of decades. This is partially due to the impact of specific personalities on the process.

James Jesus Angleton, the head of CIA’s counterintelligence division from 1954-1974, is the core of complication and suspicion when it comes to the issue of counterintelligence. Methods used to check up on employees regularly seem relatively banal, when one investigates the extent to which Angleton was willing to go to discover subterfuge within the Agency. His extreme suspicion about his fellow officers created such a level of distrust that the operations of

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<sup>134</sup> Lowenthal, *Intelligence: From Secrets to Policy*, 151.

<sup>135</sup> Lowenthal, *Intelligence: From Secrets to Policy*, 151.

<sup>136</sup> Personal communication with senior CIA official, September 14, 2011.

the CIA during that period, and for a long period after, were deeply harmed. Morale in this atmosphere of distrust plummeted and operational effectiveness dropped. This is where the concept of counterintelligence and internal control becomes very complex. CI is extremely difficult to conduct well; officers are trained and adept at developing layer upon layer of deception if required, and extraordinarily sensitive in terms of how it impacts the internal balance and on-going operations of an intelligence agency. In Jervis' words: "Since by definition it is very hard to detect a good spy and at least as hard to tell whether one of your spies has been 'turned' and is now feeding you false information and betraying secrets to the adversary, a heightened and indeed hypersensitive readiness to perceive deception comes with the territory."<sup>137</sup> He adds: "But the inevitable cost of this stance will sometimes be to see plots that do not exist, to discount accurate information, to disregard if not jail loyal informants, and to induce a great deal of paranoia within one's government if not country."<sup>138</sup> As he summarizes the problem, Jervis asks, "How can one maintain one's balance in an area where almost anything could be true, where appearances are designed to be deceiving, and in which familiar signposts may have been twisted to point in the wrong direction?"<sup>139</sup>

Regardless of whether these are officers from adversarial services attempting to outwit each other, or an internal double agent attempting to outwit his employer, these are highly skilled professionals, adept at remaining undetected. Also, what does the Agency do to deal with a suspected mole? At a very basic level, a polygraph will be conducted, an investigation started, the suspect questioned, leading perhaps to arrest, but what recourse does the Agency have if the case is inconclusive, as many of them are? It has been argued that one reason harsher punitive measures are not used is because of the danger of the wealth of knowledge the spy holds. This makes the issue of dealing with an alleged spy within the Agency an extremely complicated and dangerous Human Resources problem. It also adds an interesting dimension to our accountability framework when the crux for external accountability is access to knowledge and information, and the internal analogue is the danger of the access to knowledge and information.

The importance of CI within the context of this chapter is multi-faceted. First, it demonstrates some of the active measures taken directly at CIA personnel in order to control their behavior. Second, it once again, demonstrates the ambiguity, secrecy, and deception inherent to intelligence activities. This is not to suggest that each intelligence officer is attempting to lie to his employers or obfuscate his real allegiance, but rather that the uncertainty in terms of understanding others' motivation is a key aspect of the intelligence lifestyle. Third, it marks where a crossing of the boundaries between internal and external activities takes place. Most of the purpose of counterintelligence is to block the adversary's intelligence service from accessing information in this country, or from our services. The key piece, however, for the purposes of this argument, is the integration of this primary—external—aspect with a secondary aspect—internal—that of controlling our services from within.

Counterintelligence activities, organizational cultural expectations, and legal constraints, are all components that keep CIA personnel within the expected norms of Agency behavior. When there is perceived failure to adhere, the bureaucratic process disciplines the individual,

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<sup>137</sup> Jervis, "Intelligence, Counterintelligence, Perception, and Deception," 71.

<sup>138</sup> Jervis, "Intelligence, Counterintelligence, Perception, and Deception," 71.

<sup>139</sup> Jervis, "Intelligence, Counterintelligence, Perception, and Deception," 73.

and, in extreme cases, the Inspector General investigates any alleged deviation from the rules. The first three of these mechanisms occur in current time—they control behavior at all times, whereas the latter, the IG’s investigations, occur retroactively. The IG’s role—and the complexities of its dual nature—will be discussed in the next section. What is interesting for the current discussion is given the characteristics of the very invasive internal mechanisms maintaining order within the CIA, what are catalysts to deviate from such rigid expectations? There are many ways to deviate—one could be spying for an adversary—but that is too extreme a case to be illustrative within the current context of the subtle pressures and mechanisms of internal control. More salient is the issue of whistle-blowing on behavior that an individual deems unacceptable; behavior which others within the Agency may find necessary to the continued mission.

Internal initiatives to change behavior, such as whistle-blowing through leaking to the media, provide a substantive challenge to both the cohesive organizational culture and the internal mechanisms described here. This ties together with the investigatory mechanisms, such as the IG, described in detail below, and the counterintelligence function. Arguably, there are two sides of accountability when it comes to the leaking of information. There is a dichotomy at the point when an officer leaks information about a particular operation or issue to the media—the officer is choosing individual accountability over cohesion to the organization culture. This refusal to be bound by internal constraints is immensely complicated within a secret, national security context. It also brings up ethical issues such as where the balance between loyalty to the organization, or to one’s own sense of moral responsibility should be struck. General Hayden speaks of a personal sense of moral responsibility to push the boundaries of legality in order to protect; it could easily be the case that an officer feels that protection lies in a different direction than management’s conception—this would hardly be unusual—or that the importance of transparency to the public transcends the need for secrecy. These issues, usually painted black and white in public discussions, are immensely complex and subjective. Essentially, they introduce the question of what recourse an individual with secret information has when evidence of rule breaking is clear, and what does this recourse—or lack thereof—mean for both internal and external oversight of the CIA? Further, it introduces the question of why individuals feel the need to go to the media when, ostensibly, there are numerous other mechanisms—both within the CIA and external to it—to which they could voice their disapproval.

Leaking challenges the questions of accountability that were introduced at the beginning of this project. When asked whether oversight—the mechanism of accountability—is effective, how should efficacy be defined? On the one hand, those involved in the practices within the CIA observe that efficacy of oversight means appropriate internal *control* over intelligence activities limiting outside intervention, while those external view oversight as providing transparency, and external accountability to the other branches of government and to the public. Leaking and the statutory IG both provide a bridge across this definitional divide. These two aspects of accountability are, however, divided by the obvious division; that of legality.

In my discussion of leaking, I leave aside the highly politicized cases, such as that of former NOC Valerie Plame. Her case, due to its overt political dynamic, highly publicized portrayal, and inherent ambiguity, tends to skew toward the glamorous and victimized. The most famous example of leaking to the press based on disagreement with governmental policy

position was, of course, Daniel Ellsberg, then of the RAND Corporation, who leaked what became known as the Pentagon Papers to the *New York Times*. His trial under the Espionage Act ended in acquittal in the turmoil of prosecutorial misconduct. NSA employee, Thomas A. Drake, who leaked information on an NSA program was originally accused—also under the Espionage Act—of sneaking documents out of the NSA in order to leak them to *Baltimore Sun* journalist, Siobhan Gorman.<sup>140</sup> The case was ultimately settled when a judge required that classified information to be used as evidence by the NSA be released to the public. Rather than expose the information, the NSA withdrew their exhibits, causing the prosecution to collapse. Drake eventually pled guilty to a misdemeanor of misusing a government computer to provide information to an unauthorized person.<sup>141</sup>

The Drake case brings up a host of issues bearing on the trade-off between transparent legal procedure and protected national security material, as well as the balance between an employee's required loyalty to the government and agency, and personal views of responsibility and rectitude that may deviate from this requirement. Further, there are different types of leaks – those that expose abuses and waste in government, and those that knowingly expose national security information. The problematic ethics of drawing all of these comparisons was highlighted during the WikiLeaks scandal, which did not release any material of strategic value, but succeeded in embarrassing many in the government. While DNI Clapper stated in an interview with me that he did not think the releases were damaging to security, he did fear that a perceived lack of security of classified information could cause a chilling effect on the willingness of foreign services to share intelligence information with the United States.<sup>142</sup> Interestingly, the Obama administration, while professing support for whistleblowers, has prosecuted more leakers than all of the previous administrations combined.<sup>143</sup>

More currently, and more relevant to the issue of internal CIA control, senior CIA officer, Mary O. McCarthy, was alleged to have leaked information to *Washington Post* reporter Dana Priest regarding the secret CIA detention centers—or “black sites”—located in Eastern Europe.<sup>144</sup> The disclosures, which McCarthy ultimately admitted to providing Priest, were the basis for Priest's Pulitzer Prize-winning articles in the *Post*.<sup>145</sup> McCarthy was investigated, and given a polygraph. Some suggest, for example journalists Johnson and Shane, that when the answers to the polygraph appeared questionable, she confessed to having leaked the material.<sup>146</sup> Others think that she decided to quit the security vetting process as it was underway. She was then fired, stripped of her clearances, and escorted from the building. Her case was then referred to the Department of Justice.<sup>147</sup> CIA spokesman Paul Gimigliano explained the firing in a statement: “A CIA officer has been fired for unauthorized contact with the media and for the unauthorized disclosure of classified information. This is a violation of the secrecy agreement that is the condition of employment with CIA. The officer has acknowledged the contact and the

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<sup>140</sup> Jane Mayer, “The Secret Sharer: Is Thomas Drake an Enemy of the State?” *The New Yorker*, May 23, 2011.

<sup>141</sup> Ellen Nakashima and Jerry Markon, “NSA Leak Trial Exposes Dilemma for Justice Department,” *The Washington Post*, June 10, 2011.

<sup>142</sup> Interview with DNI James Clapper, January 25, 2011.

<sup>143</sup> Jane Mayer, “The Secret Sharer.”

<sup>144</sup> Interview with Charlie Allen, September 22, 2011.

<sup>145</sup> See David Johnston and Scott Shane, “CIA Fires Senior Officer Over Leaks,” *New York Times*, April 22, 2006.

<sup>146</sup> David Johnston and Scott Shane, “CIA Fires Senior Officer Over Leaks,” *New York Times*, April 22, 2006.

<sup>147</sup> Interview with Charlie Allen, September 22, 2011.

disclosures.”<sup>148</sup> Responses to the firing were varied, as would be expected. Some felt that Ms. McCarthy had a responsibility to report what she felt was wrong; others felt that individuals in sensitive positions should not take it upon themselves to choose what information should be published in the public media. An interesting fact that did *not* create a furor around those unfamiliar with internal CIA control mechanisms, is that Ms. McCarthy was working for the Inspector General, John Helgerson, at the time of the disclosure. The OIG is expected to be maintain a separate—and objective—stance from normal CIA operations. In addition, the discovery that McCarthy was a moderate supporter of the Democratic party added a political dimension to the situation that was exploited widely in blogs, if not as overtly in the mainstream media.

Leaking of national security information to the public is clearly a fraught issue that focuses again on the disparity between the strength of internal control in contrast to external oversight measures. In two of the most publicized cases in recent history – Ellsberg and Drake – the prosecution erred or became hopelessly entangled in trying to balance national security constraints with process and individual rights. The McCarthy case did not lead to prosecution, but it did lead to immediate dismissal. In all three of these cases, the information the leakers were trying to convey made it eventually into the public domain. In all three cases, the security agencies turned on those they felt had turned on them before evidence could be appropriately presented in court. Ellsberg’s case has faded into storied history and the Watergate incident; Drake was hounded and discredited; McCarthy was fired and sidelined.

### **Integrating Culture and Oversight through Boundary Crossing: Inspector General of CIA**

The discussion of organizational culture throughout this chapter has highlighted the opacity, secrecy, and insider mentality of the CIA world. The Manichean worldview of the CIA is represented well by the story of the CIA Inspector General. Because the IG is both insider and outsider, privy to secrets, meetings and personnel off limits to the outside world, but simultaneously, is responsible uniquely to the outside world, he/she holds a uniquely delicate position within the Agency. Further, in terms of the accountability framework, the statutory IG can contribute two aspects to internal accountability absent in the other realms of internal control mechanisms: recourse and internal independence.

With the Inspector General Act of 1978, statutory Inspectors General had been installed across federal agencies. Nominated by the president, confirmed by the Senate, and required to report to *both* the agency head and Congress, the position is unique in crossing the boundaries between the branches of government. Intended to be relatively independent, offices of Inspectors General were established with the intention that they fight fraud, waste, and abuse.<sup>149</sup> The IGs’ main responsibilities are grouped into four categories: conducting and supervising audits of agency programs and operations; providing leadership and coordination in support of improved economy, efficiency, and effectiveness of programs; preventing and detecting waste, fraud and abuse in agency programs; and keeping the agency head and Congress fully informed and current

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<sup>148</sup> David Johnston and Scott Shane, “CIA Fires Senior Officer Over Leaks,” *New York Times*, April 22, 2006.

<sup>149</sup> Frederick M. Kaiser, “Statutory Offices of Inspector General: Past and Present,” *CRS Report for Congress*, Updated September 25, 2008, 1.

about problems and recommended corrective action for these problems.<sup>150</sup> Section 5 of the original Inspector General Act, which governs reporting to agency heads and Congress is key to this discussion. It requires that agency IGs submit semi-annual reports to Congress that list agency audit details, problems, deficiencies, and failures, in addition to proposed corrective action. The individual Inspectors General are required to list what recommended corrective action had not been undertaken or completed, and also to report any matters referred to prosecutorial authorities and the results of any prosecutorial action.

Inspectors General are required to submit information on any “significant management decision” with which the Inspector General disagrees.<sup>151</sup> This requirement is intensified when the IG discovers a serious problem, and must report it to the agency head, who then has seven days with which to correct the problem and report to Congress.<sup>152</sup> The independence of the IGs’ offices is guaranteed through a range of checks. In support of their responsibility to audit agency and conduct investigations, for example, they have access to program records, information, and personnel. They can hire staff and issue subpoenas, and their activities are protected from outside interference. They report generally only to the heads of agencies, but the head may not prevent or hinder the activities of the office. Finally, in order to protect the independence of their roles, they are not allowed to take action in response to their own findings of malfeasance, but rather, must pass recommendations on the agency heads.<sup>153</sup> Follow up on the recommendations is guaranteed, or, at least, reinforced, by the reports to Congress regarding agency responses to criticism.

The Inspector General Act reinforced several aspects of a new era in governance that stemmed at least partly from the political climate of that period. In the post-Watergate environment of a crisis in government legitimacy, independent authority was considered key to improved transparency. There was also a sense that had begun to develop throughout the 1960s that bureaucracies were cumbersome, wasteful, and opaque. These views contributed to the “government openness” legislation that began in the 1960s and continued into the 1970s, including FOIA, the Government in the Sunshine Act, and a range of oversight measures.

Like most broad developments in governance and transparency, the creation of a strengthened IG CIA has roots in the 1970s investigations of intelligence abuses. Based on national security concerns, the CIA had been originally exempt from the requirement of a statutory IG at the time of the Act. There had actually been a CIA IG since 1952, but the IG was chosen from upper CIA management by the DCI and reported directly to him. The IG had limited freedom and certainly no requirement to report internal activities to any external body.<sup>154</sup> It is interesting to note that the CIA was exempted from this step toward transparency at exactly the same time that intelligence oversight mechanisms were being established in the legislative and judicial branches. To refresh, 1977 and 1976 mark the years that the House and Senate intelligence committees were established, and 1978, itself, marks the year that the Foreign

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<sup>150</sup> Inspector General Act of 1978 (as amended), 5 USC APPENDIX - INSPECTOR GENERAL ACT OF 1978 ; Kaiser, “Statutory Offices of Inspector General,” 1-2.

<sup>151</sup> Inspector General Act of 1978 (as amended), 5 USC APPENDIX - INSPECTOR GENERAL ACT OF 1978 Sec. 5.

<sup>152</sup> Margaret J. Gates and Marjorie Fine Knowles, “The Inspector General Act in the Federal Government: A New Approach to Accountability,” *Alabama Law Review* 36 (1985): 473.

<sup>153</sup> Kaiser, “Statutory Offices of Inspector General,” 2.

<sup>154</sup> Snider, *The Agency and the Hill*, 147.

Intelligence Surveillance Act (FISA) was passed and instituted in the judiciary. Internal CIA intransigence on a statutory IG was apparently mirrored by a congressional reluctance to press the CIA on this sensitive matter. This can be seen in the brief legislative history regarding the Act.

While one commission and two committees charged with investigating the intelligence abuses of the 1950-1970s—the Rockefeller Commission, and the Pike, and Church Committees—recommended strengthening the role of the Inspector General with intelligence agencies in light of their findings, this was not actually done in the CIA until after the Iran-Contra scandal of 1988. The congressional committee that investigated the Iran-Contra scandal concluded that the scandal could have been averted if the IG had had appropriate “authority and independence from the director and the administration to follow the trail where it led.”<sup>155</sup> In its investigation of the IG of that period, the Rockefeller Commission pointed out that the IG had only five staffers and its purview as well as its access to internal information was limited.<sup>156</sup> The Commission also remarked on the fact the role of the IG varied, depending on the wishes of the Director, and the size of the IG’s office was a reflection of the Director’s view on how much oversight power the office should be granted as well as how much faith he felt should be placed in the agency’s chain of command.<sup>157</sup> At the time of the Rockefeller Commission’s investigation—1975—the IG’s office had, in fact, recently been reduced from 14 to five staff members, forcing it to desist in conducting one of its primary tasks, that of component review. Even when the staff had had a larger complement, component reviews were only conducted every three to five years, and, the report points out, the staff was not always granted access to the appropriate information in order to conduct a complete review. The Director, in fact, as the report pointed out, could grant waivers for specific materials he did not wish to be provided to the Inspector General’s office.

The Church Committee noted a similar but wider range of issues with regard to the efficacy of the CIA Inspector General’s office. The main contention according to its findings was that the IG had not been granted access to important information, and had therefore been limited in its ability to conduct thorough investigations. In terms of recourse, its recommendations had been ignored, and it, in turn, was not making regular reports to the Attorney General regarding suspected illegal acts.<sup>158</sup> The Pike Committee, for its part, expanded on the Senate recommendations and suggested that an Inspector General with jurisdiction over the entire intelligence community be created.<sup>159</sup> Its recommendation was for an increase in size, as well as an increased reporting requirement, mandating that its reports be provided to other executive branch offices, for example the National Security Council.<sup>160</sup>

While pressure built in Congress for the installation of the independent new role, fundamental tension was exhibited by DCI Webster’s arguments against the need for a statutory IG. Among them was the argument that the Agency *could* be trusted. He argued that the CIA

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<sup>155</sup> Hitz, *Why Spy?*, 96.

<sup>156</sup> Rockefeller Commission Report, 88-89. See also Snider, *Creating a Statutory Inspector General at the CIA*, 88.

<sup>157</sup> Rockefeller Commission Report, 88.

<sup>158</sup> Church Committee, Book I, pp. 294-304, 394, 460-461; Book II, pp. 333-335. Snider, *Creating a Statutory Inspector General at the CIA*.

<sup>159</sup> US Congress, House of Representatives, Select Committee on Intelligence, *Recommendations of the Final Report*, House Report No. 94-833, 94<sup>th</sup> Congress, 2<sup>nd</sup> Session, GP, Washington, 1976, p. 6.

<sup>160</sup> Snider, *Creating a Statutory Inspector General at the CIA*; Rockefeller Commission Report, 88-89, 94.

could police itself and stated so vehemently in testimony before Congress. His argument was that Congress should trust the internal control already brought by a non-statutory IG.<sup>161</sup> This strenuous argument in the wake of a bruising political scandal suggests several things: first, that there was anxiety about the increased power and transparency that a statutory IG would bring to the CIA, and also that there was still benefit to arguing that the Congress, and thus also the public, should trust the CIA categorically even though all branches of government were engaged in building institutions to oversee and constrain intelligence activities at that time, and, finally, that there was still a firm belief that the organizational culture of the CIA was strong enough to maintain the appropriate level of discipline without external intervention.

Particular attention should be paid to the genesis of the position of Statutory IG in CIA and its emergent role in the network of oversight mechanisms. The political complexities that led to the creation of the role exhibit prescient dynamics in terms of the oppositional model that will be discussed in depth in the next chapter of the project, as well as on the accountability framework that is core to it. The controversy touches upon several separate themes that run throughout the history of intelligence oversight in the United States, such as executive privilege, executive information ownership, and independent oversight. Finally, and a raw vulnerability for the Agency, the role of statutory IG creates a scenario in which insider knowledge is required to be reported in full to an outside audience. Briefings to Congress on regular intelligence matters can be organized to control and limit information dissemination; the statutory IG is required by law to report any internal transgression. I must add here that I do not assert that the CIA lies or obfuscates intentionally in these cases. Rather, I think management tries hard to provide the information deemed appropriate for the oversight committees to receive so that they may engage in their supervisory responsibilities. The matter comes down to a question of a culture of control of information, and the inherent asymmetry of information between the branches of government regarding intelligence. Naturally then, drawing upon a deep cultural inheritance of intense secrecy, the Agency feels far more comfortable controlling any aperture that could allow information flow, and the position of statutory IG conflicts with every aspect of this desire for opacity. This is particularly the case because Inspectors General, generally chosen from within the ranks of the Agency, are expected to report on the activities of their own.

Ultimately it was the drive of two senators, John Boren and Arlen Specter, in the wake of the Iran-Contra scandal that proved decisive in the creation of a statutory IG in the CIA. When the scandal came to light in 1986, the IG joined the numerous other investigations of the malfeasance. While the office produced a report, it apparently paled in comparison to the other lengthy and detailed investigation reports of the time, leading Congress to assert that the IG was understaffed and otherwise ill-equipped to conduct thorough investigations.<sup>162</sup> Thus, began the debates to remove CIA's exception from the Inspector General Act, forcing the Agency to comply with this boundary-crossing oversight mechanism. While far down on the list of the institutional changes recommended during that period, the statutory IG became somewhat of a

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<sup>161</sup> Interview with Charles E. Allen, October 5, 2010.

<sup>162</sup> US Congress, House Select Committee to Investigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, *Report on the Iran-Contra Affair*, House Report No. 100-433 and Senate Report No. 100-216, 100th Congress, 1st Sess., GPO, Washington, 1987, p. 425. Quoted in Snider, *Creating a Statutory Inspector General at the CIA*; Rockefeller Commission Report, 88-89, 94.

pet project for Senator Arlen Specter. Senator Boren originally had some misgivings about this position, concerned that it could pose a hindrance to CIA operations, as well as disturb the balance of oversight mechanisms in *favor* of the internal mechanism and away from congressional control.<sup>163</sup> An unenthusiastic Boren responding to a very stubbornly anti-IG Webster, decided that rather than enforce a statutory IG immediately, he would take Webster's assertions of CIA cooperation at face value and allow him to self-monitor. He was ordered to produce reports to the committees on the activities of the IG's office, including when the DCI himself interfered in any way with the IG's activities.<sup>164</sup> Faced with entirely inadequate reports from the CIA, and potential alternative legislation from Senator John Glenn, Boren acted to introduce legislation to install a statutory IG and to make sure that the CIA IG reported to the intelligence committees. After some negotiation, the bill was signed on November 30, 1989. There was still congressional anxiety regarding an independent IG by virtue of the fact that the IG was not originally granted subpoena power under this legislation; this power was granted, in order to match the powers of other federal IGs, only in 1998.<sup>165</sup>

Installation by statute, confirmation by the Senate, and responsibility to both Congress and CIA management did not bring an end to complications surrounding the role of the CIA Inspector General. The IG crosses every sacred cultural boundary established by the CIA, but thereby is bestowed with methods of recourse and internal independence, two key factors in the maintenance of appropriate accountability. As an employee of the CIA, the IG has responsibility for monitoring the internal activities of the Agency. This includes supporting the DCIA in facilitating good management, advising the DCIA, attending high-level staff meetings, and sharing information and coordinating with other offices within the CIA. In terms of thorough oversight, the CIA IG has the key prerogatives of internal access to personnel, materials, and exigencies, as well as brings an awareness of internal culture and normative expectations in terms of performance.<sup>166</sup>

The responsibilities of the statutory Inspector General are divided into three areas: audits, inspections, and investigations.<sup>167</sup> These correspond to those areas put forth in the original Inspector General Act. Audits and routine surveys are not a serious problem to most CIA officers; investigations are a different issue altogether.<sup>168</sup> Audits are, as the name suggests, regular checks to ascertain whether components are using funds appropriately. Surveys are slightly more complex, requiring that the OIG conduct in-depth investigations on performance levels of the various components, whether that is a division, other domestic unit, or overseas station. The role of the survey is to review performance as well as assess local grievances among

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<sup>163</sup> Snider, *Creating a Statutory Inspector General at the CIA*, p. 95. Interview with L. Britt Snider, July 28, 2010. It should be pointed out here that Snider not only served as General Counsel on the SSCI but also was the second statutory Inspector General (CIA).

<sup>164</sup> *Ibid.*

<sup>165</sup> House Report 105-350, Committee Reports, 105<sup>th</sup> Congress. Section 402 matched in both House and Senate, granting the IG (CIA) subpoena power.

<sup>166</sup> Interview with former CIA official, September 17, 2010.

<sup>167</sup> Interview with former Inspector General John L. Helgerson. Interview with former chief of station, March 1, 2011.

<sup>168</sup> Interview with General Michael Hayden, March 9, 2011. Interview with former chief of station, March 1, 2011. Interview with former case officer, March 1, 2011.

officers. According to senior CIA officials, the survey is a management tool, intended to assess performance but also to understand morale and any other potential problem among personnel.<sup>169</sup>

The key point of friction, of course, is the fact that in addition to internal management responsibilities, the IG provides an additional stream of information to the congressional oversight committees, as the position also involves statutory requirements mandating that the IG report biannually to Congress. Thus, the IG introduces an interesting dynamic of “dual reporting” between the CIA and Congress. This additional stream of information is important as one former CIA officer—who had served in both the OIG and OGC—commented, Congress has a very, very limited oversight capability.<sup>170</sup> Put another way, congressional oversight committees rely on the IG because the committees have responsibility for far too much and have short attention spans; it is impossible for them to [conduct oversight] in depth. From the perspective of the IG, this relationship is fundamental to the independence of the IG as congressional committees help guide investigations and protect IG independence.<sup>171</sup>

Dual reporting has proven to be a major point of contention in the network of oversight responsibilities, because the IG actually transcends the demands of internal loyalty drawn from CIA culture. The Director (formerly the DCI) has traditionally been the point person on dealings with Congress, but the IG contributes a secondary stream of information and a resource from which Congress can demand briefings and explanations. This dual reporting requirement is extremely controversial. Former CIA Director Michael Hayden argues that dual reporting, which requires that the IG report internal CIA matters to Congress biannually, is a violation of managerial power, and even a violation of the separation of powers.<sup>172</sup> The Director of National Intelligence, James Clapper, reiterated the same point, stating that he viewed a statutory IG as essentially a bureaucratic invader, having split loyalties to the two branches.<sup>173</sup> On the other hand, many argue that the IG, having access to internal information and sources, as well as access to the Hill, holds an extremely important role with regard to intelligence oversight—perhaps somewhat more pertinent and penetrating than congressional oversight.<sup>174</sup> I would argue that the independence of the IG’s office is key to its efficacy, and the dual reporting requirement is symbolic of this independence, particularly in terms of internal independence and, thus, accountability. I would also suggest that although there is significant independence in the role, anyone determined to cross the boundaries of oppositional loyalty is likely to get crushed by CIA machinery.

In reviewing how the CIA IG compares to other statutory IGs in most “regular agencies”, the main point of control that the D/CIA exerts over the independence of the IG is the agency head’s right to prevent the IG from conducting an audit or investigation for specified reasons, such as due to national security concerns or because the investigation could harm an on-going criminal investigation. The director of the CIA is one of six agency heads to have this right, but

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<sup>169</sup> Interview with former chief of station, March 1, 2011. Interview with Peter Earnest, former Clandestine Service officer; IG inspector; Currently, Director, International Spy Museum, March 8, 2011.

<sup>170</sup> Interview with former CIA officer, September 17, 2010.

<sup>171</sup> Interview with former IG John L. Helgerson, September 29, 2010.

<sup>172</sup> Interviews with senior CIA officer, Oct. 27, 2010, Nov. 8, 2010. Interview with Michael Hayden, March 11, 2011. Interview with DNI James Clapper, January 25, 2011.

<sup>173</sup> Interview with DNI James Clapper, January 25, 2011.

<sup>174</sup> Interview with former CIA officer, October 8, 2010.

he must notify the House and Senate intelligence committees within seven days of having halted an IG investigation.

While the functions listed above tend to the rather conventional and bureaucratic, it is the investigative responsibility of the OIG that tends to catalyze extreme response among CIA officers.<sup>175</sup> This is a function of many variables, not least the extreme institutional cultural bifurcation between the other divisions, particularly between DI, responsible for analysis, and DO, responsible for covert action and other activities. Internally, there has continued to be resentment about the IG's role among the directorates. One former IG investigator argues that this is because the IG is viewed as both external and ineffective.<sup>176</sup> This same investigator pointed out that the Agency culture allowed for very little patience with activities that were perceived to distract from the mission at hand, and that taking time to participate in an IG investigation was distracting and a hindrance to effective intelligence work. Other case officers view the IG as having a particular vendetta against the Clandestine Service, and in one extreme case, a former senior operations officer characterized the IG as "evil walking upright." Another former CIA attorney pointed out that the reality of the IG's office was lost careers and indictments.<sup>177</sup>

It is clear that the IG is still a source of controversy and friction when it comes to internal oversight of intelligence. In theory the dual track reporting and unique boundary-crossing capability of the OIG should lend it a degree of independence; in actuality this has not proven to be the case. This was demonstrated by a series of clashes between former Director Hayden and the IG during his tenure, John L. Helgerson. The relationship between Hayden and Helgerson highlights a range of issues that go beyond oversight but also are relevant to an understanding of the culture of the CIA. The original catalyst for the friction was the investigation by Helgerson's office into the shoot-down of a U.S. missionary plane in Peru. The investigation lasted seven years and was considered by the Clandestine Service a targeted attempt to discredit CIA operators. Helgerson was seen as having a vendetta against the NCS. Other complaints about Helgerson included his "prosecutorial mentality" and his second-guessing of legal decisions made by the Office of General Counsel, which lead to uncertainty, a drop in institutional morale, and risk aversion.<sup>178</sup> In the words of a watch dog organization that researches Inspectors General: "... The now-departing IG at CIA has managed to focus on sensitive and controversial issues—programs whose scrutiny did not win the IG any love from his agency—that go to the agency's fundamental mission and let the American people know what is being done in their name. For instance, the CIA IG investigated the Agency's interrogation methods for alleged terrorists; issued a blistering report on its failure to prevent or warn about the attacks of September 11, 2001; and issued a report on the circumstances surrounding the shoot-down of a U.S. missionary plane over Peru, based on CIA officers' mistaken identification of the aircraft, and the subsequent cover-up."<sup>179</sup>

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<sup>175</sup> A unifying factor among all of the operations (DO, now NCS) subjects I interviewed was the emotional, aggrieved and frightened response to OIG investigations.

<sup>176</sup> Interview with former CIA officer, April 11, 2011.

<sup>177</sup> Interview with former CIA attorney, April 21, 2010.

<sup>178</sup> Walter Pincus, "Lawmakers Criticize CIA Director's Review Order," *The Washington Post*, October 13, 2007.

<sup>179</sup> POGO Report, 2008, p. 20. *Inspectors General: Accountability is a Balancing Act* (Washington DC: POGO, 2008). For the IG report on the 9/11 attacks, see Central Intelligence Agency, Inspector General, *OIG Report on CIA Accountability With Respect to the 9/11 Attacks: Executive Summary*, June 2005, publicly released April 2007.

The mistaken shoot-down was followed by Helgerson delving into even more controversial Agency operations, such as investigations in CIA policies on detention, interrogation, and rendition methods. For example, in one report Helgerson argued that interrogation procedures authorized by the CIA might violate some provisions on the International Convention Against Torture. In addition to the concerns involved with potential violations of international law, Helgerson also pointed out that the techniques could expose CIA officers to legal liability.<sup>180</sup> While the issues themselves are still very sensitive, the major grievance directed toward Helgerson by Agency operatives was that his methods were viewed as unfair and particularly unfairly directed at the clandestine side of Agency operations.<sup>181</sup>

The friction between the OIG and other components of the CIA came to a head in 2007, when General Hayden launched an internal management review of the Office of the Inspector General. Conducted by senior aide to Hayden, Robert L. Deitz, the review—all of the individuals involved in the proceedings took pains to remark that it was not an investigation, or a probe, but rather a “management review”—was quite controversial. The investigation caused a minor uproar within Congress and among others familiar with the IG process. In the words of the first CIA statutory IG, Frederick P. Hitz, “I think it’s a terrible idea. Under the statute, the inspector general has the right to investigate the director. How can you do that and have the director turn around and investigate the IG?”<sup>182</sup> Hitz also pointed out that friction between the OIG and other components within the CIA is quite natural, including friction between the OIG and Office of General Counsel when the OIG contests specific legal decisions after the fact.<sup>183</sup>

Criticism from both Republicans and Democrats on the Hill suggested that the investigation—or review—could have a “chilling effect on Mr. Helgerson’s independence.”<sup>184</sup> Further, in the words of Representative Silvestre Reyes (D – TX), then chairman of the House intelligence committee, the investigation into the IG was “‘troubling’ because of its possible impact on the official’s independence, ‘which Congress established and will very aggressively preserve.’”<sup>185</sup> Senator Kit Bond supported this opinion by stating that Congress depends heavily on the IG to help oversee CIA activities, and by reinforcing the IG’s role, he would “be watching carefully to make sure that nothing is done to restrain or diminish that important office.”<sup>186</sup>

The ultimate outcome of the review was the installation of a series of internal procedures to protect individual officers during IG investigations. Among them, the position of ombudsman

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[https://www.cia.gov/library/reports/Executive%20Summary\\_OIG%20Report.pdf](https://www.cia.gov/library/reports/Executive%20Summary_OIG%20Report.pdf) (Downloaded March 18, 2009); Central Intelligence Agency, Inspector General, *Key Unclassified Conclusions from CIA Inspector General Report: "(U)Procedures Used in Narcotics Airbridge Denial Program in Peru, 1995-2001,"* August 25, 2008. [http://hoekstra.house.gov/UploadedFiles/Peru\\_Release\\_Key\\_Unclassified\\_Conclusions\\_from\\_CIA\\_Inspector\\_General\\_Report.pdf](http://hoekstra.house.gov/UploadedFiles/Peru_Release_Key_Unclassified_Conclusions_from_CIA_Inspector_General_Report.pdf) (Downloaded March 6, 2009)

<sup>180</sup> Douglas Jehl, “Report Warned CIA on Tactics in Interrogation,” *The New York Times*, November 9, 2005.

<sup>181</sup> Mark Mazzetti and Scott Shane, “Watchdog of CIA is Subject of CIA Inquiry,” *The New York Times*, October 11, 2007.

<sup>182</sup> Mazzetti and Shane, “Watchdog of CIA is Subject of CIA Inquiry,” *The New York Times*, October 11, 2007.

<sup>183</sup> Mazzetti and Shane, “Watchdog of CIA is Subject of CIA Inquiry,” *The New York Times*, October 11, 2007.

<sup>184</sup> Mark Mazzetti, “CIA Chief Defends Review on Agency’s Inspector General,” *The New York Times*, October 23, 2007.

<sup>185</sup> Walter Pincus, “Lawmakers Criticize CIA Director’s Review Order,” *The Washington Post*, October 13, 2007.

<sup>186</sup> Pincus, “Lawmakers Criticize CIA Director’s Review Order,” *The Washington Post*, October 13, 2007.

was created to listen to CIA officers' concerns as well as to ensure the fairness of internal agency investigations. Interviews must now be recorded and a quality control officer has been installed in the office to make sure all evidence in each investigation is appropriately considered.<sup>187</sup> In response to the procedural changes to the IG's office, Senator Ron Wyden (D- OR) stated: "I'm all for the inspector general taking steps that help CIA employees understand his processes, but that can be done without an approach that can threaten the inspector general's independence."<sup>188</sup> Helgerson retired from the Agency in 2009, to be replaced eventually by David Buckley, more than 18 months after Helgerson's departure.

## Conclusions

There are several layers of control over the activities of the CIA, not a least a strong internal culture that has established institutional norms intended to guide personnel in activities that may be extra-legal. This culture has developed over decades and has contributed to an institutional insularity built upon secrecy, privilege, and exceptional mission. The CIA is also extremely closely linked to the president, and considers itself purely an executive branch tool. I have explored the internal operations of the CIA and the executive branch's internal accountability mechanisms by focusing on the five categories that constitute it: hierarchical authority, bureaucratic process, organizational complexity, legality, recourse, and internal independence. These categories provide a framework with which to assess the integral characteristics of internal accountability, as well as to understand whether internal accountability breaks down in the face of perceived external onslaught.

In terms of the accountability framework, internal accountability is strong on all fronts. It faces crisis only when confronted with an actor who has allegiances to both the internal ecosystem and the external world. The statutory Inspector General creates a new dimension in accountability as differentiated between internal and external throughout this project. This role provides great analytical traction on the conceptual understanding of accountability, but ultimately very little in terms of active internal control. I would argue, substantiated by the majority of intelligence officers I interviewed, that the Inspector General trades off internal authority and legitimacy for independence and external validity. The role does not match the circumstances – and the weaknesses – of external accountability in the face of a strong internal culture and set of control mechanisms. The boundary crossing edifice is broken down too easily by both the strength of internal control and the weakness of external accountability.

Finally, as a matter strictly of policy, the issue of internal control of CIA activities is complicated *in stasis*, but additional questions are equally complicated, such as do and should these parameters shift to engage with a continually changing political environment and a set of emerging and evolving threats? One commentator referred to the development of intelligence oversight as the result of "fungible absolute rules"; the rules are in place until they must adapt to a new exigency.<sup>189</sup> Another intelligence officer who had served as a high level legal counselor in two major intelligence agencies described the difference between private sector law and legal

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<sup>187</sup> Mark Mazzetti, "CIA Tells of Changes for Its Internal Inquiries," *The New York Times*, February 2, 2008.

<sup>188</sup> Mazzetti, "CIA Tells of Changes for Its Internal Inquiries," *The New York Times*, February 2, 2008.

<sup>189</sup> Presentation by David G. Brooks, International Spy Museum, Washington DC, Feb. 7, 2011. While I find the phraseology odd here, the concept is very apt.

support of the intelligence mission by pointing out the difference in legal focus: in private practice, the attorney's objective is to limit risk by making sure the client stays well within the law. In bounding intelligence, the attorney provides the service of finding how close to the law the client may come before breaking it.<sup>190</sup> This means that as the threat adjusts, the functional constraints on intelligence activities adjust with it. This dynamic is the key to a holistic understanding of oversight. Oversight itself must be forced to adjust to the flexible culture and process of changing intelligence, which, in turn, must adjust to the exigencies of the demands of the threat environment.

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<sup>190</sup> Interview with senior CIA official, Nov. 8, 2010.

## Chapter 3:

### External Accountability: Congress, Opposition, and Oversight Development

*As far as Congress is concerned, oversight of the executive branch is motherhood. Oversight of the CIA is motherhood, apple pie, and the 4th of July wrapped into one.<sup>1</sup>*

L. Britt Snider

*The old tradition was that you don't ask: It was a consensus that intelligence was apart from the rules ... that was the reason we did step over the line in a few cases, largely because no one was watching. No one was there to say don't do that.<sup>2</sup>*

William Colby, DCI, 1973—1976

In the executive branch, accountability refers to internal mechanisms responsible for meeting presidential requirements in terms of support for foreign policy objectives, legality, and efficacy. Efficacy in this context is operational: does a specific project meet the particular needs of the executive, and is it legal? Does it fit within the broader panorama of foreign policy requirements and objectives? What could the consequences be if the project fails? What collateral damage could there be from the program?<sup>3</sup> In the early years, this also meant asking whether the program could be traced to the president, or whether that particular connection could be denied if the program were discovered—in the intelligence term of art, plausible denial. Within the CIA itself, internal accountability focuses on internal authority, requiring formal internal hierarchy, established bureaucratic processes, recourse, and, finally, internal independence of the mechanism. These processes are in place to constrain the behavior of personnel to align with internal expectations and the overall objective of the CIA's mission. These processes are locked firmly in hierarchical chain of accountability that leads to the Director. The one role deviating from this hierarchy is the Inspector General, statutorily independent from this chain, but also responsible to it. External accountability, the focus of this chapter, explores the development of congressional oversight mechanisms that hold the intelligence community responsible for its actions; serve as information conduits for intelligence information among the intelligence community, Congress, and the public; and serve as a check on the activities of the intelligence services.

In order to understand the development of external accountability, I will analyze it through a theoretical framework that divides the necessary characteristics of effective accountability into five categories: knowledge conditions; organizational complexity; external independence; temporality; and transparency. As I describe the development of legislative oversight mechanisms, I will gauge how change affects each of these categories, providing a snapshot of the mechanisms at a series of pivot points. Beyond providing a succinct history of

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<sup>1</sup> Snider, *Creating a Statutory Inspector General at the CIA* (Washington DC: CIA, 2001).

<sup>2</sup> Quoted in Loch K. Johnson, *A Season of Inquiry* (Chicago: Dorsey Press, 1988), 7.

<sup>3</sup> These questions reflect those asked of the developers of covert projects by internal program reviewers.

the institutional development of the mechanisms, the objective of this chapter is to pinpoint where and why external accountability weakens. Whereas internal accountability remains relatively robust, external accountability has tended to break down time and again. Overall this is due to the inherent information asymmetry that characterizes the relationship between the intelligence community and the external world, but I seek to narrow in on which categories listed above are challenged and how this occurs at each pivot point. This will not only provide a more granular view of development, but will also allow for more refined and specific prescriptions for change. Change in the relationship between the overseer and the “overseen” is driven by a need to “rebalance” the asymmetry that characterizes the relationship. The friction in this relationship drives development of the oversight mechanism.

Legislative oversight has developed incrementally over the last four decades. The development has been characterized by friction with the executive branch as well as internal congressional friction characterized by countervailing political impulses that undercut its authority and efficacy. This type of adversarial interaction extends beyond the normal charges of obstructionism typically levied at the executive and focuses on how contrasting conceptions of accountability extend deep into the practical matters of actual oversight. Rather than simply being an opaque entity determined to keep intelligence information secret from legislators, the executive has its own internal control mechanisms, intended to serve a different set of objectives—namely service to the president and his foreign policy goals—and to function under a different operational code. Executive accountability differs from legislative conceptions of accountability, according to which Congress stands in for the public and accountability is the result of transparency through oversight. This relationship is laden with friction and is the determinative variable in why oversight has developed incrementally and unevenly, and why it continues to function at a level that is sub-optimal. I term this dynamic process *oppositional oversight*—the tension between the branches serving as the driver for change in oversight mechanisms. Oppositional oversight as a model for interaction highlights how the two branches use specific asymmetric tools to adjust their leverage on the engagement. For example, the executive manipulates information control, while the legislative branch uses the public as a lever for gain. While this is quite a simple concept, the effect is complex, dynamic, and *lasting*. We continue to see the same types of oppositional manipulations used now as we saw in the very earliest years of earnest congressional oversight of intelligence.

While conflict about objectives between the branches is built into the structure of the governmental separation of powers, conflict with regard to intelligence oversight is unique. It is one area where government goals are diametrically opposed, with the executive wanting—and *needing*—to maintain secrecy, while the legislative branch demands information, transparency, and relative openness. Further, conflict about oversight also occurs *within* the legislative branch, a function of the reordering of priorities that cross the lines of branch loyalty and engage with issues, such as the politicization of security, partisanship, and the traction that specific intelligence issues have on the process of intelligence oversight. To gain analytical traction on this issue, I pose and explore a series of questions. How do the inter-branch dynamics involved in oppositional oversight contribute to the incremental development of congressional oversight? How has this dynamic contributed to the sub-optimal development of congressional oversight over time? Given that the major impetus for oversight change has been competition between the branches, how and why do congressional overseers weaken their own efficacy and authority?

This chapter begins with a brief history of the development of the oversight of intelligence, tracing the core themes that contribute to oppositional development. It introduces the institutional structures and describes the interlocking oppositional dynamic between the branches. It relies on three pivot points to establish analytical traction on institutional development of the oversight mechanisms: the intelligence abuses scandals of the 1970s, the Iran-Contra scandal, and the post-9/11 reorganization of the intelligence community. These events have defined both the structure and expectations of external oversight of intelligence activities, while at the same time have acted to draw different boundaries around internal controls over secrecy in the executive branch. The two scandals changed the relationship between the executive and legislative branches, while the third event, post-9/11 structural reorganization, has changed the structure of the intelligence community, the role of the intelligence community in the United States, and the culture surrounding intelligence activities. Finally, the institutional development of oversight will provide the foundations for an analysis of how and why current congressional decision-making has persisted in weakening intelligence oversight. It analyzes where countervailing internal political trends have caused overseers to dull the efficacy of their own function.

### **Legislative Oversight: History and Development**

The National Security Act of 1947, which created the Central Intelligence Agency, also required that the president keep Congress “fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity”...<sup>4</sup> Congressional oversight reinforces the ideal view that elected representatives stand in for the public and support their interests even when matters are technical and secret. The tool of oversight places intelligence activities in an accountable relationship to the other branches of government and the public. It is institutionalized, formal, and represents a clear and established example of the balance of powers, and it is responsible for authorizing programs and activities, and appropriating funds for these activities. This long-established modus operandi notwithstanding, criticisms of the intelligence community in the wake of 9/11, and the subsequent steps toward reorganization, including the addition of a new agency, and the transformation of mission among existing agencies, have all challenged the traditional organization and expectations regarding congressional oversight of intelligence. Post-9/11 organizational changes as well as the challenges of an emergent threat that requires unorthodox tactics have increased pressure to find answers to the questions of how to maintain the accountability of the intelligence community to the rest of the government and to the public it serves.

The concept that national security is the purview of the executive is deeply embedded in American culture and governance. Adherence to the “deference theory,” the convention that the other branches of government defer to the executive on issues of national security, has been the norm for decades, and provides a bastion for the oppositional concept I am introducing here. Custom has provided since the founding of the republic that decision-making on foreign policy and security rests in the hands of the chief executive, and intelligence activities are core to both of these functions. The upheavals of the 1970s, however, provided a political context in which public challenge to the engrained tradition of the exceptionalism of national security issues—

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<sup>4</sup> 50 U.S.C. § 413 (b) (2006). The National Security Act of 1947, as amended.

with mystery surrounding intelligence activities deeply culturally entrenched—could be challenged. For the first time, secret government activities were considered something to which the public could or should have access. Constraints on secret activities taken as given in our current environment are actually only a few decades old. From World War II to 1972, for example, warrantless surveillance conducted by the executive went both unquestioned and unsupervised.<sup>5</sup>

The current form of active, institutionalized intelligence oversight was thus a reaction to the political upheavals and uncertainty of the 1970s. The Vietnam War, public outrage in response to the Watergate scandal, and President Nixon's perceived political misuses of both "national security" and "executive privilege" had by 1974 created both a charged political environment and a skeptical public attitude toward government.<sup>6</sup> When, in late 1974, revelations emerged of long-term intelligence activities that had not only crossed boundaries of legality but had also focused on the American population, the result was widespread public uproar.<sup>7</sup> In the words of former DCI Colby: "All the tensions and suspicions and hostilities that had been building about the CIA since the Bay of Pigs, and had risen to a combustible level during the Vietnam and Watergate years, now exploded."<sup>8</sup> The public challenge to the sanctity of intelligence operations demonstrated how immediate public reaction to an intelligence scandal could gain traction on the policy process regarding issues that had been seen as clearly out of public reach prior to that time. Seymour Hersh wrote in some detail of the CIA's involvement in domestic spying against US citizens. The first sentence of his piece set the tone for public response: "The CIA, directly violating its charter, conducted a massive illegal domestic intelligence operation during the Nixon Administration against the antiwar movement and other dissident groups in the United States, according to well-placed government sources."<sup>9</sup> This was the first of several days of above-the-fold exposés of intelligence activities. Interestingly, the catalogued activities brought to public attention by Hersh's article had been collected and organized by the CIA itself, in an effort to understand the depth of its involvement in the Watergate break-in.<sup>10</sup>

Determined to explore the depth of the CIA's involvement in Watergate, James R. Schlesinger, the Director of Central Intelligence, and Deputy Director for Operations William Colby, in the midst of a deep reform of the Agency, had issued an order on May 9, 1973, requiring CIA employees to report "on any activities now going on, or that have gone on in the past, which might be considered outside the legislative charter of the Agency."<sup>11</sup> Further, he

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<sup>5</sup> Barbara Ann Stolz, "The Foreign Intelligence Surveillance Act of 1978: The Role of Symbolic Politics," *Law and Policy* 24 (2002): 274.

<sup>6</sup> Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978), 9.

<sup>7</sup> Seymour Hersh, "Huge CIA Operation in US Against Antiwar Forces, Other Dissidents in Nixon Years," *The New York Times*, Dec. 22, 1974.

<sup>8</sup> Colby quoted in Johnson, *A Season of Inquiry*, 11.

<sup>9</sup> Johnson, *A Season of Inquiry*, 11.

<sup>10</sup> The potential connection between the CIA and Watergate was through Howard Hunt, a former CIA employee, who by the time of the Daniel Ellsberg trial for release of the Pentagon Papers in April 1973, had already been convicted of the Watergate break in. During the course of Ellsberg's trial, it was discovered that Hunt had been a member of the team who burglarized Ellsberg's psychiatrist's office.

<sup>11</sup> Memo from Schlesinger to CIA staff, quoted in Rhodri Jeffreys-Jones, *The CIA and American Democracy*, 191.

demanded to be informed if any employee received an order that appeared “in any way inconsistent with the legislative charter [NSA 1947].”<sup>12</sup> As is further noted in the text of what became known as the “Family Jewels,” the DDO asked specifically for listings of events that could potentially have “embarrassment potential” for the Agency.<sup>13</sup> The submissions from CIA personnel were compiled by the Inspector General into a 693-page document, classified, and titled the “Family Jewels” because the substance was considered sensitive and potentially damaging to the CIA if released outside of the Agency.<sup>14</sup> Included among them were previews of later revelations: descriptions of domestic surveillance, experimentation with drugs on unwitting subjects, surveillance of American journalists, and descriptions of CIA activities in conjunction with other domestic agencies. In a secret annex, the CIA’s involvement in assassination attempts against foreign leaders was described.<sup>15</sup> While Schlesinger had ordered the assembling of the Jewels, he had moved on to become Secretary of Defense by the time they were complete. His successor, William Colby, was left to decide how they should be brought to congressional attention, particularly as he was coming up for confirmation as the new DCI.<sup>16</sup>

The creation of the Family Jewels raises an important point with regard to information control within the CIA. The CIA has byzantine methods for handling information. Information is stored in separate streams within the Agency—the abused term “need to know” describes when an officer attains access to a specific set of data. Information is thus compartmented so the least possible number of individuals have access to it. This process clearly complicates both internal and external oversight of CIA activities by making internal information opaque even to senior level managers. This problem would arise again during the Iran-Contra scandal, and is continual in terms of the categories included in my accountability framework.

In the face of the period’s negative attitude toward the intelligence, Colby felt that opening the Jewels would protect the CIA, protect his nomination, and would hedge against further intrusion from external parties. A voluntary briefing also allowed the CIA to control what information was offered to Congress. Colby briefed Senators Stennis and Symington of the Senate Armed Services Committee and Representatives Hebert and Nedzi of the parallel House Armed Services Committee. Those briefed focused on whether such activities existed only in the past and whether they would be allowed in the future.<sup>17</sup> Of all four men briefed, Congressman Nedzi was the only individual to ask specific questions and to query whether the Jewels should be released to the public as a “catharsis of the past and a barrier against their repetition in the future.”<sup>18</sup>

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<sup>12</sup> Daniel L. Pines, “The Central Intelligence Agency’s “Family Jewels”: Legal Then? Legal Now?” *Indiana Law Journal* 84 (2009): 641. See also CIA, *Family Jewels* 00418 (1973) at <http://www.foia.cia.gov>.

<sup>13</sup> *Family Jewels*, Memorandum, 15 May 1973, 36.

<sup>14</sup> The Inspector General (CIA) was not statutory at this point. He was a part of the upper management structure with no external reporting requirements.

<sup>15</sup> *Family Jewels*, 00418 (1973). William Colby, *Honorable Men: My Life in the CIA* (New York: Simon and Schuster, 1978), 340-342. Much of the literature documenting the CIA’s drug experiments was destroyed in 1972 internally.

<sup>16</sup> Colby, *Honorable Men*, 345.

<sup>17</sup> Snider, *The Agency and the Hill*, 30-31.

<sup>18</sup> Colby, *Honorable Men*, 346.

I mention this because it highlights several points: first, Nedzi's awareness of the Jewels a full year before the others was a point against him in his later somewhat incompetent performance as chair of the House investigatory committee – it was one of the reasons why he was replaced by Pike; second, it demonstrates the backroom and informal nature of intelligence oversight up to that point, not only because a relatively major issue was briefed to select individuals, but also because they chose not to do anything official about what would later become a massive scandal; third, and perhaps most damning, because, as Nedzi pointed out at that time, there was very little awareness of what the four congressmen *should* do about the Jewels as there was very little precedent for formalized congressional involvement in intelligence oversight at that time. In Nedzi's own words in 1973: "It is a bit unsettling that 26 years after the passage of the National Security Act of 1947, the scope of real congressional oversight, as opposed to nominal congressional oversight, remains unformed and uncertain."<sup>19</sup> Prior to the establishment of the permanent oversight committees in 1976/1977, intelligence oversight responsibilities were placed in four sub-committees: the House and Senate Armed Services Committees and the House and Senate Appropriations Committees. These committees seldom met on intelligence issues, submitting the intelligence community to approximately 24 hours of "legislative 'probing'" in both House and Senate over the course of an entire year.<sup>20</sup>

In this case, the CIA found preemptive, controlled transparency a method by which to hedge what they viewed as excessive congressional investigation of a purely internal, executive agency matter. Indicative of this point, the seeming congressional unconcern at that time about the potential for scandal embodied by the Jewels was not matched by quietude on Colby's part. As DCI Colby later said, "The shock effect of an exposure of the 'Family Jewels', I urged, could, in the climate of 1973, inflict mortal wounds on the CIA and deprive the nation of all the good the agency could do in the future."<sup>21</sup> The Jewels would have a particularly strong impact because the CIA had very little public profile. As Colby mentions in his autobiography, if the revelations regarded the Army, the FBI or a local police force, the public would have had a context for understanding these extreme activities. As it was, there was very little sense of what the CIA actually did and thus no real frame of reference for an observer exposed to such things for the first time.<sup>22</sup> While Colby's awareness of public reaction was reasonably astute, his actual personal reaction to the content of the Jewels bears recounting in its original detail in order to provide a sense of the culture and leadership of the CIA at that time. This selection from his autobiography further illustrates clearly the continuing challenge of effective oversight of intelligence activities.

And perhaps I revealed my own long career in, and resulting bias in favor of, the clandestine profession, when I concluded that this list of CIA misdeeds over twenty-five years was really not so bad. Certainly there were activities on it that could not be justified under any rule or by any rationalization, were outside CIA's proper charter, and were just plain wrong whether technically forbidden or not. But I was familiar with the procedures of other intelligence and security services in the world; was aware of the kind of encouragement and exhortations CIA received from government leaders and public alike

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<sup>19</sup> Quoted in Snider, *The Agency and the Hill*, 31.

<sup>20</sup> Johnson, *A Season of Inquiry*, 7.

<sup>21</sup> Quoted in Pines, "The Central Intelligence Agency's "Family Jewels," 642.

<sup>22</sup> Colby, *Honorable Men*, 342.

during the Cold War, to be ‘more effective, more unique and, if necessary, more ruthless than the enemy’; knew the difficulty of enforcing disciplined behavior in an atmosphere of secrecy and intrigue; and knew personally some of CIA’s more bizarre characters...<sup>23</sup>

While the details of the Jewels were not personally scandalous to Colby, their exposure to the public was. Further, his sense that his agency was vulnerable and would be misunderstood by the public turned out to be correct. This sense of vulnerability penetrates internal discussions of CIA matters to the present—protective concern spikes uniquely and sensitively at every scandal or failure. The feeling of suspicion and mistrust that stems from external perceptions of the Agency and its activities runs in both directions—internally, officers feel that they must protect their closed society. This was highlighted when extracts drawn from the Jewels were published by Hersh, causing outrage and, ultimately, a general feeling to arise that the CIA could no longer be trusted, and particularly could not be trusted in its traditional autonomous role.<sup>24</sup> Watergate, of course, contributed to the anxiety that the intelligence community was at risk of political manipulation—as it was generally unclear what role the CIA did, in fact, have in the break-in—as mentioned above, even to itself.<sup>25</sup>

During the early 1970s, this sentiment was not entirely unprecedented. While the public may not have been exposed to the excesses of the intelligence community, Congress had already begun to consider tightening the oversight, at least, of covert action. This nascent engagement with foreign policy issues included a range of statutes intended to bridge the gap between Congress and the executive branch on foreign affairs issues.<sup>26</sup> In terms of intelligence, in 1974, Congress amended the Foreign Assistance Act of 1961 with the Hughes-Ryan Amendment. This Act required that the president produce a *finding*—a statement—for Congress regarding a potential covert activity, stating that the activity was in the national security interest of the United States.<sup>27</sup> The notification requirement of the Hughes-Ryan Amendment points to the beginning of the establishment of a framework between branches that would supervise and constrain intelligence activities, and that would also lead to an oppositional and complicated relationship at once adversarial and complementary in terms of burden-sharing. Hughes-Ryan was a first oppositional move on the part of Congress to claim a stake in the oversight process. Overall, Hughes-Ryan forced the president to be accountable for covert action. This is no small step, considering these activities are run on the basis that the president be kept isolated from responsibility for them. The term of art for this disconnect between presidential orders for the action and accountability for them is called *plausible denial*.

One of the most attractive aspects of covert action for any president had been the freedom it gave him to deny knowledge of the activity, allowing him to distance himself from any scandal and shift the risk to the intelligence agency conducting the operation. Hughes-Ryan installed a

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<sup>23</sup> Colby, *Honorable Men*, 341.

<sup>24</sup> Kirsten Lundberg, *Congressional Oversight and Presidential Prerogative*, Harvard Case Study C14-01-1605.0, 2001, 4. Ironically, the Family Jewels were released in their entirety by D/CIA General Michael Hayden in 2007 to signal greater openness and transparency of the Agency, there was very little public reaction to their substance.

<sup>25</sup> *Legislative Oversight of Intelligence Activities: The US Experience*, Report Prepared by the Select Committee on Intelligence, United States Senate, October 1994, 4.

<sup>26</sup> Harold Hongju Koh. *The National Security Constitution: Sharing Power After the Iran-Contra Affair*. (New Haven: Yale University Press, 1990), 46.

<sup>27</sup> Hitz, *Why Spy?* 117.

firm triangulated connection on covert action that included responsibility between the CIA, the executive branch, and Congress. It also served to differentiate covert action from other types of intelligence activities. Hughes-Ryan clarified and made explicit the relationship between the president and the CIA, reinforcing the fact that the CIA responds to executive orders. Plausible denial was the operational code for separating the president from responsibility for secret activities. In Johnson's formulation: "The objective of plausible denial was to brush away footprints in a covert operation to prevent anyone from following the tracks back to the United States and particularly to the Oval Office."<sup>28</sup>

Plausible denial is still core to the concept of covert action, which by definition is not externally *owned* by its originators. This disconnect between action and government is crucial in many cases to the success of the mission. The point here was that up to that point there had, in fact, been no *external* accountability regarding covert action to Congress. This is a key point in terms of the framework of accountability that is core to this project. The requirements of Hughes-Ryan represent a first step, albeit a weak one, in the development of external independence of Congress as supervisor of intelligence activities. First, Hughes-Ryan required the executive to *inform* Congress of covert action—but Congress had no official *in process* recourse to change activities of which it disapproved. That is, Congress could cut off funding for a particular program but the process for doing so would be difficult to complete in a timely fashion, particularly given that there has always been ambiguity in terms of the required timeliness of reporting in relation to the commencement of the program. Further, achieving unanimity among congressmen to do so would be difficult given partisanship and diverse ideological claims. An unofficial approach to ending a covert action could be to leak the matter to the press, but there has generally been a norm against doing so, and since leaking is unofficial, it does not have a role in our framework for institutionalized accountability. It should be remembered that Hughes-Ryan was passed prior to the installation of dedicated intelligence oversight committees. Its findings were distributed among six committees with minimal connection to and expertise in intelligence activities. Thus, in terms of knowledge conditions, expertise and focus was thin and variable. When the intelligence committees were established a few years later the number of committees grew to eight. While a rather diluted step, Hughes-Ryan was instrumental in establishing institutional pathways to facilitate the mechanics of intelligence oversight. The pathways established not only a line of discipline for the relationship between the executive and legislative branches, but also a line that would provide the future pathway of controversy and friction that would continue to challenge and catalyze the development of intelligence oversight mechanisms for decades.

Hitz, one of the first Inspectors General, CIA, makes an interesting point regarding Hughes-Ryan. In his view, the "Agency rank and file were pleased for the most part by the passage of the Hughes Ryan Amendment because it squelched subsequent chatter in the Church Committee that that the CIA was a 'rogue elephant' operating on its own in covert action proceedings."<sup>29</sup> This trend toward greater control over intelligence issues was helped by a change of congressional generation—the older, veteran congressmen who had conducted oversight informally via personal relationship was replaced by a new generation of young congressmen eager to begin a post-Watergate political era by challenging the conventional independence of

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<sup>28</sup> Johnson, *A Season of Inquiry*, 58.

<sup>29</sup>Hitz, *Why Spy?*, 117.

the CIA.<sup>30</sup> This was particularly acute in the House where 75 new reformist members—“the Watergate class”—joined the chamber with the mission to change congressional process. A second change was a new congressional focus on gaining foreign policy expertise in order to gain more equality with the executive branch on foreign policy issues.<sup>31</sup> Both objectives on the part of freshmen congressmen pointed toward an interest in rebalancing the traditional asymmetry with the executive in terms of foreign policy and national security.

### **The Investigations: Pre-emptive, Public, and Purposeful**

In order to understand the depth of intelligence agency malfeasance alleged by the Hersh reports, three investigatory committees were created—two in Congress (one in each chamber) and one in the executive. Congress seized this evidence as proof that the executive branch required checking, and it took the opportunity to delve into its excesses, with the White House hoping to hedge against inopportune investigation. In 1975, the Pike Committee—originally the Nedzi Committee—was established in the House, the Church Committee in the Senate, and the Rockefeller Commission set up by the White House. The three investigatory efforts focused on different aspects of the intelligence enterprise although all three touched on the appropriateness and legality of intelligence activities. The Church Committee analyzed the range of alleged abuses, both foreign and domestic. Pike did not examine the abuses but worked mainly on intelligence performance and effectiveness.<sup>32</sup> The Rockefeller Commission analyzed the CIA’s role in domestic intelligence activities, as well as oversight and internal CIA control mechanisms.<sup>33</sup>

In terms of the oppositional relationship between Congress and the executive regarding intelligence oversight, the installation, process, and purview of the Rockefeller Commission is instructive. When it became clear that the fall-out from the Hersh revelations was to lead to multiple investigations, President Ford acted to pre-empt invasive congressional inquiries by establishing his own investigatory mechanism. It was thought that responsive presidential reaction to the abuses could curb the other investigations, demonstrate leadership, and allow the president to frame and control criticism. Executive branch views of the potential fall-out of the revelations were extreme. In Kissinger’s words: “If they come out, blood will flow.”<sup>34</sup> The congressional committees’ activities were striking because they explored intelligence activities in unprecedented depth, but the mere creation of the Rockefeller Commission was precedent-setting. The Rockefeller Commission was the first time a presidential commission had been created to investigate the national security apparatus.<sup>35</sup> Considerations were taken as to how to define jurisdiction of the Commission’s investigations—DCI Helms recommended that the FBI be included in the White House investigations, but ultimately President Ford decided the focus should be on CIA only—and on a narrow slice of CIA activities at that.

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<sup>30</sup> Snider, *The Agency and the Hill*, 49.

<sup>31</sup> Koh, *The National Security Constitution*, 45.

<sup>32</sup> Snider, *The Agency and the Hill*, 38.

<sup>33</sup> *Report to the President by the Commission on CIA Activities within the United States (Rockefeller Commission Report)*, June 1975. See in particular chs 7-8, 71-95.

<sup>34</sup> Prados, *Safe for Democracy*, 433.

<sup>35</sup> Kenneth Kitts, “Commission Politics and National Security: Gerald Ford’s Response to the CIA Controversy of 1975,” *Presidential Studies Quarterly* 26, No. 4, Fall (1996): 1081.

The Rockefeller Commission, under the leadership of Vice President Nelson Rockefeller, was mandated to investigate only alleged CIA improprieties *within* the United States. The outcome of the investigation was not far reaching—or even soul-searching—but clearly an attempt at an oppositional move to preempt external inquiry into the activities of the CIA. As one scholar of presidential commissions put it, “Behind-the-scenes maneuvering shaped the panel’s activity throughout the investigation and even altered the content of the final report. And long after the commission had disbanded, Ford continued to use the commission’s findings as a preemptive tool to argue against the need for more external controls on the intelligence community.”<sup>36</sup> In further support of the importance of preemption in order to oppose and limit congressional investigations, Ford asserted in his memoirs that “unnecessary disclosure” would have been the result of a commission led by Congress.<sup>37</sup> Further, all recommendations from top aides responsible for decision-making regarding the commission mentioned the need to preempt congressional action. As Kitts points out, one aide, Jack Marsh, stated the need baldly. In his words, “The panel’s efforts would take the initiative rather than finding ourselves whipsawed by prolonged congressional hearings.”<sup>38</sup> Finally, as Colby reported it in his memoirs, “I was then told that Ford was considering appointing a ‘blue ribbon’ commission to conduct an investigation of CIA’s domestic activities to answer *The New York Times* charges, and hopefully to still the outcry and thus prevent a full investigation of intelligence from getting started.”<sup>39</sup>

With the objective of the Rockefeller Commission being to deflect and/or mitigate critical congressional investigation of the intelligence community, the outcome was unsurprising. The report focused on the history of the Agency and mildly addressed the major charges leveled. It recommended some reforms, such as strengthening the internal CIA oversight role of the Inspector General, but the report itself was considered a white-wash. I would suggest that the installation of the Rockefeller Commission was a pure tactical oppositional move that ultimately did not have much strategic bearing on hindering the development external oversight mechanisms. This failure to shut down the congressional investigations was due to the unique political environment of the time, as well as the deft use of public exposure on behalf of the congressional committees—particularly Church—to gain traction on reform of the intelligence community. The congressional investigations of the 1970s changed the environment surrounding intelligence and security issues by exposing some of the more illegal and ridiculous programs, but also by suggesting that deference to the security function must be kept within bounds, and implying that the security apparatus itself was part of the normal functioning of democratic government. These results were possible and plausible because of the political environment and the political pressure that required that information on programs be forthcoming—although begrudgingly—from the intelligence community at the time. The struggle for intelligence information is a key component of this oppositional relationship and the asymmetry inherent in accountability of intelligence: the executive will always own the intelligence, and the legislative branch will always ask to borrow it.

Although executive efforts were made to head off congressional involvement in intelligence activities, the most far-reaching and lasting of the investigatory efforts stemming

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<sup>36</sup> Kitts, “Commission Politics and National Security,” 1082.

<sup>37</sup> Kitts, “Commission Politics and National Security,” 1083.

<sup>38</sup> Kitts, “Commission Politics and National Security,” 1083.

<sup>39</sup> Colby, *Honorable Men*, 398.

from the Hersh revelations was the Senate Committee (the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, known as the Church Committee after its chairman, Senator Frank Church (D., ID). Its broad impact was partially due to the fact that its activities were public, widely publicized, and, in some cases, focused on scandal that could be conveyed visually, for example, through images of dart guns. The Church Committee hearings were also a very organized public spectacle and thus the committee had leverage over the executive's more private investigatory undertakings, and therefore leverage over the final objective of institutionalized oversight.<sup>40</sup> First, Church's committee's activities were more often in the public light than the other two due to the fact that Senator Church launched a presidential campaign for the 1976 immediately after accepting the chairmanship. In Snider's words: "This inevitably led to an investigation that was more sensational, more controversial, and more political than it otherwise would have been."<sup>41</sup> Church's attempt to use the committee's investigations as a political lever seem apparent in his desire to hold as much of the investigations in public as possible. This plan contrasts with his rather disingenuous statement, made directly to the press after his appointment as chairman, in which he said: "I would not see this inquiry as any type of television extravaganza. It's much too serious to be a sideshow." His objective was to be to "safeguard the legitimate security interests of the country" while uncovering abuses of power "lest we slip into the practices of a police state."<sup>42</sup>

In addition to Senator Church's personal role in publicizing the proceedings of the Church Committee, obviously, the more systemic consideration was the stated and re-stated objective of the congressional hearings; they were intended to restore legitimacy of government, underscoring the fact that at least one branch of government, Congress, was willing to be honest with the public. They were to provide an aperture for the public into the internal workings of the intelligence agencies, and they were to provide symbolic legitimacy to the institutions of government. They were a public oppositional move to executive obfuscation and denial regarding intelligence activities and their public nature was a symbolic and pointed gesture to the executive. The public was engaged so that the intelligence community would be responsive to congressional demands.<sup>43</sup> According to this argument, the public was to be marshaled as a pressure point to force the intelligence community to reform. In order to mobilize public sentiment in this direction, some of the more lurid intelligence program details were to be disclosed openly – such as assassination. This was felt strongly by the staff supporting the committee's work. As Schwarz, the General Counsel to the committee, stated: "It was vital to make the politicians and the American people really *believe* that reform was necessary. You couldn't speak in abstractions; you had to have something real and concrete. This the assassination report provided, in memorable, horrifying detail."<sup>44</sup>

The Church Committee delved into a wider range of alleged abuses than the Rockefeller

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<sup>40</sup> The Ford administration did not even want to release the final report of the Rockefeller Commission until public outcry forced its release.

<sup>41</sup> Snider, *The Agency and the Hill*, 49. Johnson also speaks at length about the politicized nature of the committee proceedings in his memoir, *A Season of Inquiry*.

<sup>42</sup> Senator Frank Church, quoted in Johnson, *A Season of Inquiry*, 15.

<sup>43</sup> Johnson, *A Season of Inquiry*, 13.

<sup>44</sup> Johnson, *A Season of Inquiry*, 55.

Commission, including domestic activity by the FBI and assassinations, among other topics.<sup>45</sup> In terms of seeking transparency, the objectives of the Church Committee were in direct opposition to the goals of the Rockefeller Commission. Further, while the main functional goal of the Senate committee was to explore the stories of abuses and open these activities to congressional scrutiny, more importantly, the result of its recommendations was to be the basis of a new charter for the intelligence community that would redefine its responsibilities and boundaries in light of the flagrant civil liberties infringements of the FBI and CIA.<sup>46</sup> This charter would *specify* the responsibilities of the intelligence community and place constraints on how it would conduct its duties. This may seem a banal goal for so much investment of political time and money during that period, but the intelligence community's activities remained unspecified for decades, and in many ways still are.

In concept, the goal of the Church Committee investigations was to restore accountability and public trust in government, but it was also an oppositional move to differentiate control over intelligence from the executive branch. According to conventional wisdom, the Church Committee investigations “opened” intelligence to the public and began the process of integrating intelligence back into “normal” government.<sup>47</sup> What the Church Committee discovered was wide-ranging and particularly damning of both the CIA and FBI, although it was the CIA that was rightly blamed for operating outside of its jurisdiction. The CIA, strictly forbidden from operating domestically by NSA (1947), launched Operation CHAOS, using intelligence methods to gather over 1 million files on American citizens. CHAOS was focused on gathering information particularly on student dissident groups in order to expose foreign, ie Communist, involvement in their activities.<sup>48</sup> Local police departments took part in some of these activities, either on their own initiative or in tandem with federal agencies, as did the CIA. Interestingly, the main outcome of these programs tended to be needless harassment of the public; they did not tend to be incredibly effective in terms of operational intelligence gathering. CHAOS, for example, led to the collection of huge amounts of “useless intelligence, all of which had to be analyzed in vain attempt to persuade a disbelieving president that it did not contain evidence of a vast international conspiracy.”<sup>49</sup>

Programs, such as COINTELPRO—organized by the FBI—infiltrated groups deemed by domestic law enforcement as politically unsavory or potentially threatening to the United States government. The FBI infiltrated these organizations and disrupted their activities, FBI agents directed targeted harassment of individuals, for example political leaders and journalists, and even the blackmail of high profile public figures—one of the more bizarre examples being Martin Luther King, Jr., whose alleged extracurricular sexual activities the FBI threatened to expose if he did not commit suicide. Individuals and groups were subjected to surveillance, mail was opened and read, and assassinations of foreign leaders were deemed acceptable in dealing with the domestic threat.<sup>50</sup> Other programs focused on intercepting mail and telegrams, such as

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<sup>45</sup> Americo R. Cinquegrana, “The Walls (And Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978”, *University of Pennsylvania Law Review* 137, no. 3 (1989): 806.

<sup>46</sup> Johnson, *A Season of Inquiry*, 227.

<sup>47</sup> Arthur S. Hulnick, “Openness: Being Public About Secret Intelligence”, *International Journal of Intelligence and Counterintelligence* 12, no. 4 (1999): 467.

<sup>48</sup> Andrew, *For the President's Eyes Only*, 354-355.

<sup>49</sup> Andrew, *For the President's Eyes Only*, 355.

<sup>50</sup> See Johnson, *A Season of Inquiry: Congress and Intelligence* (Chicago: The Dorsey Press, 1988).

the National Security Agency's Operation MINARET.

Reading over the operations conducted by the intelligence agencies of that period, it is difficult to avoid being struck by their simultaneous outrageousness and banality. In addition to the FBI's attempts to infiltrate and disrupt a range of usually peaceful social groups, the CIA experimented on unwitting civilians with LSD in order to test what effect the drug had. One person died from the tests, resulting in the creation of new criteria prohibiting the use of drug testing on unknowing individuals (!). The issues and problems of that period are poignantly addressed in a series of rhetorical questions listed in the Church Committee's final report:

What is a valid national secret? What can properly be concealed from the scrutiny of the American people, from various segments of the executive branch or from a duly constituted oversight body of their elected representatives? Assassination plots? The overthrow of an elected democratic government? Drug testing on unwitting American citizens? Obtaining millions of private cables? Massive domestic spying by the CIA and the military? The illegal opening of mail? Attempts by an agency of the government to blackmail a civil rights leader? These have occurred and each has been withheld from scrutiny by the public and the Congress by the label 'secret intelligence.'<sup>51</sup>

According to the lore about the issue, the Church Committee's revelations were shocking on several levels. They came on the heels of specific evidence of executive branch misdeeds, but they also shattered complacency regarding intelligence on two sides. Post-World War II, the public had grown accustomed to the primacy of national security issues; in specific, the ambiguity of the outcome of nuclear war and the doctrine of mutually assured destruction (MAD) required a certain level of faith in government decision-making and problem solving.<sup>52</sup> As F.A.O. Schwarz Jr., the Chief Counsel to the Church Committee, explains it, the political environment prior to this period had been very different with an engrained sense of "cultural trust."<sup>53</sup> As the country drew away from the McCarthy era, citizens had a complex relationship with the agencies—they still respected, feared, and to some degree, loved—the security apparatus. Some of this trust was based on the fact that these activities were almost completely opaque to the public. There was generally never even a consideration of what the intelligence agencies were doing and if there were, it would be inferred that the agencies were protecting "us" against "them" and the activities were conducted abroad against a clear threat – the Soviet Union; questioning them was not done by individuals, or even by Congress, which focused on learning as little as possible about intelligence activities.

The attitude underlying this absence of active oversight prior to the investigations is reflected well in this statement by a Senate overseer: "The difficulty in connection with asking questions and obtaining information is that we might obtain information which I personally

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<sup>51</sup> *Church Committee Final Report*, Book I [45A, 12]

<sup>52</sup> Much of the RAND Corporation's nuclear scenario-planning of that period was based on the ambiguity of potential nuclear outcomes. This penetrates deeply both the decision-making and political culture surrounding security decision-making of that period. See Fred Kaplan, *The Wizards of Armageddon* (Palo Alto: Stanford University Press, 1991) for an interesting discussion of this issue. The extreme but related version is, of course, Herman Kahn, *On Thermonuclear War* (Princeton: Princeton University Press, 1960).

<sup>53</sup> Interview with F.A.O. Schwarz Jr, April 19, 2010.

would rather not have, unless it was essential for me as a member of Congress to have it.”<sup>54</sup> It has been argued that other reasons for this lack of congressional interest in intelligence activities were, in addition to the deference theory, a strong culture of trust in intelligence officers, lack of time to understand fully the highly technical details of intelligence, and the absence of the oft-mentioned true motivator of congressional activity: activities open to the public that could provide support for re-election.<sup>55</sup> Another observer commented: “The mechanism for oversight clearly existed; what was missing was an interest in using it – or more properly speaking, a consensus that would legitimize its use.”<sup>56</sup>

Further environmental conditions that contributed to an attitude of oversight avoidance stemmed from the Manichean ideology of the post-World War II era—the concept of a very distinct good vs. evil conflict that had resulted in resounding victory for American administration and values. This era of heroism demonstrated American exceptionalism in terms of strength and ideology, and also reinforced the legitimacy of government won by long-term successful warfare. The postwar prosperity and the blossoming of the middle class formed the basis of conformity in terms of obedience and trust in government during the early Cold War period. Conformity was reinforced by civil defense exercises intended to organize the distributed population as well as by threat communication that focused on the prospect of nuclear war.<sup>57</sup>

In terms of accountability and the tools of oversight, the investigations ushered in a modern era in terms of the relationship between the executive and legislative on issues of intelligence. In the scholarship about this period—and about intelligence oversight overall—this era was a changed political environment for oversight. Academics assessing the 1970s point out that the investigations marked the “opening of government,” and the reintegration and normalization of intelligence activities. The feeling across the board, from both intelligence operators and overseers, was that the 1970s scandals were a turning point. Some scholars argue that this was a brand new era of intelligence in the United States; I would argue that none of the steps in the development of the American security environment have been “brand new”, but rather have built step-wise upon the past, with grand objectives on both sides being subject to the normal mitigation of the political environment, the limitations of resources, and the boundaries the American public places on outside efforts made by its government in unorthodox and, perhaps, illegal directions.

Important themes for accountability emerged from these discussions: for example, the fundamental question about all of the abuses, but particularly the egregious programs, such as assassination, was how much did the president know about the proceedings? Did he order the

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<sup>54</sup> Interview with F.A.O. Schwarz Jr, April 19, 2010.

<sup>55</sup> This series of reasons for disinterest in oversight is laid out in Johnson, *A Season of Inquiry*, but the congressional focus on re-election as a prime motivator is deeply rooted in the literature on Congress. See Fenno (1973) for a solid, if dated, discussion. See Davidson, “Congressional Committees as Moving Targets,” *Legislative Studies Quarterly* 11, no. 1 (1986): 19-33 for an updated discussion. This topic is also touched upon in the oversight classic, Aberbach, *Keeping a Watchful Eye*.

<sup>56</sup> Robert M. Gates, “American Intelligence and Congressional Oversight,” World Affairs Council of Boston, January 15, 1993.

<sup>57</sup> A fascinating description of how civil defense worked to instill particular values and trust under the continual threat of nuclear war is Andrew Grossman, *Neither Dead nor Red: Civil Defense and American Political Development in the Early Cold War* (New York: Routledge, 2001).

programs, or was the CIA operating under its own authority without executive branch supervision or involvement of any kind? These were shades of the discussions on plausible denial that had led to the Hughes-Ryan amendment. Further questions included, what should be done about providing a systematic framework for future intelligence activity? And, if approval is given for a project, how long does that approval last before the activity must be reviewed again? While seemingly basic among the range of broader excesses of that period, in terms of oversight control, many of these questions had not been thoroughly addressed in any kind of public forum. It is difficult to grasp how opaque the entire world of intelligence was during that period, and just how shocking the revelations were to both public and private citizens. Further questions included how congressional review and approval of programs should be structured, and reform of the intelligence community should be organized, and who should take charge of the process.

All three investigatory bodies delivered answers to these questions in one form or another, but the most lasting in terms of oversight structural development stemmed from the recommendations of the Church Committee. As mentioned above, while the Rockefeller Commission was an interesting development for our model of oppositional oversight, in reality it turned out, as expected, to be generally a presidential white wash, although it did touch upon some suggested reorganization recommendations. The Pike Committee, the House's effort at investigating poor intelligence performance, became mired in politics and sloppy handling of classified material, including allowing the report in its entirety to be leaked to the *Village Voice*. Interestingly, in a direct oppositional move, in the wake of the debacle brought on by the mishandling of the Pike Committee report, President Ford attempted to regain control over intelligence oversight by making a stern statement about the direction of intelligence reform. His Executive Order on intelligence activities was intended to establish a line of authority over intelligence reform.<sup>58</sup> His address regarding the issue was, interestingly, presented publicly on television, and he stated that he was conducting "the first major reorganization of the intelligence community since 1947" in response to what was perceived as the irresponsible release of the secrets of the Pike Committee report.<sup>59</sup> Thus, he preempted congressional recommendations about intelligence reform *and* did so publicly; he pulled tools from both sides of the oppositional relationship in making this statement. While the move was deft in terms of an attempt at regaining the operational high ground, the Church Committee recommendations contributed to reform and to the permanent installation of institutionalized oversight mechanisms within Congress. Congress won that round.

The Church Committee concluded its assessment with 96 recommendations for change within the intelligence community and to intelligence oversight.<sup>60</sup> Recommendation 96 was the creation of a permanent Senate intelligence oversight committee, with the bulk of the recommendations focusing on processes for overseeing domestic intelligence activities via internal methods.<sup>61</sup> This period marked a very real transition for the intelligence agencies and their dealings with the other branches, or a "metamorphos[is] into an entirely new operating

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<sup>58</sup> Andrew, *For the President's Eyes Only*, 419.

<sup>59</sup> Andrew, *For the President's Eyes Only*, 419.

<sup>60</sup> Interview with David Aaron, Task Force Leader, Church Committee April 6, 2010.

<sup>61</sup> Intelligence Activities and the Rights of Americans, Book II, (Church Committee Final Report), April 26, 1976.

environment for the intelligence community.”<sup>62</sup> The creation of the intelligence committees centralized supervision of intelligence activities, allocated resources to staffing intelligence oversight, and coordinated intelligence oversight with other types of oversight, requiring that intelligence oversight processes be standardized, for example in terms of set terms of appropriations and authorization. By fiscal year (FY) 1979, the Intelligence Authorization Act of that year placed intelligence agencies in the same authorization and appropriations cycle as other federal agencies.<sup>63</sup> It also shifted the role of intelligence from being a service dedicated almost totally to the needs of the executive branch, to one that also serves the legislature. As the first statutory Inspector General of the CIA, Frederick Hitz points out, the creation of the committees added additional consumers of intelligence information, diluting to some degree the proprietary executive control over intelligence that had existed up to that point.<sup>64</sup> In former Senator David Boren’s (D-OK) words: “The activities of the [intelligence] oversight committees ... are inherently controversial; the mere existence of them in some ways circumscribes the power of the Presidency.”<sup>65</sup>

The committees were installed in the Senate and House in 1976 and 1977 respectively. The Senate committee approved by a vote of 87 to 7 was based on the structure of the former-Church Committee. Not only did the Senate absorb many of the Church Committee recommendations in their development of a permanent intelligence oversight mechanism, but the new oversight committee hoped to minimize partisanship by keeping the ratio of majority to minority members close—8 to 7—and requiring a vice-chairman from the minority party.<sup>66</sup> This mirrored the composition of the Church Committee. As a “select” committee, members are chosen by the Senate majority and minority leadership to serve in the new committee. Members were chosen from the standing committees with experience in intelligence: Judiciary, Armed Forces, Foreign Relations, and Appropriations. In a step to avoid capture or co-optation on the part of the oversight committee members, tenure on the committees was initially limited to eight years; six years in the House.<sup>67</sup> Based on Senate Resolution 400, intelligence agency heads would be required to keep the committee “fully and currently informed with respect to intelligence activities, including any significant anticipated activities.”<sup>68</sup>

HPSCI (the House Permanent Select Committee on Intelligence) was established in 1977, a year after the Senate committee. The original committee had 13 members chosen by the majority and minority leadership (nine Democrats and four Republicans) and was sub-divided into four sub-committees: Oversight, Legislation, Evaluation, and Program-and-Budget Authorization. Unlike the Senate committee, the House committee’s membership reflected the party proportion in the House as a whole.<sup>69</sup> As Johnson details the responsibilities of HPSCI, it

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<sup>62</sup> Kristen Lundberg, *Congressional Oversight and Presidential Prerogative*, Harvard Case Study C14-01-1605.0, 2001, 4.

<sup>63</sup> Lundberg, *Congressional Oversight and Presidential Prerogative*, 6.

<sup>64</sup> Hitz, *Why Spy?* 118

<sup>65</sup> Boren, “Winds of Change,” 853.

<sup>66</sup> Frederick A. O. Schwarz Jr and Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New York: The New Press, 2007), 52.

<sup>67</sup> Hitz, *Why Spy?* 117.

<sup>68</sup> S. Res. 400; *Legislative Oversight of Intelligence Activities: The US Experience*, Report Prepared by the Select Committee on Intelligence, United States Senate, October 1994, 5.

<sup>69</sup> Snider, *The Agency and the Hill*, 53.

was tasked with developing new charter legislation for the intelligence agencies, reviewing their administrative guidelines, analyzing their requests for annual funding, assess management structure, evaluate intelligence results and methods, conduct cost-benefit analyses on hardware innovations, and provide a safe haven for whistleblowers and their concerns.<sup>70</sup> HPSCI currently has 22 members, with the party ratio 13-to-9. HPSCI's genesis is slightly more removed from its investigatory committee forebear, the Pike Committee, because the House committee's tenure was plagued with disorder and leaks, including the leak of the final committee report.<sup>71</sup> HPSCI's authority is reinforced not only by congressional institutional authority but also the authority to determine intelligence agency budgets. Further, structural requirements mandate specific types of interaction between HPSCI and the agencies. An example of this is specific types of statutory reporting requirements, such as receiving presidential findings or the mandated reports by the statutory Inspector General.<sup>72</sup> In terms of jurisdiction over particular aspects of intelligence activities, the House and Senate committees differ slightly. The Senate committee has exclusive responsibility for overseeing the CIA, and has concurrent responsibility with other committees for supervision of other elements of the intelligence community.<sup>73</sup>

Interestingly, while the SSCI was given the authority to authorize funds for all "intelligence activities" annually, specific appropriations regarding "tactical foreign military intelligence activities serving no national policymaking function" were excluded from the Senate intelligence committee's purview.<sup>74</sup> In contrast, HPSCI maintains authorization and appropriations authority over tactical issues level "tactical intelligence and intelligence-related activities", (in the fantastical military lexicon, TIARA) an interesting divergence from the rather more limited jurisdiction ascribed to the Senate committee, and a testament to the strength of the Senate Armed Forces Committee, keen on retaining its turf, at that time.<sup>75</sup> This has tended to be a lop-sided point in conference committees' processes for integrating Intelligence Authorization bills. To highlight the novel role of the committees, referring to HPSCI, Congressman Bolling mentioned during discussion of the legislation to create the House committee, "This is a select committee, a permanent select committee. It is basically a committee of the leadership."<sup>76</sup> The selectivity of both HPSCI and SSCI can be encapsulated by a sense of prestige but also by the reality that these committees have privileged information and are not only the providers of framework and responsibility to the intelligence community, but also the primary interlocutors regarding matters of security to their colleagues. As a former HPSCI staff director pointed out, the committees are the guarantors to the rest of the members that responsibility is being taken for these matters.<sup>77</sup>

In terms of the theoretical framework for accountability, the installation of the oversight

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<sup>70</sup> Loch K. Johnson, *America's Secret Power: The CIA in a Democratic Society* (Oxford: Oxford University Press, 1989), 210.

<sup>71</sup> Johnson, *A Season of Inquiry*, 190-191.

<sup>72</sup> The CIA statutory IG was installed later than in the other agencies – in 1989 -- but I include this here to provide a sense of the realm of HPSCI responsibilities.

<sup>73</sup> Snider, *The Agency and the Hill*, 51.

<sup>74</sup> Snider, *The Agency and the Hill*, 51.

<sup>75</sup> Kaiser, *Congressional Oversight of Intelligence Activities*, 5; Snider, *The Agency and the Hill*, 51.

<sup>76</sup> Quoted in Frank J. Smist, Jr. *Congress Oversees the United States Intelligence Community, 1947-1995* (2<sup>nd</sup> edition), (Knoxville, TN: University of Tennessee Press, 1994), 215.

<sup>77</sup> Interview with former HPSCI staff director, June 28, 2011.

committees marked a giant step forward in all categories. The most important aspect of the framework for the strength and efficacy of an oversight mechanism is external independence. In the case of the two committees, they were installed by statute in the House and Senate in 1977 and 1976 respectively, and, of primary importance, they were given the authority to authorize and appropriate funds for the intelligence community. Although there were term limits in the early years in both committees, dedicated committees gave overseers a unified forum for the investigation of intelligence activities as well as institutional processes, such as hearings and briefings which gave the committees external independence from the executive in terms of the acquisition of information regarding intelligence activities. Knowledge and expertise were centralized, the committees were staffed, and provided with the specialized resources necessary, such as secured sites to read classified documents. One aspect of external independence that began weak and still remains troublesome is *recourse*. In this case the problem of recourse links to another category in the framework, temporality. Both of these categories are somewhat more complicated in the legislative branch than in the others because the committees are charged with supervising a wider range of intelligence activities than, for example, the judiciary.

In terms of covert action, for example, the executive is required to issue a finding and provide it to the committees in a timely fashion. Other types of intelligence do not require such specific reporting, other than the general mandate that the committees be kept “fully and currently” informed. This lack of specificity adds ambiguity to the process. Further, there is the question of recourse; what can the committees do if they disagree with a proposed program? The most strenuous measure would be to curtail the funding for a program. Programs are reviewed every year and budgets for them can be cut, amended, or extended. Less formally congressmen can express their dismay in an advisory capacity, and least formally, they can leak information about the proposed program to the media. The complications of each of these methods of recourse are somewhat obvious. In terms of funding, timeliness plays a role. It would be difficult to cut funding unilaterally and immediately upon hearing about a dissatisfactory program. Further, covert actions do not require approval of the committees in order to be conducted; the requirement is only that the committees be informed. This leaves the issue of the authority to exact consequences somewhat ambiguous. In the second case, any change in behavior would be dependent on personal suasion; not the most reliable or institutionally sound approach to changing behavior. Third, in my discussions with both intelligence officers and overseers, leaking to the media is uniformly frowned upon, not only due to potential endangerment of intelligence operatives, but the potential further damage to sources and assets. Finally, the norm of patriotic support for the country’s national security apparatus post-9/11 has generally curbed congressional leaking on these matters. This will be discussed in greater depth at the end of the chapter. The final category—transparency—must be viewed relationally. That is, the installation of the intelligence committees greatly enhanced the transparency of the process from the backroom dealings approach to oversight that had preceded it. Within Congress, the members of the committees stood in for the remainder of their peers and, thus, by extension for the public. Some hearings were public and redacted reports began to be filed every year. Core weaknesses of the committees at their inception remain the problem of temporality and the complexities of recourse, or the exacting of consequences.

The section above described the political environment that surrounded the institutionalization of dedicated congressional intelligence oversight committees. The

development of these oversight mechanisms was catalyzed by the loss of government legitimacy that characterized the Vietnam War/Watergate era, the revelations of widespread long-term intelligence abuses, and new-found political willingness in Congress to engage with issues long believed the sole purview of the executive branch. From the perspective of the executive branch, the committees also connoted a deep incursion into its territory and the basis for continuing struggle between the two branches. We will return to the development of external oversight shortly, but the next section discusses how the executive branch focused on specification—and thus control of intelligence activities—in the face of the congressional encroachment on its territory. As has been mentioned throughout this project, the relationship between the executive and other branches regarding intelligence is characterized by information asymmetry. Control of intelligence information is core to authority over its operations. Development of oversight mechanisms to ensure accountability of the intelligence community are an attempt on the part of the legislature to rebalance the asymmetry toward an equilibrium, while the executive branch, broadly, works to keep the informational tilt in its favor. In the next section, I will describe how the executive endeavored to achieve this in response to the creation of the congressional oversight committees.

### **Oppositional Behavior in the Executive: Priorities and Specificity**

President Ford's overt attempt, mentioned above, at staking a claim on intelligence reform and reorganization directly after the three investigations demonstrates a secondary trend in the reorganization of intelligence oversight (both legislative and executive). This trend is characterized by overstatement of objectives and, in actuality, minor change—not surprising within an adversarial political environment. This, I argue, is a function of both the oppositional relationship, and internal countervailing political trends. The former, a creation of the inter-branch relationship, the dynamic of which is discussed here; the latter, an intra-branch phenomenon that will be illustrated in greater depth later in this chapter. This outcome is not novel for political scientists accustomed to analyzing incentives to compromise, but the process of under-achieving within this context is worthy of analysis. The trend is political and rhetorical, for example, for the most part, “reform” or “change”—sweeping statements—touch upon reorganizing an internal committee or redefining specific intelligence terms of art, such as what constitutes “covert action” or “timeliness.” The wide conceptual claims resulting in minor advancement is one of the goals of the executive side of the oppositional relationship when it comes to specifying the role and limits of the intelligence function. The reason for this is that a primary objective of the executive is to maintain as large an arena for the intelligence services to maneuver as possible. This obviously contrasts with congressional desires to broaden their oversight purview, increase transparency, and increase legislative control over intelligence activities. Executive oppositional intentions, thus, require keeping the structure of constraints as underspecified as possible, or keeping the constraints so limited as to be almost valueless. Further, the executive must maintain a clear focus on its requirements in terms of *internal* accountability of the intelligence services—to the president and his foreign policy objectives. President Ford's EO 11905 of February 1976 illustrates this.

President Ford's EO 11905, in a series of sweeping and authoritative statements, established “a new command structure for foreign intelligence” and established “a comprehensive set of public guidelines” that would be “legally binding charters” for intelligence

activities.<sup>78</sup> Ford replaced the 40 Committee—the intelligence oversight committee within the NSC discussed in the first chapter—with a smaller five-person Operations Advisory Group, comprised of senior members of the White House, CIA, State and Defense.<sup>79</sup> The Order established the Intelligence Oversight Board (IOB) within the executive branch, consisting of three presidentially appointed members. Members were able to receive reports from the Inspectors General and General Counsels of the intelligence agencies, and “instructed to report possible illegalities to the attorney general and improprieties to the president.”<sup>80</sup> At the press conference for EO 11,905 President Ford explained the context for the executive order:

“[What we have sought to do in this case is to make the process and the decision-making fall on the shoulders of the President, and he will be held accountable by the American people. In each of the cases—of the Director of the Central Intelligence or any of the other intelligence agencies—the directives or the guidelines will hold special individuals accountable for what happens in their particular area of responsibility. But the final and ultimate responsibility falls on the shoulders of the President.”<sup>81</sup>

This presidential responsibility for accountability is reiterated in an interesting critique of that period. In a remarkable piece that was actually published in the CIA’s internal, classified journal, *Intelligence Studies*, it was stated:

[An] intriguing aspect of the emphasis on accountability is that it should have become the focus of Executive Branch intelligence reform after the revelations that many of the abuses of the intelligence agencies were caused not by too little, but rather by too much, *accountability to the President*. [emphasis added] Often the agencies had wandered from their statutory roles precisely in an effort to be responsive to Presidents who sought (or ordered) their help either in covert actions overseas or in dissident surveillance on the home front ... It was perhaps symptomatic of the Ford Administration’s image of itself—and indeed largely its reality—that no doubt would ever enter its mind that Presidents could be trusted, were honest, and always proceeded by legal means.”<sup>82</sup>

This quote highlights the competing definitions of accountability that are core to the oppositional relationship, and it also challenges, as its authors intend, the common belief of that period that the CIA was rogue, instigating actions far removed from the appropriate constraints of governmental regulation, when, in fact, it was tightly linked to presidential decision-making. This statement should, of course, be taken with several grains of salt, as the CIA was locked in a long-term endeavor to explain its overreach in some places and actual crimes in others.

Further, William Colby, the DCI during that period, made several attempts to clarify to Congress the actions of the CIA. His attempts at disclosure earned him a varied response but it is important to note here that his personal attempt to clarify the activities of the Agency are a

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<sup>78</sup> Bretton G. Sciaroni, “The Theory and Practice of Executive Branch Oversight,” *Harvard Journal of Law and Public Policy* 12, no. 2, (1989): 404.

<sup>79</sup> Andrew, *For the President’s Eyes Only*, 419.

<sup>80</sup> Andrew, *For the President’s Eyes Only*, 419.

<sup>81</sup> Sciaroni, “The Theory and Practice of Executive Branch Oversight,” Fn 207, 404.

<sup>82</sup> Hardy, “Intelligence Reform”, 11, DDRS, 1989, no. 1247, quoted in Andrew, *For the President’s Eyes Only*, 419.

definitive CIA trend that lasts until this day. The CIA, unlike other agencies, relies on the voice of one man (a male always, until I get the job) to defend and protect its actions.<sup>83</sup> Colby's approach to the criticism of the CIA was to make selective disclosures to his interlocutors.<sup>84</sup> His statements were horrifying to many within the Agency; not exactly because of their content, but because they were inconsistent with the culture of secrecy within the Agency, and the expectations of the President up to that point. In this case, they resulted in his firing. One clearly should not hold higher principles than the one who signs your check within this context. Colby's words are indicative of the oppositional dynamic and the expectations placed on the players obviously expected to support the executive side:

I believe I was fired because of the way I went about dealing with the CIA's crisis. My approach, pragmatically and philosophically, was in conflict with that of the President and his principal advisors. From their point of view, I had not played the game during that turbulent year as a loyal member of the White House "team."

My strategy quite simply had been to be guided by the Constitution, and to apply its principles. This meant that I had to cooperate with the investigations and try to educate the Congress, press, and public, as well as I could, about American intelligence, its importance, its successes and its failings. The Agency's survival, I believed, could only come from understanding, not hostility, built on knowledge, not faith.<sup>85</sup>

While the executive orders always focus on supporting the executive side of the oppositional dynamic, they are also reflective of the individual administration's perspective on the use of covert action, which can evolve from reaction to previous covert activity, political ideology, stance, and environment, and/or the exigencies of the threat environment. When President Ford's successor, Jimmy Carter, having campaigned on a platform very critical of covert action, advanced his own Executive Order 12,036, superseding the Ford order on January 26, 1978, it focused on constraining intelligence activities by instituting a more rigorous decision cycle for covert action. Under Carter two committees were established in the NSC with responsibilities for intelligence activities, the Policy Review Committee (PRC), focused on setting the requirements for foreign intelligence collection and monitoring resource allocation and intelligence product; the Special Coordination Committee (SCC) was to be responsible for authorizing covert action proposals prior to advancement to the president for his approval.<sup>86</sup> In addition to a primary responsibility for covert action, the SCC reviewed and approved particularly sensitive intelligence collection and counterintelligence programs. The members of the SCC were high level, including the Secretary of State, Secretary of Defense, Attorney General, Director of the OMB, assistant for national security affairs, chairman of the Joint Chiefs of Staff, and the Director of the CIA.

Overall, however, arguably, President Ronald Reagan's Order, signed in 1981, was the most important of them all, not least because it is still in place in amended form today. It also

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<sup>83</sup> Sentiment of Stephen R. Kappes, supported by CIA public relations history. Interview May 12, 2011.

<sup>84</sup> Jeffreys-Jones, *The CIA and American Democracy*, 199.

<sup>85</sup> Colby, *Honorable Men*, 14-15.

<sup>86</sup> Loch K. Johnson, "Covert Action and Accountability: Decision-Making for America's Secret Foreign Policy", *International Studies Quarterly* 33, no. 1 (1989): 92-93.

marked a more strenuous foreign policy and commitment to the use of covert action. Executive Order 12333 defined covert action as:

Special activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection or production of intelligence and related support functions.<sup>87</sup>

EO 12333 is important for a number of reasons. First, clarification of covert action brings a level of, very basic, transparency to a very secret activity that even the Hughes-Ryan Act didn't address fully, while also firmly keeping the power of specificity in the hands of the administration. To clarify, the focus of activity, whether it is collection or covert action, has a significant impact on the level and procedure of oversight. For example, the D/CIA (at that point, DCI) requires no external permission before initiating intelligence collection, but does require presidential approval in the form of a finding for any covert activity. Second, the Order reinforced the point that covert action occurs at the behest of the White House, and is not something instigated by the CIA. This is key, and sensitive to many operations officers in the CIA, who point out that the CIA is not "rogue" and is not plotting illegal activities, but rather is providing an operational service upon demand within an institutionalized oversight process. This is reinforced by the actuality of the covert action initiation process, which is rather different from common perceptions of it. As former Deputy Director (CIA)—also a former Director of Operations—Stephen R. Kappes, pointed out, "Covert action is owned by the NSC and implemented by the CIA. Covert action is a tool of the president."<sup>88</sup> Finally, in Reagan's words, firmly confirming presidential accountability over intelligence activities:

These orders [EO 12333 and 12334] have been carefully drafted ... to maintain the legal protection of all American citizens ... Contrary to a distorted image that emerged during the last decade, there is no inherent conflict between the intelligence community and the rights of our citizens. Indeed, the purpose of the intelligence community is the protection of our people.

This is not to say mistakes were never made and that vigilance against abuse is unnecessary. But an approach that emphasizes suspicion and mistrust of our own intelligence efforts can undermine this Nation's ability to confront the increasing challenge of espionage and terrorism ... As we move into the 1980's, we need to free ourselves from the negative attitudes of the past and look to meeting the needs of the country.<sup>89</sup>

In an interesting foreshadowing of the challenges of Iran-Contra, EO 12,333 stipulates that all covert action be conducted by the CIA, with the dual exceptions that the armed forces may conduct covert activity during a time of war declared by Congress or during a period

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<sup>87</sup> E.O. 12333 quoted in Daugherty, *Executive Secrets*, 13.

<sup>88</sup> Interview with Stephen R. Kappes, April 6, 2011.

<sup>89</sup> Pub. Papers, Ronald Reagan, 1981 1126 (1982) quoted in Sciaroni, "The Theory and Practice of Executive Branch Oversight," 409.

covered by a report from the President to the Congress consistent with the War Powers Resolution. Under this Order, these are the only bodies that may act in a covert fashion officially unless the President determines that another agency is more likely to achieve a particular objective.<sup>90</sup>

Reagan's press release contributes to our oppositional argument because, as asserted in the previous chapter, presidential ownership is not only fundamental to the process of covert action, it is also key to the legal ramifications of the activity, and eventually in some cases the public perception of it. While congressional oversight is usually where the aperture to the public resides regarding intelligence activities, covert action has a unique position in the oppositional relationship that even Congress is wary of encroaching upon. Public awareness of covert action is increasing all of the time, a function of targeted political communication about CIA actions, and the increased media penetration of government activity overall.<sup>91</sup> A clear example of this trend is President Obama's overt ownership of the covert action that led to the capture and killing of Osama bin Laden. While this particular situation is clearly different from most covert actions, the president pointed out clearly that that he had ordered CIA Director Panetta to develop a plan to remove bin Laden, and that "he had given the order to execute."<sup>92</sup> This is a new and interesting use of the covert function; formerly shrouded in black; currently an on-going source of political credibility, strength, and proof of activity on the part of the government. Covert action, used this way, is a lever on the oppositional relationship that is virtually untouchable by other actors. This is particularly the case as although the executive is required to inform Congress of the action, the committees must only be informed, not approve of the actions, at least in the short term.

EO 12,333 was amended numerous times post-9/11 to reflect both the changing threat environment and the reconfiguration of the intelligence community, but changes to the text have been minimal over the years, reflecting a firm sense of the use of executive control. While the congressional committees have been unable to develop a charter for the intelligence community, the executive has long held to a general set of guidelines, particularly regarding covert action. This section was intended to demonstrate how the executive branch responded over the course of three administrations to the encroachment of congressional oversight on traditional executive branch "turf." It shows how the executive worked at reclaiming authority over intelligence activities through both asserting presidential authority over intelligence accountability on a public level while also focusing on specifying the terminology regarding intelligence activities. The next section will return to an analysis of the development of congressional oversight. Although the administrations discussed here were of both parties, the trends in maintaining control over intelligence and intelligence oversight varied very little among them. The presidents defined accountability in terms of the intelligence services' responsibility to the executive, defined the intelligence activities most relevant to external oversight, and specified the terms of art used to constrain or expand the intelligence function. All three of these functions are virtually unassailable by the adversary—Congress—and thus the congressional committees have developed their own processes through which to gain traction on the relationship. Evidence of this is in the bureaucratic procedures brought to bear on the intelligence community, particularly

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<sup>90</sup> Daugherty, *Executive Secrets*, 14

<sup>91</sup> Interview with former Staff Director, SSCI and former Staff Director, PFIAB, April 29, 2011.

<sup>92</sup> Press Release, President Barack Obama on the Killing of Osama bin Laden, May 1, 2011.

as the mechanisms developed out of the immediate scandal era of the mid-1970s.

### **Intermediate Development: Friction and Legislative Oversight**

By the late 1970s, the committees had become institutionalized with procedures developed. Intelligence agencies were subjected to an annual legislative budget review, required to attend hearings on the Hill, submit reports, brief politicians, and generally acquiesce to the requirements of their overseers.<sup>93</sup> Further, while the Executive Orders were signed by sequential administrations on the one side, pressure to refine intelligence information processes were brought to bear by Congress. The two major pieces of legislation that demonstrate this trend are the 1980 Oversight Act and the 1991 Authorization Act. These two statutes book end the Iran-Contra scandal; the first provided loopholes that may have facilitated the illegal activities of the Reagan Administration, while the second attempted to shore up any oversight vulnerabilities. Both Acts combined created the current oversight structure.

The foundations of the 1980 Oversight Act involved a 263-page charter for the intelligence community, the development of which had been a core objective of the Church Committee's original recommendations. By the end of the debate over the charter, the bill had been reduced to two pages as the outcome of intra-branch negotiations and compromise.<sup>94</sup> This period also introduced more leverage on the part of regular political dynamics. Not only did the political allegiances of the chairs matter to the focus of the committees, but the political and threat environments also played a role in where the committees stood in the balance of the intelligence community in terms of constraints. The political context during this period provided some impetus for slimming down exceptional needs on the part of the oversight committees. Senator Birch Bayh, a Democrat, was chair of the SSCI and, initially was engaged with fulfilling the recommendations of the Church Committee, such as completion of the charter mentioned above. With the onset, however, of the Afghanistan campaign, the emphasis shifted away from post-Church Committee constraints and more toward opening the options of the intelligence community. This was also the era of the revolution in Iran, which increased the need for security strength in the eyes of American leadership. However, Senator Bayh did champion both the Intelligence Oversight Act as well as, prior to that, the Foreign Intelligence Surveillance Act, which delimited the role of the judiciary in intelligence oversight, albeit only over foreign intelligence collection within the United States.<sup>95</sup> The SSCI began to take a swing back toward championing the intelligence committee when Barry Goldwater took over as chair upon the Republican Senate take-over of 1980.

The end result of Senator Bayh's last days as chair, and the waning moments of the Church Committee era, was the Intelligence Oversight Act, which streamlined the process of oversight, solidifying the reporting requirements and narrowing the committees to whom the intelligence community had to report to the two intelligence committees. In addition to the requirement to keep the committees "fully and currently informed," stated in an executive order signed by President Carter, the Intelligence Oversight Act required the executive to give prior notice to Congress on all important intelligence activities, including covert action. When the

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<sup>93</sup> Johnson, *America's Secret Power*, 208.

<sup>94</sup> Koh, *The National Security Constitution*, 58.

<sup>95</sup> Smist, *Congress Oversees the United States Intelligence Community*, 96-97.

president did not inform Congress of covert action before the operation, he was to inform the committee of the action in a “timely fashion” and explain why advance notice was not given. Interestingly, while considered a step forward in streamlining and focusing the oversight process, the final Act was a diluted version of the original bill, which had attempted to require *advance* notice of all activities, but ended up with the ambiguous “timely” notice.<sup>96</sup>

As the accountability framework highlights, this issue of the timeliness of reportage is key to an understanding of the characteristics of accountability. It was quite controversial in the early years of institutionalized intelligence oversight and remains so: the requirement of timeliness gradually narrowed from “the occasional report” to Congress regarding covert action through the early 1970s, to reports “in a timely fashion” following Hughes-Ryan amendment (1974), to prior notice of covert activity, according to the 1980 Oversight Act.<sup>97</sup> On a conceptual level, timely reporting is an issue of both legitimacy and efficacy in the relationship between the intelligence services and Congress. It means that the oversight function is part of *guidance* of intelligence, and thus proactive and not just retroactive. It allows congressional committees to have a voice in how projects are developed, how they are funded, and whether they should continue to be funded. These are all fundamental components of effective oversight and effective maintenance of the chain of accountability. Further, timeliness can be a factor in the level of legitimacy of an issue. For example, if time allows a number of actors to support an activity, this lends credence to that project if it becomes public, even if it is, ostensibly, secret. And, as we know, covert action projects are increasingly becoming overt in the current technological and political environment.

In addition to this key factor of temporality, an important variable was and is also to whom this information is ultimately reported. I define the audience of intelligence briefings as *reporting recipients*. The reporting recipients fit in the external independence category of the accountability framework and is crucial to oversight efficacy. Beyond the timeliness question, the Oversight Act of 1980 streamlined the process of intelligence oversight by changing the reporting mandate. Thenceforth the intelligence community would only be required to report to the two intelligence oversight committees, thereby keeping tighter control over the intelligence information and centralizing authority over intelligence activities. The Act, while framed in efficient, corporate, and positive terms such as “streamlined,” limited the number of members of Congress who would have access to intelligence information, and thus narrowed the number of those who would have a voice in oversight of the agencies. When the number of recipients is limited, alongside the usual limitations regarding classified material, external independence of the oversight mechanism can easily be compromised.

This issue of controlling the number of recipients of intelligence information has been key throughout the development of congressional oversight mechanisms. Arguments that members could potentially be irresponsible and leak key intelligence information, either purposely or accidentally, have imbued the debate about the role Congress should play in intelligence oversight for decades. One informal approach to limiting access to intelligence information was to limit briefings to four people, the “Gang of Four.” The participants in the Gang of Four are the chairmen and ranking members of the two intelligence oversight

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<sup>96</sup> Koh, *The National Security Constitution*, 127.

<sup>97</sup> Johnson, *America’s Secret Power: The CIA in a Democratic Society*, 225.

committees. Gang of Four briefings are not based in statute but they do provide an avenue for the agencies to brief on matters perceived of such sensitivity that briefing the full committees could risk disclosure. Gang of Four briefings deal only with *non-covert action* intelligence activities, and in terms of formality, were overtaken by this Oversight Act.<sup>98</sup>

The limited notification provision was formalized in the Act by the statement: “If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.”<sup>99</sup> While this issue of limited notification may seem arcane and irrelevant in light of the broader issues of intelligence and the requirements of thorough oversight, it has become a key operational factor in understanding how oversight is conducted as well as a methodological problem for researchers on the subject because it limits any record of the transmission of intelligence information from the agencies to Congress.

At root, in terms of oversight, the notification limitation provision has its basis in the fear that extremely sensitive intelligence information distributed to the full memberships of the two intelligence oversight committees could be prone to leaks or other congressional misuse. An integrated assumption when the Act containing the Gang of Eight limited briefing provision was passed was that the committee leadership would decide the procedures for notifying the remainder of the committee membership. Limited notification was not considered a permanent bypass of congressional committee procedure; it was a mid-step based on the understanding of the importance of sensitivity to timeliness in reporting covert activities.<sup>100</sup> In the words of Senator Walter Huddleston: “The intent is that the full oversight committees will be fully informed at such time the eight leaders determine is appropriate. The committees will establish the procedures for the discharge of this responsibility.”<sup>101</sup> At the time, limiting the number of those briefed on a specific mission was a reasonable compromise between congressional oversight and executive expectations and requirements of secrecy in the conduct of covert action. It does, however, appear to be a solid victory for the executive in terms of the oppositional relationship between the branches regarding intelligence oversight.

Obviously, from the legislative perspective, the oversight concern is that limited hearings enforce opacity with regard to active oversight. This matter, while discussed in depth in the late 1970s, continues in almost exactly the same format to this day. Records of these limited hearings are generally not kept, staff members are not allowed to attend, and notes are not taken. Further, and key to the functioning of the institutional culture of Congress, it remains ambiguous as to what degree those briefed are allowed to discuss these issues with their committee colleagues,

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<sup>98</sup> Alfred Cumming, “*Gang of Four*” *Congressional Intelligence Notifications* (CRS Report R40698, January 29, 2010).

<sup>99</sup> 50 U.S.C. § 413 (b) (2006). The National Security Act of 1947, as amended.

<sup>100</sup> Alfred Cumming, *Sensitive Covert Action Notification: Oversight Options for Congress* (CRS Report R40691, January 29, 2010), 5.

<sup>101</sup> Cumming, *Sensitive Covert Action Notification*, 3.

and this limitation tends to be decided by the executive branch.<sup>102</sup> The complexities of this type of briefing were exemplified by questions over whether House Speaker Nancy Pelosi was indeed briefed on the enhanced interrogation techniques then in use by the CIA. As expressed by a former congressional staff member, who had also served as a CIA attorney:

As a former legal counsel for both Republican and Democratic leaders of the House and Senate intelligence committees, I'm well aware of the limitations of these "gang of eight" sessions. They are provided only to the leadership of the House and Senate and of the intelligence committees, with no staff present. The eight are prohibited from saying anything about the briefing to anyone, including other intelligence panel members. The leaders for whom I worked never discussed the content of these briefings with me.

It is virtually impossible for individual members of Congress, particularly members of the minority party, to take any effective action if they have concerns about what they have heard in one of these briefings. It is not realistic to expect them, working alone, to sort through complex legal issues, conduct the kind of factual investigation required for true oversight and develop an appropriate legislative response.<sup>103</sup>

Although the 1980 Oversight Act seems, in retrospect, not only to be heavily skewed in the favor the executive, but also to have caused complications to effective and active oversight to this day, President Carter went even a step further when he signed the Act. He stipulated: "There are circumstances in which sensitive information may have to be shared only with a limited number of executive branch officials, even though the Congressional oversight committees are authorized recipients of classified information."<sup>104</sup> As Koh points out, rather than being a bold step toward intensified oversight, the Act simply codified the practice of the Carter administration from the last four years.<sup>105</sup> Interestingly, although the Act contained much of the language from Carter's 1978 executive order on intelligence, the administration did not want to enact its provisions through legislation "because the President did not want to give those restraints the force of law."<sup>106</sup>

### **Institutional Challenge: The Iran-Contra Scandal**

The description above was a brief outline of the incremental development of legislative oversight mechanisms stemming from the pivotal moment of the 1975 congressional investigations of intelligence ending with the last relevant oversight legislation prior to Iran-Contra. Below, I will describe the second turning point in the development of intelligence oversight: the Iran-Contra scandal. The Iran-Contra scandal was important to the development of oversight because it was the first really major test of the oversight mechanisms. It was also the source of tremendous upheaval in terms of the balance between the branches of government. It required investigators to assess whether the system and institutions were at fault for the scandal, or whether individuals had taken advantage of loopholes and lax systems within the system to attain their objectives. It

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<sup>102</sup> This list of concerns is drawn from a letter from Congresswoman Jane Harman to George W. Bush, January 4, 2006 regarding the National Security Agency's program, Terrorist Surveillance Program (TSP).

<sup>103</sup> Suzanne E. Spaulding, "Power Play: Did Bush Roll Past the Legal Stop Signs?" *Washington Post*, December 25, 2005. Interview with Suzanne E. Spaulding, April 6, 2011.

<sup>104</sup> Johnson, *America's Secret Power*, 209.

<sup>105</sup> Koh, *The National Security Constitution*, 58.

<sup>106</sup> Koh, *The National Security Constitution*, 58.

generated questions, again, of what role the other governmental branches have and, normatively, should have in terms of placing constraints on the executive, particularly on covert action.<sup>107</sup>

In brief, the Iran-Contra scandal centered on an elaborate scheme for advancing the Reagan administration's interest in supporting the Nicaraguan Contras, the opponents of the left-leaning Sandinista government. The Iran-Contra scheme emerged out of a complex set of geopolitical beliefs. Reagan and his Director of Central Intelligence, William Casey, held strong beliefs the Soviets would threaten American security by gaining a toehold in Central America.<sup>108</sup> While they felt that the Marxist Sandinista government was an emergent threat, the real fear was that a joint-Cuba/Soviet incursion could threaten the United States. In Ronald Reagan's words:

Although El Salvador was the immediate target, the evidence showed that the Soviets and Fidel Castro were targeting all of Central America for a Communist takeover. El Salvador and Nicaragua were only a down payment. Honduras, Guatemala and Costa Rica were next, and then would come Mexico.<sup>109</sup>

By December 1981, Congress had begun supporting the venture, supplying materiel, clothing and advice to the Contras via the CIA. However, congressional support for the Contras was short-lived, mainly due to waning public support and general feelings that deep engagement in Central America could lead to another quagmire similar to the Vietnam War.<sup>110</sup> Reacting to these political trends, Congress prohibited funding for the Contras; funding for the specific purposes of overthrowing the Sandinista government in 1983 and then limited all aid to the Contras to \$24 million in fiscal year 1984.<sup>111</sup> A key moment in the development of congressional aversion to continuing funding the Contras came when it was discovered that the CIA had been involved in mining the harbors in Nicaragua without informing Congress appropriately.<sup>112</sup> The mining incident served to highlight the role of the CIA in the later scandal, even though the core of the questionable activity happened within the NSC. This led to Congress cutting off all funding for the Contras, including both military and paramilitary operations in fiscal year 1985. Signed into law by President Reagan on October 12, 1984, it was known as the Boland Amendment and was the beginning of a series of amendments limiting and finally curtailing support for the Contras.

Committed to continuing support for the Contras, President Reagan, however, ordered the NSC to find a means to continue supporting them. In early 1984, with funding to the Contras drying up, Casey and McFarlane began exploring different options for continuing their support of the rebel group.<sup>113</sup> They looked abroad for potential sponsors in Saudi Arabia and Israel, with Saudi Arabia eventually providing millions of dollars in aid. Key to the progression of the engagement is the fact that as congressionally appropriated funding was cut off in the summer of 1984, operational responsibility for the Contras switched from the Directorate of Operations in

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<sup>107</sup> Koh, *The National Security Constitution*, 2.

<sup>108</sup> Andrew, *For the President's Eyes Only*, 461.

<sup>109</sup> Ronald Reagan, *An American Life*, 238-239, quoted in Andrew, *For the President's Eyes Only*, 461.

<sup>110</sup> Executive Summary, *The Iran-Contra Majority Report*, issued November 18, 1987, 1.

<sup>111</sup> Executive Summary, *The Iran-Contra Majority Report*, issued November 18, 1987, 1.

<sup>112</sup> Executive Summary, *The Iran-Contra Majority Report*, issued November 18, 1987, Interview with former Staff Director, SSCI and former Staff Director, PFIAB, April 29, 2011.

<sup>113</sup> Robert M. Gates, *From the Shadows: The Ultimate Insider's Story of Five Presidents and How They Won the Cold War* (New York: Simon and Schuster, 1996), 391.

CIA to Lt. Col. Oliver North in the NSC. The rationale behind this change was the fact that because the law forbade any U.S. “agency or entity ... involved in *intelligence activities*” from supporting the Contras, the NSC, as a non-intelligence component and thus apparently not covered by the statute, would provide an acceptable base for such activities.<sup>114</sup> Thus, secret activity was removed from the traditional home of covert activity, the CIA, in order to evade a congressional statute, and placed in an agency that was created to advise the president on national security matters but conduct no operations of its own, all without letting Congress know about the entire operation. The process that ultimately developed—as is widely known—was to drastically mark up weapons to be sold to Iran in order to divert the funds to support the Contras. In house, this illegal process was known as “the Diversion.”<sup>115</sup>

The outcome of the scandal, which resulted in a largely ruined relationship between Congress and the executive branch, and a fundamental questioning of the president’s capability to lead, had severe repercussions for the Agency, not least because some CIA officers were implicated in the scandal itself, but more because Congress viewed the scandal as the outcome of an incomplete picture of covert action in the country. The CIA itself was only specifically statutorily tasked to conduct such missions in 1991. While this statutory permission arrived many years after the Agency was given authorization by default by NSA 1947, the activities of the NSC under President Reagan challenged the newly installed congressional oversight mechanisms and forced a recalibration of intelligence oversight from that point on. The irony, of course, of the Iran-Contra scandal development is that the key pivotal moment that demonstrates a compression of the relationships between government branches and the public, which led to a leap forward in intelligence oversight, had very little to do with the actual intelligence agencies.

The outcome of the critique weighed heavily on recent government superstars. Robert Gates was criticized by congressional inquiries for not objecting more strenuously to the on-going Iran affair, especially regarding the non-notification of the intelligence oversight committees. He was criticized for not reacting much more strongly, including demanding that Casey go to the Attorney General and demanding full disclosure to the intelligence committees after being informed by Charles Allen of his suspicions of the diversion.<sup>116</sup> In his words: “A thousand times I would go over the ‘might-have-beens’ if I had raised more hell than I did with Casey about non-notification of Congress, if I had demanded that the NSC get out of covert action, if I had insisted that CIA not play by NSC rules, if I had been more aggressive with the DO in my first months as DDCI, if I had gone to the Attorney General on Allen’s suspicions of a diversion, if...”<sup>117</sup> In terms of the CIA, rising star Charles Allen was reprimanded due to his failure to report apparent malfeasance immediately. This reprimand was later removed from his record.

Interestingly, the final report of the Iran-Contra Committee’s Majority Report only recommended one thing regarding executive branch intelligence oversight, that the President’s appointees for the offices of IG and GC be confirmed in the Senate before assuming office. While seemingly minor, this recommendation has implications for our accountability model and the

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<sup>114</sup> Gates, *From the Shadows*, 392. Emphasis added.

<sup>115</sup> Interview with Charles E. Allen, July 7, 2011.

<sup>116</sup> Gates, *From the Shadows*, 416.

<sup>117</sup> Gates, *From the Shadows*, 417.

importance of understanding the different types of accountability and the various processes inherent to each type. First, the executive branch is generally perceived of as monolithic in terms of intelligence programs. Intelligence is a tool of the presidency, according to the spies themselves. Iran-Contra shattered the inviolability of the presidential decision-making regarding covert action that had, ultimately, survived even the scandals of the 1970s. To suggest officially that other internal mechanisms should have supervised the activities of the presidency is to invite scrutiny of internal activities. In terms of this project, the mention of the importance of internal control mechanisms and the stated importance of the internal independence of mechanisms from the overseen reinforce the theoretical approach to accountability that forms the core of my approach.

Among the changes were several that focused explicitly on reporting on covert action, the crux of the Iran-Contra issue and an on-going theme—as we know—in the development of intelligence oversight. The congressional committee that investigated the Iran-Contra affair recommended that notification be required within 48 hours after a covert action finding had been approved. Additionally, it was recommended that all findings be in writing and personally approved by the president, retroactive findings should be prohibited, findings should specify their funding sources, and all findings should lapse after one year unless the president renewed them.<sup>118</sup> While the executive malfeasance during the Iran-Contra scandal period was egregious, the changes to intelligence oversight were minimal, ultimately. In this case, focusing on the prerogatives of the president as Commander-in-Chief, the G. H. W. Bush administration refused to be bound by the 48-hour time limit and for the first time ever vetoed the Intelligence Authorization Bill. An agreement was reached, however, eventually in which the earlier strenuous deadline was diluted to require that the president must provide “timely notice,” explained in the conference committee notes to mean “within a few days” of the signing of a finding.<sup>119</sup>

The legislation that eventually arose from the investigation of the Iran-Contra affair, the Intelligence Authorization Act (1991), outlawed retroactive presidential findings and required that any third party participation in covert activity be reported to the congressional oversight committees.<sup>120</sup> Almost a decade after the committees were put in place, post-Iran-Contra measures were enacted to codify statutorily rules that had previously been agreed upon tacitly. During that interim period, there was still a level of ambiguity as to what degree Congress could compel the intelligence agencies to provide information. As a 30-year veteran of the Hill and former HPSCI staffer put it, prior to the Iran-Contra revelations, oversight of covert action had been conducted based on a “gentlemen’s agreement.”<sup>121</sup> It was *assumed* that notification of covert action would be timely and appropriate, but actual measures to enforce diligent reporting were slow to follow this assumption.

Iran-Contra, according to some arguments, was the second act to the original

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<sup>118</sup> *Report of the Congressional Committees Investigating the Iran-Contra Affair*, 423-27, quoted in Snider, *The Agency and the Hill*, 66.

<sup>119</sup> Snider, *The Agency and the Hill*, 67. David L. Boren, “The Winds of Change at the CIA,” *The Yale Law Journal* 101, no. 4 (1992): 856.

<sup>120</sup> Boren, “The Winds of Change at the CIA,” 857.

<sup>121</sup> Interview with former HPSCI staffer, May 5, 2011.

congressional investigations of the 1970s; it forced a reinvestigation of the oversight relationship between the agencies, particularly the CIA, and Congress.<sup>122</sup> It is true that the 1991 Act served to strengthen the areas that seemed to have allowed for loopholes for the Iran-Contra episode. While the investigations, both in the 1970s and 1980s, were titillating and involved the press and public to an unusual degree in intelligence operations, what do they—and the legislative decisions made in response to them—mean for the accountability framework? Essentially, the soul-searching of that period produced some change in terms of our categories of effective accountability, but the changes themselves were minor in comparison with the deep distrust between the legislature and executive that the scandal itself in engendered. The process of reporting was tightened, but even the small step to try to force a time window on the executive failed. Taking the choice of temporality of reporting away from the executive would have reinforced the congressional mechanism's external independence. Interestingly, the focus on timely reporting once again highlights the importance of temporality in accountability. Transparency of the congressional oversight mechanism was not on play but conversely the investigations shed light on the range of executive control mechanisms that did not function appropriately during this episode.

I argue that Iran-Contra proved something in terms of a pivotal moment in legislative oversight mainly because it showed, once again, that while the mechanisms of the 1970s were deemed important, real effective oversight is almost impossible in light of an executive that is determined to pursue a narrow agenda. Thus, in terms of analysis, it is important to assess the asymmetrical relationship between the two branches rather than try to engage in the fallacy that congressional oversight can provide a constraining mechanism without executive branch buy-in. Once again, the 1991 Authorization Act started with a large objective and following the trend developed within this chapter was minimized throughout the process to provide only a micro-step in the development of the overall matrix of oversight mechanisms.

### **9/11: Reorganization, Blame and Organizational Change**

Oversight has developed stepwise; the outcome of a function of the oppositional relationship between Congress and the executive, both focused on defining and controlling the extent of appropriate intelligence oversight. While it is clear that the Church Committee investigations and Iran-Contra scandal led to a clarification of the relationship between the executive and legislative branches and a recalibration of where checks should be placed on the executive branch, the changes after 9/11 have turned out to be a different beast altogether. This is partly a function of the characteristics of the different crises; the first two were political scandals, while the third was an operational failure calling for a different type of potential solution. The reaction to the attacks—as well as to the failure to find weapons of mass destruction in Iraq—led to unprecedented change and reorganization of the intelligence community. While the changes to the community were wide-ranging, cutting across cultural and institutional boundaries, the oversight committees remained surprisingly supine in reaction to 9/11 Commission criticisms that they were part of the problem. This section touches very briefly on the activities of the 9/11 Commission, as they provided the basis for the organizational change that occurred within the intelligence community. I describe two results of the recommendations and discuss briefly the ramifications of those changes for intelligence oversight.

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<sup>122</sup> Smist, *Congress Oversees the United States Intelligence Community*, 269.

The attacks on 9/11 were an unexpected shock that shook American perceptions of safety and insularity. 9/11 did not introduce a new type of threat to the world; it simply brought immediacy to an age-old tactic, but the impact was immediate.<sup>123</sup> The result of the attacks was, as intended, society-wide fear and cascading economic effects, but the United States never faced an existential threat, and probably never will. What the attacks on 9/11 did shatter was the exceptionalism borne of incredible relative strength in the international arena and hubris arising not only from this strength, but also from motivated ignorance of the dynamics of the world. The reason I mention ignorance is to illustrate that much of the response to the attacks in terms of institutional reorganization of the national security apparatus was in response to the political environment rather than the exigencies of the threat. It is true that the audacity of the attacks was unprecedented and the fact US infrastructure could be used so effectively against itself was striking. All talk of brilliant mastermind terrorists, however, is overblown. In the case of 9/11, the dual keys to the project were timing and an awareness of American structural vulnerabilities. But, instead of reacting proportionally to the attacks, both in terms of return strikes against the purported adversary and hardening of American targets, the US government under the Bush administration rushed to reorganize the pieces of the sprawling intelligence community.

A concerted effort was made to discover what had gone wrong; what had been missed to allow the 9/11 attacks to occur. A joint congressional investigation into the causes of 9/11 as well as a second commission, the 9/11 Commission, investigated where the fault for 9/11 lay and where to place blame. The 9/11 Commission became famous and popular in a way unique for an investigatory commission. Partially, this was because of the outsized personalities eventually chosen to participate, particularly the chair and vice-chair, New Jersey governor Thomas Kean and former Congressman Lee Hamilton, and secondarily, of course, due to the nature of the topic, *owned* by the American people, and represented in the personae of the Families of the 9/11 Victims, whose influence on the proceedings proved to be enormous. Scholar and former CIA official, Paul R. Pillar, summarizes the impact of the Commission in a commonly accepted view within Washington circles: “The 9/11 Commission would attain—in part because of the salience of the event it was charged with investigating and in part because of its own prodigious salesmanship—prominence and influence that would make it the envy of ad hoc panels everywhere. It would come to be listened to as the arbiter of all that is good and bad in counterterrorism. Its word would be accepted and replayed again and again as the last word on everything about 9/11, including everything involving intelligence.”<sup>124</sup>

Unfortunately, a determination to be politically sensitive to the families of the victims, and the need to smooth bipartisan divides diluted the end product, requiring removal of some data and the watering down of interpretation.<sup>125</sup> The partisanship issue was particularly fraught because the 9/11 Commission was investigating a highly charged political issue that sat exactly

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<sup>123</sup> A quote from Martha Crenshaw, a renowned terrorism scholar with years of experience prior to 9/11, counters the “break from the past” theory succinctly: “... [T]he departure from the past is not as pronounced as many accounts make it out to be. Today’s terrorism is not a fundamentally or qualitatively ‘new’ phenomenon but grounded in an evolving historical context.” Quoted in Pillar, *Intelligence and US Foreign Policy*, 209.

<sup>124</sup> Pillar, *Intelligence and U.S. Foreign Policy*, 234.

<sup>125</sup> Pillar, *Intelligence and U.S. Foreign Policy*, 235. See also Philip Shenon, *The Commission: The Uncensored History of the 9/11 Investigation* (New York: Twelve, 2008). This sentiment also appeared in my interview with former 9/11 Commission staffer, April 14, 2011.

at the inflection point between the Clinton and Bush administrations. Who failed at counterterrorism? Both were eager to protect their colleagues from specific blame, leading to bargaining and deal-making on how the individuals would be investigated and presented in the final text of the report. Thus, the ultimate report does not particularly blame individuals. In nicely worded text, for a government publication, the blame was placed on the intelligence community for a series of ambiguous sins, including “failure of imagination.” Anyone who has ever worked in a bureaucratic organization should giggle at this censure. Further, biases and assumptions on the part of specific Commission staffers had an effect on the final conclusions of the investigation. This did not only have an effect on the outcome of the report but also on the subsequent recommendations for intelligence community reform. One such issue was the creation of a Director of National Intelligence, a pet project of the extremely strong-willed staff director, Philip Zelikow.<sup>126</sup>

The 9/11 Commission’s role in determining the appropriate approach to intelligence reform is an interesting phenomenon in its own right. First, the Commission grew out of a combination of issues – the tepid response to the congressional investigation and the prolonged public demands for further investigation on the part of the 9/11 victims’ families groups. In many ways, the 9/11 Commission’s genesis mirrored those of the investigations after the 1970s scandals and in response to the Iran-Contra scandal. It was, as were the others, a public display of governmental thoroughness and earnestness in the wake of a national scandal, or, in this case, tragedy. The outcome of the Commission’s investigation was an anodyne, well-written best seller that served to soothe the partisan conflict that had characterized discussions of the issue.<sup>127</sup>

Blame was placed on the intelligence community for its failure to share information, to build an accurate enough mosaic of the looming attack that it could be prevented, and, overall, for a failure to adapt. Drawing upon the range of opinions expressed both in the media analyses and among the intelligence officers I interviewed, as well as on my own analysis, the truth of the failure was actually much more basic than the hearings and commission reports would suggest. The intelligence community is a series of hierarchically organized agencies. They use standard procedures to shift an incredible amount of information through the system and into the hands of policy-makers. Failures will happen. Some of the vulnerabilities of the system should have been fixed years prior to the attacks; among them the different spheres of influence within the community, the turf wars, and unwillingness to share. The absence, in some cases, of unifying objectives for the overall intelligence community, structural atomization, and the uneven relationship between the Director of Central Intelligence—in theory the head of the community at that time—and the Secretary of Defense, who controlled, and still does, the lion’s share of the intelligence budget were also major issues. This does not even begin to address the layers upon layers of political and policy failings that contributed to the attacks. From the Bush administration’s alleged failure to take Presidential Daily Briefs (PDBs) warning of potential Al-Qaeda attacks to President Bush’s lack of interest in foreign policy matters. Of course, on the other side, accusations were made that President Clinton’s administration was soft on national

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<sup>126</sup> Pillar, *Intelligence and U.S. Foreign Policy*, 239. See also Shenon for detail on how Zelikow’s management style, personal political connections, and analytical predelictions influenced the outcome of the 9/11 Commission’s work.

<sup>127</sup> Interview with Bill Harlow, CIA Public Relations Officer under Tenet, March 28, 2011. Interview with former 9/11 Commission staffer, April 14, 2011.

security—“swatting at flies”—and terrorism, thus allegedly leaving the Bush administration with the prior administration’s mess to clean up.<sup>128</sup>

The 9/11 Commission recommended a series of organizational changes to the intelligence community in the politicized environment of the period. They were whole-heartedly embraced by Congress and contributed heavily to the legislation guided quickly through Congress by the Senate Governmental Affairs Committee. There was also a political push behind the recommendations in that the report appeared during the final stages of the 2004 presidential campaign and neither candidate wanted to appear weak on national security at such a crucial juncture for American safety. The bill was passed by the Senate two weeks after its was introduced; the House bill passed also in two weeks.<sup>129</sup> One of the main points of the legislation, of course, was the creation of a Director of National Intelligence to sit atop the intelligence community. This move reduced the former putative head of the community, the Director of Central Intelligence, to mere agency director, Director, CIA. Posner’s description of plan for the role of DNI: “... [T]he DNI, shorn of responsibility for running the CIA, would become not the chairman but the chief executive officer of the intelligence community.”<sup>130</sup> The idea behind the hierarchical change was that coordination and information-sharing were the key problems leading to 9/11 and thus a very senior official could unite the 16 agencies of the community, as well as serve as the point person and central intelligence adviser on intelligence matters to the president.

As described above, by convention since NSA (1947) clarified the role of the CIA, the Director of Central Intelligence (DCI) has held two responsibilities: he has directed the CIA and has also been charged with the direction of the entire intelligence community, at least in terms of the IC’s coordination with the requirements of the President. There have always been many caveats and drawbacks inherent to this bifurcation of roles. Mainly, the DCI, while formerly the key reporter to the president about intelligence issues, did not have control over the bulk of the intelligence budget, which is under the purview of the Secretary of Defense. Further, the tension between the military and national intelligence program agencies was exacerbated by the military fear that a strong DCI could hinder military intelligence agencies’ responsiveness to the needs of the military.<sup>131</sup>

Over the course of many years, it has been suggested that an overall coordinator of the entire intelligence community could be useful to streamlining information stemming from the awkwardly atomized intelligence community. While the creation of such an office had been discussed for several decades, the attacks on 9/11 and the analyses after these attacks led to the realization of such an office. As a result of the recommendations of the 9/11 Commission, the Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 established the Office of the Director of National Intelligence with the responsibility of serving as the president’s adviser on intelligence and with the purview over the national intelligence program, excepting the military-focused agencies which remain in the Department of Defense.

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<sup>128</sup> *9/11 Commission Report*, 202.

<sup>129</sup> Richard A. Posner, *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11* (Lanham, MD: Rowman and Littlefield, 2005), 53.

<sup>130</sup> Posner, *Preventing Surprise Attacks*, 37.

<sup>131</sup> Richelson, *The US Intelligence Community*, 453.



**Figure 4: Intelligence Community post-IRTPA (2004)**

In addition to the position of the DNI, intended to centralize intelligence, another specific criticism brought by the 9/11 Commission, was the failure to “connect the dots” — the failure to share information between agencies enough to put the pieces of the plot together. In theory, proposals to create centralized locations where analysts drawn from throughout the community could work together on a specific issue, such as counterterrorism, or counter-proliferation, would centralize information, thinking, and analysis could help with the problems of group think, lack of alternative analysis, and stove-piping that led to the failure to foresee the attacks on 9/11. In actuality, the result of the pressure to build additional components and units whose focus was to share and integrate information was to cause a massive proliferation of the entities charged with overlapping duties. While these new institutions at the top level have created confusion with other, longer entrenched components, these problems have also dropped down to the local and state levels and caused the number of agencies to multiply drastically. The push for increased inter-agency cooperation and information sharing led the federal agencies, particularly DHS and the FBI as the two agencies focused on domestic security issues, to begin to integrate local level agencies, such as local law enforcement, into the intelligence gathering process.

Investments using federal funds were made to increase the number of “fusion centers”, locations where members of various agencies would be co-located to analyze intelligence information. These usually all have a DHS officer detailed to serve as a point person to the federal level. JTTFs (Joint Terrorism Task Forces) were organized by the FBI through their field offices to bring collaborating agencies together to work on terrorism issues. Thus, streams of

information have been increasing in all directions. Local level agencies began to get the attention of their “betters” in Washington, while the federal agencies started to consider local-level expertise on communities and practice useful to the overall intelligence enterprise. Thus the network of agencies linked together has grown, as has the number of components dealing with counterterrorism.

As is noted throughout the literature on the 2004 intelligence reforms, they have not proven exceptionally successful, because of several reasons. They were devised in haste to serve political constituents not normally a part of the oversight process; they were based on the assumptions and quick analysis of the 9/11 Commission, and they were not realistic about the successes and failures that are normal to the intelligence process as a regular bureaucratic function. As Betts points out, the political imperative to find fault and to highlight the faults of the IC allowed observers to ignore the many successes of the agencies. This is not to apologize for the community, but rather to point out that rash and dramatic reorganization was its own failure of foresight, leading to the disruption of the many components of the community that worked effectively.<sup>132</sup>

The failure of 9/11 was the product of a bureaucratic process that is large, overlapping, and beset with conflicting objectives. It also involved individuals—and thus potential human failure—as well as linkages between operators, analysts, and decision-makers. As pointed out in my chapter that focuses on the CIA, the Agency and the intelligence community are easy to blame. The secrecy inherent to their work, their lack of public profile, and the fact that they do not have a natural constituency within the policy debates to support their claims, such as the Pentagon does, all contribute to the community as easy target. As DCI Richard Helms put it, “I am the easiest man in Washington to fire. I have no political, military or industrial base.”<sup>133</sup> One can, however, go too far with assertions of unfair blame and accusations of habitual scape-goating of the intelligence community. My assertion is that blame for the attacks was misaligned with the actuality of which changes could have been beneficial to the intelligence apparatus. Hundreds of books have been written on 9/11, analyzing what caused the attacks to succeed, and arguing for a range of different solutions to the problems these analyses unearth. My objective here was not to add to this list, but rather to point to how the 9/11 Commission own goals and the political context within which it released its recommendations enabled a specific, narrow type of reorganization of the intelligence community.

The creation of a new position atop the intelligence community and the dispersion of intelligence gathering authorities raise conflicting questions for accountability. On the one hand, centralizing intelligence decreases apertures for oversight, while on the other the increase of intelligence-focused components dilutes the attention overseers would be able to give to the individual intelligence activities. An issue that has arisen in the post-IRTPA period is what role the Director of National Intelligence, and his office, plays in the oversight of active intelligence operations. The DNI is not an actual “overseer” in terms of how I use the term throughout this project. A question often asked in terms of the DNI is whether he possesses oversight authority and how that functions. The DNI is not perceived as “external” to the remainder of the intelligence community. Rather, as stated above, he is the CEO, the coordinator, the figurehead,

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<sup>132</sup> Betts, *Enemies of Intelligence*, 2.

<sup>133</sup> Quoted in Pillar, *Intelligence and U.S. Foreign Policy*, 179.

and not generally involved in the operational level of intelligence. This creates an extra layer of bureaucracy for the intelligence community, but does not, in fact, affect traditional oversight mechanisms to any great extent. Thus, although we may want to add the DNI to the mechanisms studied, the position added bureaucratic complexity, but not any degree of greater accountability. The sheer magnitude of the responsibilities of the DNI would make any additional “external” task not only impossible, but also inappropriate. The DNI is the president’s closest advisor on intelligence matters. He is, thus, responsible for bringing together the thoughts of the community and presenting those to the president daily. He presents a unified voice, but the task of ensuring internal adherence to executive policy requirements rests far below him. One specific challenge to accountability could be a changing role of the Inspector General (CIA), who has held a special role in terms of oversight due to his/her statute basis and reporting responsibilities. This could feasibly change if the DNI chooses to coordinate community-wide Inspectors General under his authority or under the authority of the Inspector General within the ODNI.

The proliferation of intelligence components has challenged the unified approach that the DNI represents. While the intelligence community was developing new bureaucratic processes to cope with new agencies, responsibilities, and a new community-wide director, oversight has been challenged to keep up with this change, on both functional and political levels. The two committees have generally not kept up to change in the intelligence community, but the adaptation and growth of the IC has engendered overlapping jurisdictions for security and intelligence-related activities among other committees. The responsibility is currently distributed among 17 committees, each claiming a particular piece of the intelligence mosaic. Currently, in the House, in addition to the House Permanent Select Committee on Intelligence, House Appropriations, Armed Services, Budget, Energy and Commerce, Government Reform, Homeland Security, International Relations, and Judiciary all supervise some aspect of intelligence. In the Senate, Appropriations, Armed Services, Budget, Energy and Natural Resources, Foreign Relations, Homeland Security and Government Affairs, Judiciary Standing Committee and the Senate Select Committee on Intelligence committees all provide oversight to intelligence activities. Further, three members of the HPSCI are on a newly created Select Intelligence Oversight Panel on the Appropriations Committee.

This dispersion brings up intelligence oversight issues of old, when the fear was that briefing numerous committees could lead to leaks of extremely sensitive information. In this case, also, the question arises of what level of expertise regarding intelligence matters each of these committees is expected to attain. It has been proven to be very difficult to understand the intricacies of highly technical programs quickly; hence the reason the Senate abolished term limits within its intelligence oversight committee. This becomes even more complex when the intelligence issues stem, for example, from new agencies, such as DHS or ODNI, where processes of reporting are just being established and where senior staffers may be in short supply to provide needed expertise on arcane intelligence matters. This distributed approach to intelligence oversight demonstrates the uneven historical process that congressional intelligence oversight has taken to get to this point, and also reflects the increasing number of overlapping issues that have relevance to intelligence in the post-9/11 security environment. These include, among others, issues of civil liberties when law enforcement and intelligence information are integrated, the emergent problem of cyber-security, issues of government-controlled information and access, the amorphous sphere of homeland security, the role of the private sector, and

military affairs.<sup>134</sup> This proliferation of issue areas and entities is portrayed visually in the Figure 2 above. The challenge of overseeing such a multitude of atomized and distributed intelligence units is clear. This also comes at a time when numbers of congressional staffers on the oversight committees are actually *shrinking*. In the words of one scholar, the growth of the intelligence community has achieved “an extraordinary rate of growth ... which has not been matched by a comparable increase in the size of the oversight committee staffs or a corresponding expansion of other oversight mechanisms.”<sup>135</sup>

Many recommendations have been advanced post-9/11 to improve congressional oversight, for example, increased attention in the Senate has been focused on improving the relationship between the intelligence committee (SSCI), which handles the authorizations for the intelligence community and Appropriations committee, responsible for any appropriations for the IC.<sup>136</sup> Other relevant systemic measures to increase oversight have engaged with the role of the Inspectors General and the potential insertion of a statutory IG in a IC-wide capacity, who would be charged with coordinating and strengthening the reporting among the various agency IG offices. This step would not be uncontroversial, particularly if it conflicted with the authority of the statutory IG in the CIA. At the committee level, the Senate intelligence committee abolished the term limits that its members may serve, although the House did not. This, in itself, is an interesting shift in the priorities of the constitution of the committees. The issue of tenure on the committees is rooted in the original debates about them in the 1970s, and is based on one of the fundamental complexities of regulation and oversight: how to avoid “capture” by the agency one is charged with overseeing. Secondly, it was thought that increasing the number of viable candidates for membership on the intelligence communities could increase the opportunities for members to learn about intelligence matters.

This fear of members being co-opted by the priorities of the intelligence agencies led term members to be limited to eight years in the Senate; six in the House. This requirement was lifted according to S. Res. 445 in 2004 in response to the recommendations of the 9/11 Commission. While term limits may seem a banal issue, they have been a crucial consideration since the committees were originally established, and were considered a change of immense importance by members of the Senate committee staff.<sup>137</sup> On an analytical level, it is important that members and their staff have adequate time to understand the arcane issues of intelligence, particularly as technological advances make intelligence a much more involved process. Further, there is an implicit trust that must be placed in the overseers not to be captured by their agencies. Thus trust in the committees has apparently grown, or efficiency in maintaining skill in intelligence has outweighed doubts about members’ bias in this more controversial threat environment. In terms of the accountability framework, unbounded service on the committees contributes a great deal to a wider expertise and authority on the increasingly arcane and technical matters of intelligence.

Post-9/11 criticism of the intelligence oversight committees also recalls the pre-Church Committee era, when Congress chose not to engage rather than delve into unpleasant details of

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<sup>134</sup> Kaiser, *Congressional Oversight of Intelligence Activities*, 1.

<sup>135</sup> Steven Aftergood quoted in Zegart, *Eyes on Spies*, 99.

<sup>136</sup> Kaiser, *Congressional Oversight of Intelligence*, 3.

<sup>137</sup> Interview with former senior SSCI staffer, June 16, 2011.

intelligence activities. In a 2007 statement before the Senate Select Committee on Intelligence, Lee Hamilton articulated in strong terms his perspective on the current state of intelligence oversight:

To me, the strong point simply is that the Senate of the United States and the House of the United States is [sic] not doing its job. And because you're not doing the job, the country is not as safe as it ought to be.... You're dealing here with the national security of the United States, and the Senate and the House ought to have the deep down feeling that we've got to get this thing right.<sup>138</sup>

It has been argued that the level of fear engendered by the 9/11 attacks greatly challenged the stature of overseers, as the Bush administration made greater and greater inroads on their purview. As Treverton points out, "... The process of congressional oversight of intelligence, including covert action, so carefully crafted in the 1970s, is now regarded as something of a joke in Washington. Terrorism is frightening enough to the body politic to justify almost any action in response..."<sup>139</sup> This is an interesting point in terms of how anxiety and public reaction can cause extreme effects in terms of the perception that security outweighs concerns about the civil liberties that are ostensibly protected by careful oversight of the intelligence process. I find, however, the quip too facile to grasp adequately the complexities of the post-9/11 security and intelligence environment. Rather, I would argue that political concerns, including an unwillingness on the part of Congress to cross partisan ideological lines, as well as an overall unwillingness to be seen as unsupportive of defense and security issues as more to blame for the laxity of congressional oversight after the attacks. Although this chapter describes opposition between the executive and legislature regarding intelligence, it was only in the last decade or so that partisanship within the committees began to actively impact intelligence oversight. At this point in our incremental development of intelligence oversight, progress has stalled somewhat. The complications of the changes in overseeing the post-IRTPA environment are clear, but questions remain. For example, why has partisanship within the oversight committees begun to play such a strong role in the current environment? On a theoretical level, what does partisan rancor mean for the accountability framework? That is, does internal conflict hinder the provision of adequate external accountability? In the next section, I will investigate these questions through explorations of specific moments of post-9/11 partisanship. I will look at a particularly concrete case, the failure to enact Intelligence Authorization Acts that highlight this dynamic particularly clearly.

### **9/11 and Intelligence Oversight: Countervailing Politics, Internal Friction and Recourse?**

This chapter has described the relationship between the executive and Congress regarding intelligence as *oppositional*, meaning that friction between the two branches has led to incremental development of the congressional oversight mechanism, responsible for the external accountability of intelligence activities. This inter-branch friction hindering optimal oversight is compounded by *intra*-branch friction within Congress. This two-fold friction differentiates the institutional development of legislative oversight from both the executive control mechanisms

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<sup>138</sup> SSCI Hearing on Congressional Oversight, 110th Cong., 1st sess., 13 November 2007, quoted in Amy B. Zegart, "The Domestic Politics of Irrational Intelligence Oversight," *Political Science Quarterly* 126 (2011): 1.

<sup>139</sup> Gregory F. Treverton, *Intelligence for an Age of Terror* (Cambridge: Cambridge University Press, 2009), 232.

and judicial review of intelligence that frame this chapter of the project. I will explore this dynamic by investigating the congressional oversight committees' behavior with regard to the authorization and appropriations processes for the intelligence community.

The “power of the purse” is key to the balance of power between Congress and the executive, and particularly fundamental to congressional control over executive behavior. In most ways, Congress attempts to gain power over the other branches steadily. In terms of intelligence oversight, this seems to be the case in rhetoric, but not in actual practice. As a former CIA officer states it: “The centrality of the budget to oversight should be obvious. In reviewing the president’s budget submission and crafting alternatives or variations, Congress gets to examine the size and shape of each agency, the details of each program, and the plans for spending money over the next year. No other activity offers the same degree of access or oversight. Moreover, given the constitutional requirement for congressional approval of all expenditures, in no other place does Congress have as much leverage as in the budget process.”<sup>140</sup> While this is the case, it raises the question of why the oversight committees have seemed to behave so haphazardly with this most important, and, in the opinion of many, only concrete avenue of recourse when it comes to redirecting the behavior of the intelligence agencies. Are they sabotaging their own efficacy, or are there unseen—or at least under-analyzed—variables hindering effective passage of this key legislation? It is striking that in the one arena where Congress could use statutory authority to help rectify the asymmetry between the executive and legislative branches. While information and knowledge are the keys to intelligence authority, control over budgets—and the ability to cut budgets—is a great equalizer. Intelligence authorization legislation can affect intelligence programs by establishing them, altering them in progress, or curtailing them.<sup>141</sup> On the other hand, from FY2005 to FY 2010 no annual authorization bill had been enacted. There has been legal coverage for the intelligence community in the form of a one-sentence inclusion in the defense appropriation acts authorizing intelligence activities.<sup>142</sup> Obviously, thus, intelligence is not operating illegally, but the fact that this potential oversight role has not been seen as important, and, has, in fact, been bogged down in political maneuvering, demonstrates that this key authority of the supervisory mechanism is weak.

First, it is important to understand the disaggregated organization of mechanisms responsible for the authorization and appropriation of the intelligence budget. Different oversight mechanisms cover different pieces of the intelligence enterprise. Beyond the division into separate agencies serving the needs of individual departments, the intelligence community is divided into military and national intelligence services. This is an important distinction in terms of oversight because the intelligence oversight committees’ jurisdictions differ in the two chambers. This variation creates complexity and friction because the committees have different access to intelligence information, overlap in some cases, while not touching in others, have different policies regarding term limits, a key issue in terms of intelligence, and have different

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<sup>140</sup> Lowenthal, *From Secrets to Policy*, 207.

<sup>141</sup> Eric Rosenbach and Aki J. Peritz, “Confrontation or Collaboration? Congress and the Intelligence Community” (Harvard Kennedy School), 1.

<sup>142</sup> Richard A. Best Jr. *Intelligence Authorization Legislation: Status and Challenges* (CRS Report R40240, January 27, 2010).

approaches to staffing and the acceptability of partisanship within the staffs.<sup>143</sup> At root, the process of authorizing and appropriating funds lacks unity and sometimes coherence, divided as it is with uneven jurisdiction between oversight mechanisms.<sup>144</sup>

To begin, the intelligence budget is divided into separate programs. The Military Intelligence Program (MIP) budgets finance all of the defense-related intelligence activity, while the participants in the National Intelligence Program (NIP) budgets support national intelligence agencies, including the CIA. NIP programs are supervised by the DNI and managed by program managers. The program managers develop and monitor budgets and allocate funds.<sup>145</sup> TIARA, as was mentioned earlier in this chapter, are a sub-set of defense intelligence programs mainly dealing with immediate tactical force support. Interestingly, NIP funds are “fenced,” that is they cannot be transferred to other programs. The divisions on who has responsibility for which programs varies, obviously, between the chambers, leading to varying constellations of committees responsible for developing authorization bills. Thus, in addition to the normal requirements of conferencing bills between the committees in both chambers to calibrate differences, the varying jurisdictions require additional committees, such as SASC to weigh in on military intelligence issues. This in itself can create a logjam in terms of agreement on appropriate guidance for the intelligence agencies.<sup>146</sup>

Resolutions in both intelligence committees permit them to authorize appropriations for intelligence activities, and thus per normal congressional practice, the appropriations cycle requires specific intelligence committee activity, such as authorization bills and budgets.<sup>147</sup> The standard two-step process, authorizations and appropriations, applies to intelligence. One difference, however, from standard procedure is that while the authorization bills received from the administration are public, the levels of personnel and funding are classified by the executive branch.<sup>148</sup>

	SSCI	HPSCI	SASC	HASC
<b>NIP</b>	<b>x</b>	<b>x</b>		
<b>MIP</b>		<b>x</b>	<b>x</b>	<b>x</b>
<b>TIARA</b>		<b>x</b>	<b>x</b>	<b>x</b>

**Figure 5: Congressional Intelligence Authorization and Appropriations Responsibilities**

<sup>143</sup> Interviews with former staffers of HPSCI and SSCI, May 20, 2011, June 16, 2011, June 28, 2011, July 17, 2011.  
<sup>144</sup> Gordon Adams and Cindy Williams, *Buying National Security: How America Plans and Pays for its Global Role and Safety at Home* (London: Routledge, 2009), 194.  
<sup>145</sup> Adams and Williams, *Buying National Security*, 131.  
<sup>146</sup> Interview with former SSCI staffer July 17, 2011.  
<sup>147</sup> Johnson, *America’s Secret Power: The CIA in a Democratic Society*, 218.  
<sup>148</sup> Loch K. Johnson, *Strategic Intelligence: Intelligence and Accountability*, Appendix A, 216.

Some argue that the problem lies with this bifurcated process of one body authorizing appropriations but dependent on the appropriators for actual budget action.<sup>149</sup> There can be friction between these two sets of mechanisms. For example, programs may be approved but the appropriators may not fund it, or fund it to the level to which it was originally authorized. Termed “hollow budget authority”, the appropriators are superseding the wishes of the authorizers. In another example of authorizers’ wishes not being respected, appropriators can appropriate funds not authorized. This is called “appropriated but not authorized.”<sup>150</sup>

All agree that the absence of an authorizing bill weakens the efficacy of oversight – both functionally and normatively. Functionally, the absence of an authorization bill—and thus Intelligence Authorization Act for the year—creates a scenario in which the intelligence committees do not provide guidance for the intelligence community. A further consideration is that since the budgets are classified and processes regarding appropriate handling of sensitive material onerous that very few members of the committees actually engage in thorough analysis of budget requests. This would suggest that recourse is limited even in this area where it should be assumed that concrete consequences would be the norm. In the words of one congressional staffer: “There’s lobbying in intelligence, but not nearly as much and it’s all done behind closed doors... What are you going to do if you’re an authorizer who doesn’t like what’s in the appropriations bill? Hold up the entire defense appropriations bill? No way. There’s not much recourse for intelligence authorizers, but there is in other areas.”<sup>151</sup>

This raises the question of how important the guidance in the Act is if it can easily be done without? Is this budgetary control actual oversight? It seems, again, and admittedly it is difficult to prove beyond a doubt without the benefit of empirical data, as it is classified, that the structure of the appropriations process, the complicated procedures that limit access to information, and the eternal problem of the information asymmetry between the executive and Congress all hinder active oversight. Others argue that the problems of the process go beyond structure, claiming that it is so politicized that Congress stands in its own way, while even others argue that clashes between the legislative and executive branches over authorizing bills have stood in the way of a smooth process. Some also point to the intervention of the executive branch at several levels of the budgeting and oversight process, citing at the most obvious level, attempts to coerce members to redact particular programs, and in more discreetly, the failure to provide necessary intelligence information and/or to limit the distribution the distribution of information excessively.<sup>152</sup>

What does the process of authorization and appropriations mean for the framework of accountability? The same theme that has run throughout this chapter characterizes accountability at this juncture in its development: weakness. I have introduced authorization and appropriations here in order to provide a more concrete example of how intelligence oversight could enact actual consequences on the activities of the intelligence community. What we find, however, is that although the power of the purse is Congress’ strongest avenue of recourse, it still provides ambiguous leverage over the intelligence community. In terms of the framework, knowledge

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<sup>149</sup> This was the standard argument provided by the 9/11 Commission, in particular.

<sup>150</sup> Lowenthal, *Intelligence: From Secrets to Policy*, 206.

<sup>151</sup> Quoted in Zegart, *Eyes on Spies*, 104.

<sup>152</sup> Interview with former SSCI staff director, July 17, 2011.

conditions still suffer from the information asymmetry inherent to all relations between these two branches; external independence develops, but is rather stalled in the post-9/11 era and has apparently chosen to stall itself in terms of the accountability it could demand based on a solid and unified series of Authorization Acts; temporality has remained largely the same, and transparency has suffered. My determination in this last category relies heavily on congressional responses to intelligence community activities, such as Nancy Pelosi insisting she had not been briefed on enhanced interrogation techniques, as well as greater use of the limited audience provision—such as the Gang of Eight—in the post-9/11 environment. Further, the proliferation of intelligence components and the use of contractors dealing with intelligence matters have resulted in increased obscurity in intelligence activities and the oversight of these activities. This is not to address the other issues of technical intelligence and programs intended to evade oversight, such as the Terrorist Surveillance Program, addressed in the chapter of this project focused on the judiciary and intelligence oversight.

### **Conclusions:**

Johnson points out that, post-9/11, congressional involvement in security and intelligence activities has carried a cachet of public service and responsibility in terms of profile among constituents. On the other hand, the issues have been controversial and politically risky.<sup>153</sup> An example is former Speaker Nancy Pelosi's conflict over having been briefed about the use of enhanced interrogation techniques. Additionally, some types of intelligence activities have turned increasingly domestic. For example, federally compiled terrorist watch lists, increased searches, fusion centers, which integrate intelligence and law enforcement information, and government surveillance. Thus constituents could perhaps become directly affected by direct activities more often. Other issues—such as enhanced interrogation techniques, extraordinary rendition, and CIA secret prisons (“black sites”) have focused public attention on the “spooky” aspects of intelligence, operations perceived by most as conflicting with democratic values and national culture mores. These variables may change the reactions of overseers to their duties, or it may, in fact, reinforce the trends witnessed continually—of attention and then reversion to inattention as the immediate crisis passes—much in line with the McCubbins and Schwartz model of “fire alarm oversight”, but with the added complications of the secret information, technical complexity, and marginal paranoia of intelligence. The pivot points mentioned are the moments of attention given to the intelligence enterprise. Catalyzed by scandal or operational failure, development of the congressional mechanisms have been incremental, hindered by executive opposition, internal political dynamics, or a political environment that supported “unleashing” the intelligence services, such as after 9/11.

Congressional oversight committees themselves were the outcome of political scandal, and they are viewed as stand-ins for the public, in order that the public may know that there is an established process for dealing with secret government activities. In practice, the symbolic and ritual nature of the oversight activities presented to the public in punctuated time periods over the course of the past four decades. Thus, committee operations, whether they are public hearings, press releases, or wider investigations into potential problems, are leveraged apertures that allow for a semblance of transparency of secret government activities to the public. Finally, to add

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<sup>153</sup> Johnson, “The Church Committee Investigation,” 209.

complexity to the conversation, intelligence oversight is not static; its efficacy ebbs and flows along a continuum as the result of friction, the political environment, *and* the threat environment.

## Chapter 4:

### **An Independent Judiciary? The Domestic Implications of Intelligence and the Politics of Secret Oversight**

*This concept of “national defense” cannot be deemed an end in itself, justifying any exercise of ... power designed to promote such a goal. Implicit in the term “national defense” is the notion of defending those values and ideals, which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of those liberties which make the defense of the Nation worthwhile.<sup>1</sup>*

Supreme Court Chief Justice Earl Warren

*You have no civil liberties if you're dead.<sup>2</sup>*

Senator Pat Roberts (R - KS)

#### **Introduction**

The accountability of government in a democracy requires that government actors be held responsible for their actions to the majority. Due to the complexity of government, the arcane nature of some government activities, and to secrecy, chains of accountability, linking activities to oversight mechanisms, must be established and legitimized. Some of these chains involve holding the government accountable to elected officials—as proxies for the public—or to other branches of government, such as the judiciary, both of which are then held accountable to the public and to each other. In terms of intelligence, these oversight mechanisms link the intelligence community into a network of relationships built on the exchange of information, the control of funding, and the review of intelligence programs.

Oversight of intelligence is unique in that the mechanisms of accountability are intended not only to ensure compliance with government regulations and legal institutions, but also to rebalance, to the extent possible, the information asymmetry inherent to the relationship of intelligence with other parts of the government. I will describe the development and characteristics of judicial oversight by exploring the five interlocking categories of external mechanism characteristics drawn from the theoretical framework for accountability introduced in the first chapter. The framework adds specificity to the discussion of accountability in the literature by dividing the concept of accountability into five specific characteristics that

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<sup>1</sup> *United States v. Robel* (389 U.S. 258, 264 (1968)) quoted in Fletcher N. Baldwin Jr. and Robert B. Shaw, “Down to the Wire: Assessing the Constitutionality of the National Security Agency’s Warrantless Wiretapping Program: Exit the Rule of Law,” *University of Florida Journal of Law and Public Policy* 17 (2006): 430.

<sup>2</sup> Opening statement of Senator Pat Roberts, chairman of the Senate Select Committee on Intelligence (SSCI) on the occasion of the confirmation hearing of General Michael Hayden to be Director, CIA. May 18, 2006.

characterize the efficacy of external accountability: knowledge conditions; external independence; organizational complexity; temporality; and transparency. The parameters of knowledge and scope conditions include expertise regarding intelligence matters, both of the primary members of the mechanism—such as judges, members of Congress, and their staffs—and specific required procedures for providing information on individual intelligence programs. Scope refers to the breadth of intelligence activities supervised by the mechanism; external independence conveys the independence of the mechanism to provide external accountability, for example, between branches and to the public and to deliver consequences to change behavior; organizational complexity refers to the *overseen*, that is, how do the conditions of the organizational structure of the intelligence entity challenge oversight mechanisms, as well as how does the intelligence community overall challenge this specific mechanism; temporality refers to the timing of oversight in the preparation, conduct, and review of intelligence programs; transparency requires that the mechanism have some degree of openness to the public about its process. The issue of transparency, something that seemingly should be straightforward in a regulatory arrangement, is complex when it comes to national security and intelligence.

Judicial oversight of intelligence provides a unique test of a theory of accountability as information asymmetry between the executive and the judiciary is at one of its most acute points regarding intelligence. Technological advances and the characteristics of conflict with non-state actors have both also forced changes in judicial oversight that are not seen to the same degree in congressional oversight. I begin this chapter by describing the legal decisions prior to the Foreign Intelligence Surveillance Act (FISA)—all of which excluded judicial review of foreign intelligence activities. Then I discuss how the advent of FISA changed this relationship between the branches. Finally, I explain how changes in technology and the threat environment have challenged FISA and affected the trajectory of its development, arguably causing it to weaken. Although FISA introduced a radical change in terms of how active judicial supervision of foreign intelligence could be, it still did not create “balance” between the branches of government. Asymmetrical access to foreign intelligence information continues to create disequilibrium in the relationships among all three branches of government, and the balance cannot be rectified even through strenuous oversight. In the final section of this chapter, I will test my theory against dramatic exogenous shock—9/11—allowing us to see where the weaknesses in both theory and mechanism lie.

The majority of this project focuses on the CIA, its relationship to external oversight mechanisms, and the requirements of accountability. This chapter, however, expands to include the National Security Agency in order to understand how oversight works in handling electronic surveillance in pursuit of foreign intelligence. Foreign intelligence surveillance can cross rather easily into the domestic arena, regardless of institutional constraints. Signals intelligence (SIGINT)—the intelligence discipline of the NSA and the slice of intelligence most supervised by the judiciary—is an increasingly dominant intelligence discipline because it is simply more efficient and wide-reaching in many ways than traditional forms of HUMINT, and is a creature of the burgeoning technological environment of the past decades. At a basic level, all enterprises depend on communication to function, and signals intelligence provides a view of a vast range of human interaction. Information can be gathered at breathtaking rates of speed. While the vast quantities of raw data create their own difficulties for analysis in terms of sifting for relevant fact, in an increasingly technological and globalized era, it will take electronic surveillance and

data collection to handle the increasingly sophisticated adversaries of the United States. This also requires increasingly sophisticated oversight mechanisms to understand and supervise these activities. The extensive and expedited legislative changes made to increase the power of federal law enforcement and counterterrorism capacity after 9/11 had the greatest impact on the specific arenas supervised by judicial oversight. It did this by breaking down boundaries between separate spheres—between law enforcement and intelligence, and between domestic and foreign activities—that had developed through legislation and custom over the course of several decades.<sup>3</sup> While custom regarding separation is firmly entrenched, differentiating the spheres in practice has always proven difficult.<sup>4</sup>

One final note on methodology in this chapter: this project was built around the more than 100 interviews I conducted with intelligence officers, both active and retired, Hill staffers, and government attorneys. I built this chapter on the statutory framework regarding foreign intelligence electronic surveillance, supplemented by secondary literature, and complemented by materials drawn from my extensive interviews. I addressed a variety of intelligence and oversight issues over the course of my research; none were as fraught, controversial, and politicized as this issue of judicial oversight, particularly concerning decisions touching upon these issues by the G. W. Bush administration, when drastic changes to the statutory framework were made in the name of expeditiousness and executive authority. Concern about the legality of the statutory changes has significant merit, and the discourse about it has always been extremely polarizing. Some of the concern about the changes to foreign intelligence electronic surveillance during that period was due to a lack of clarity—perforce and voluntary—and an absolute absence of balance on both sides in the narratives regarding this issue. I try here, drawing upon extensive review of the literature and from the recounting of senior officials involved in the decision-making, not only to explain the complicated trajectory of judicial oversight development, but also to try to find a middle ground in the policy debate.

### **Intelligence Oversight and the Judiciary: Foreign Intelligence and the Constitution**

Judicial oversight of intelligence is a unique creation. Developed formally in the wake of the Church Committee recommendations, it focuses on a narrow set of foreign intelligence matters that can cross over into the domestic realm. Secrecy and a narrow purview distinguish judicial oversight from congressional supervision of intelligence. While many congressional hearings do take place behind closed doors for security purposes, a key component of congressional oversight is transparency to the public in the form of open hearings when possible, yearly reports, and press releases. Judicial oversight, in contrast, is conducted almost entirely outside of the public eye. Constitutional executive authority over foreign intelligence meant that there was no supervision from the judiciary until the radical changes of the 1970s. In decision after decision, the Supreme Court decided that the judiciary had no purview over foreign intelligence and thus intelligence was left to chart its own course, generating programs with the tight collaboration of Executive branch components, but with very little external check on its actions

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<sup>3</sup> Maintaining the separate spheres has been core to the mission of the NSA for decades. There are overlapping mechanisms in place to make sure that foreign does not conflict with domestic in terms of targeting and surveillance, as well as between law enforcement and foreign intelligence.

<sup>4</sup> James Bamford, *The Puzzle Palace: A Report on America's Most Secret Agency* (New York: Penguin Books, 1983), 459.

from either Congress or the judicial branch.

Congressional oversight has a wide scope and handles a range of intelligence policy issues, whereas judicial oversight is quite narrow and focused.<sup>5</sup> Congressional oversight committees also have multiple roles when it comes to oversight. They receive some information regarding potential programs, for example through findings on covert action, about which they are informed but not required to consent, but the majority of their work concerns retroactive examination of programs in process. Congressional control over the budget is the most concrete conduit through which recourse over intelligence activities can be exercised. This contrasts with judicial oversight, which occurs prior to the intelligence activity—in the form of the FISC court orders discussed throughout this chapter.

Prior to the intelligence investigations of the 1970s, there was very little judicial oversight of the intelligence agencies, and no judicial supervision of electronic surveillance for foreign intelligence purposes. Although the Department of Justice possessed the power to initiate prosecutions of criminal misconduct, this statutory responsibility was mitigated prior to the investigations by an agreement between the DoJ and CIA that allowed the CIA to conduct its own internal investigations of wrongdoing on the part of CIA officers and agents. Most important for the trajectory of judicial oversight development, the judiciary adhered to the custom of respecting the President's perceived "higher authority" in terms of issues touching upon national security drawn from Article II of the Constitution.<sup>6</sup> Every judicial decision up to the creation of FISA in 1978 held an exception for executive authority over the national security function.

While Congress has battled for greater supervisory authority over intelligence, the judiciary has ostensibly adhered to a narrower interpretation of its role in review of the supervision of foreign intelligence activities.<sup>7</sup> This relationship fits under the framework established by the "deference theory," the convention that the other branches of government defer to the executive on issues of national security. The format of this relationship has a deep foundation in the relationship between the judiciary and executive branches. It is commonly accepted that in times of crisis, war or emergency, American courts defer to the executive regarding issues of national security.<sup>8</sup> The "war on terrorism" has challenged many of the

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<sup>5</sup> Fred F. Manget, "Intelligence and the Rise of Judicial Intervention", in Loch K. Johnson (ed.), *Handbook of Intelligence Studies* (London: Routledge, 2009), 330.

<sup>6</sup> Fred F. Manget, "Intelligence and Judicial Intervention," 330.

<sup>7</sup> This would suggest that for all of the post-Church Committee conventional wisdom on the "opening" of intelligence and the reintegration of those activities into "normal" government, that the process is either incomplete or has begun to turn in the opposite direction. See Gregory F. Treverton, "Intelligence: Welcome to the American Government", in *A Question of Balance: The President, the Congress and Foreign Policy*, ed. Thomas Mann, (Washington DC: Brookings Institution, 1990). See Loch K. Johnson, "The Church Committee Investigation of 1975 and the Evolution of Modern Intelligence Accountability," *Intelligence and National Security* 23 (2008):198-225 for a discussion of the range of levels of responsibility Congressional intelligence oversight committee members have applied to their task.

<sup>8</sup> Jeremy Waldron, "Security and Liberty: The Image of Balance," *The Journal of Political Philosophy* 11 (2003): 191. The conventional case upon which to base the deference assertion is *Korematsu v. United States* (1944), which established that in times of war or national emergency, it could be acceptable to limit individuals' civil liberties in protection of national security. In this case, it was decided that Japanese-Americans could be removed from their homes in response to the military threat of Japan. In the words of the decision, "... When under conditions of

precepts of war and the expectations of what constitutes appropriate balance between security and civil liberties. The current state of war could be un-ending, potentially resulting in a permanent state of quasi-emergency. After the attacks on 9/11, in a national environment imbued with political urgency, legislators loosened procedural constraints on law enforcement in order to expand domestic law enforcement and intelligence powers rapidly. Intelligence in this context is no longer focused mainly on gathering secret foreign information to defend the state's borders, but rather is increasingly also contributing to domestic security.

The conventional argument intelligence oversight is that change in the supervisory legal framework is caused by two countervailing impulses. When there is an operational intelligence failure, analysis focuses on improving performance, providing additional resources to the intelligence community, and loosening restrictions on agencies' activities. Oversight becomes contracted. The reverse occurs when there is a political scandal regarding intelligence—evidence of misbehavior on the part of intelligence agencies results in expanded oversight, insistence on improved transparency, and a requirement that intelligence integrate itself further into the mainstream of government processes. This is often termed a “pendulum” cycle in the discussions on intelligence; what is not so clearly described is the elaborate framework of laws and practice that must adjust to every swing of this pendulum.

Jack Goldsmith, himself one of the architects of this legal structure under the Bush administration, characterizes this pendulum as alternating “timidity” and “aggression,” as the IC responds to executive and congressional expectations that it “engage in controversial action at the edge of the law [but then] fail to protect it from recriminations when things go awry.”<sup>9</sup> His explanation for this behavioral bipolarity is that intelligence sits at the nexus between, as he defines it, “related Washington pathologies: the criminalization of warfare, the blame game, and the cover-your-ass syndrome.”<sup>10</sup> I would agree with this pendulum but also assert that this theory has been tested minimally, particularly in terms of judicial oversight. I also assert that it is a convenient and political argument for those who choose to believe they were caught up in a movement, rather than responsible for independent and reasoned arguments in terms of the boundaries of appropriate intelligence gathering. As is stands, FISA was the first check on executive authority; the series of statutory changes emanating from 9/11 are still in process. We can assert that there is a pendulum swing, but we have not yet seen the end station of its trajectory. Thus, we should not project too much on this putative explanation.

This explanation introduces the impact of the threat environment on change in judicial oversight, and shows how the judicial branch can be more responsive to the changing threat

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modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.” *Korematsu v. United States*, 323 US 214 (1944), Discussed in Naitsu Taylor Saito, “Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent”, *Oregon Law Review* 81 (2002): 1077. A counter-balance to *Korematsu* is *Ex parte Milligan*, which focuses on the responsibility of the Supreme Court to stand as a guardian of rights and a guarantor of the promises of the Constitution. Rather than deferring to the Executive as is the conventional debate during crisis, according to this argument, the Court provides a bulwark against extreme measures, even when they do concern issues of national security.

<sup>9</sup> Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton, 2007), 163-164.

<sup>10</sup> Goldsmith, *The Terror Presidency*, 164.

environment as well as to technological development. If so, the different *types* of intelligence activity overseen must be added into the equation. Obviously, electronic collection will change much more dramatically than covert action with the advancement of technology, taken as a whole. Further, there are deeper, under-explained political trends occurring in each “swing” that place intelligence, as well as intelligence oversight, in the center of this dynamic. These involve the trade-offs that occur within Congress, as the result of both partisan negotiations and an oppositional stance to the executive. While Goldsmith’s argument has a cast of self-exculpation, he describes the incentives of the players well; the executive wanting action but as much plausible denial as possible; Congress demanding to be informed “but not in a way that will prevent them from being critical when things go badly;” and the intelligence agencies wanting explicit instructions from both branches—and I would add, legal cover in both technical terms and in the public eye.<sup>11</sup> The tension that this cycle of expansion and contraction introduces into the relationships between the branches as well as the efficacy of intelligence performance is complex. Operationally, it impacts the information that is shared between agencies, the lengths to which the intelligence agencies are willing to go, for better or for worse, in undertaking risky ventures, and the overall structural framework that serves to guide national security activities in the United States. In terms of oversight, it introduces tension between the branches and a political dimension to decision-making.

The president’s constitutional authority over national security matters extended to foreign intelligence and thus no other oversight of that function was required until after the post-Watergate congressional investigations instigated sweeping oversight changes. From World War I to 1972, in fact, surveillance conducted by the executive was both unquestioned and unsupervised.<sup>12</sup> Although decisions were made regarding domestic security, searches, and wiretaps, foreign intelligence was always explicitly left out as an exception to the decision based on the acceptance of the president’s constitutional authority over national security matters. The numbers of wiretaps were not small during this period. According to former Attorney General Edward Levi, federal agencies authorized approximately 8,350 warrantless wiretaps and 2,450 warrantless microphone installations.<sup>13</sup> In the area of potential judicial oversight, judges perceived their role was to be ‘hands-off’ in terms of foreign intelligence gathering and were wary of even defining terms that could potentially infringe on executive authority over foreign intelligence. In terms of the role of the judiciary, as Manget states, “There is even a historical hint of an argument that, to the extent that intelligence activities are concerned with the security of the state, they are inherent to any sovereign’s authority under a higher law of self-preservation and not subject to normal judicial review.”<sup>14</sup> Deputy Assistant Attorney General Kevin T.

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<sup>11</sup> Goldsmith, *The Terror Presidency*, 164.

<sup>12</sup> Barbara Ann Stolz, “The Foreign Intelligence Surveillance Act of 1978: The Role of Symbolic Politics,” *Law and Policy* 24 (2002): 274; Americo R. Cinquegrana, “The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978,” *University of Pennsylvania Law Review* 137 (1988-1989): 795

<sup>13</sup> Quoted in Nola K. Breglio, “Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance,” *The Yale Law Journal* 113 (2003): 182.

<sup>14</sup> Frederic F. Manget, “Another System of Oversight: Intelligence and the Rise of Judicial Intervention” in *Strategic Intelligence: Windows into a Secret World*, ed. Loch K. Johnson and James J. Wirtz (Los Angeles: Roxbury, 2005), 408.

Maroney testified on behalf of the Ford administration that the president had “unilateral constitutional authority to use electronic surveillance ... to protect important security interests.”<sup>15</sup>

When the courts did issue decisions that touched upon security matters, between the 1920s and 1970s, the issue of intelligence gathering for national security was not considered a constitutional issue; it was simply the purview of the president. The 1928 *Olmstead vs. United States* decision determined that electronic surveillance was not covered by the Fourth Amendment.<sup>16</sup> The case itself involved bootlegging operations, evidence against which was gathered by wiretapping eight telephones. The defense argued that this constituted unreasonable search and seizure as described by the Fourth Amendment. Interestingly, adhering to a literal interpretation of the Constitution, Chief Justice Taft decided in the *Olmstead* decision that the Fourth Amendment pertained only to situations in which a technical trespass or seizure of tangible items occurred. It thus exempted any electronic—or “intangible”—surveillance from Fourth Amendment protections.<sup>17</sup> In language drawn from the majority decision, “voluntary conversations secretly overheard” could not be equated with material ‘things’ seized by the government.”<sup>18</sup> *Olmstead* and the series of decisions following reinforce the primacy of the executive over intelligence gathering for the purposes of national security; in practice, this meant judicial decisions differentiates domestic law enforcement from foreign intelligence matters.<sup>19</sup>

A series of decisions intervened in the decades after *Olmstead*, but the seminal one challenging *Olmstead* was *Katz vs. United States* (1967), which reversed the *Olmstead* decision and demonstrated a shift in Fourth Amendment jurisprudence, from physical trespass to protection of individual privacy.<sup>20</sup> In this case, Katz was convicted partly based on evidence gleaned by bugging a public telephone booth. This case found that Katz’ Fourth Amendment rights had been violated based on the infringement of Katz’ reasonable expectation of privacy.<sup>21</sup> The ruling stated that “the Fourth Amendment protects people, not places.”<sup>22</sup> *Katz* extended Fourth Amendment protections to cover *privacy expectations*, no longer focusing on property, tangibility, and trespass. As Cinquegrana points out, “Fourth Amendment protection now focused on individuals, not locations, and extended to surveillance techniques not requiring a physical intrusion.”<sup>23</sup> But, having broadened the inclusivity of Fourth Amendment rights, *Katz* still did not include national security issues within its purview. A footnote offered that the decision did not require that an order be required for electronic surveillance for the purposes of national security. To quote Cinquegrana again: “Justice White emphasized this point in a concurring opinion dwelling on the unique requirements of electronic surveillance for national security purposes. *He noted the authorization of such activities by a succession of Presidents,*

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<sup>15</sup> Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (New York: Oxford University Press, 1997), 142.

<sup>16</sup> 277 U.S. 438 (1928).

<sup>17</sup> Michael Goldsmith, “The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance,” *The Journal of Criminal Law and Criminology* 74 (1983): 8.

<sup>18</sup> Quote from majority decision drawn from Cinquegrana, “The Walls (and Wires) Have Ears,” 795.

<sup>19</sup> Cinquegrana, “The Walls (and Wires) Have Ears,” 800.

<sup>20</sup> J. Christopher Champion, “The Revamped FISA: Striking a Better Balance Between the Government’s Need to Protect Itself and the 4<sup>th</sup> Amendment,” *Vanderbilt Law Review* 58 (2005): 1677.

<sup>21</sup> Goldsmith, “The Supreme Court and Title III,” 29.

<sup>22</sup> Cinquegrana, “The Walls (and Wires) Have Ears,” 800.

<sup>23</sup> Cinquegrana, “The Walls (and Wires) Have Ears,” 800.

*concluding that no prior judicial review should be required if the President or Attorney General found surveillance reasonable under the circumstances.*”<sup>24</sup> [emphasis added]

The next step in differentiating the law enforcement from national security objectives came in a congressional move. In a shift toward statutory reform, Congress reacted to the guidance of the courts in these earlier decisions and enacted Title III of the Omnibus Crime Control and Safe Streets Act (1968). This act established a judicial framework for orders related to criminal investigation, while, again, still maintaining the exceptionalism of national security. “[Title III] was designed to provide a framework for regulating all so-called *nonconsensual* electronic surveillance except national security eavesdropping.”<sup>25</sup> Title III authorized electronic surveillance through wiretapping and bugs for the purposes of law enforcement but required adherence to statutory requirements as well as prior judicial approval.<sup>26</sup> Title III was intended to focus and contain the benefits of wiretapping while constructing a framework of privacy safeguards, including a requirement of high-level responsibility on the part of both the executive and judiciary in terms of application and granting of the order. With regard to judicial responsibility, in addition to being responsible for ensuring adherence to the legal statute, judges under Title III were empowered to deny applications, alter them, or monitor through mandatory progress reports.<sup>27</sup>

Title III, concerned with criminal investigation, is bound by carefully constructed legal structure and practice. As Goldsmith puts it: “These safeguards, together with the expectation that compliance would be monitored closely by the courts, served to alleviate the fear of many that Title III was synonymous with the arrival of Big Brother.”<sup>28</sup> It also left out of consideration the requirements of intelligence gathering in explicit language:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.<sup>29</sup>

Congress deferred to the executive in exempting national security purposes from the purview of Title III, stating that it in no way attempt to infringe on the President’s constitutional to protect the United States, to obtain foreign intelligence information, and to protect it from any other “clear and present danger.”<sup>30</sup>

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<sup>24</sup> Cinquegrana, “The Walls (and Wires) Have Ears,” 800. Original text in 389 U.S. 347, 353 (1967) (overruling *Olmstead and Goldman*)

<sup>25</sup> Goldsmith, “The Supreme Court and Title III,” 39. It is important to take a moment here to note the irony in the concept of “nonconsensual electronic surveillance.”

<sup>26</sup> Goldsmith, “The Supreme Court and Title III,” 4.

<sup>27</sup> Goldsmith, “The Supreme Court and Title III,” 44.

<sup>28</sup> Goldsmith, “The Supreme Court and Title III,” 4.

<sup>29</sup> 82. Stat. 213 (1968) quoted in Robert M. Pallitto and William G. Weaver, *Presidential Secrecy and the Law* (Baltimore: Johns Hopkins University Press, 2007), 166.

<sup>30</sup> Cinquegrana, “The Walls (and Wires) Have Ears,” 801.

The right of the executive to authorize electronic surveillance in internal security matters without prior judicial approval was challenged for the first time in (*United States v. United States District Court* (“*Keith*”))—decided in the Supreme Court in 1972. *Keith* was charged with bombing a CIA office. As stated in the decision, “[The] Fourth Amendment contemplates a prior judicial judgment” and although the task of ensuring national security presented special circumstances, it was argued that “[t]he circumstances described do not justify complete exemption of domestic security surveillance from judicial scrutiny.”<sup>31</sup> But, again, it was also made clear in the decision that the *Keith* case only concerned itself with domestic surveillance – it did not include entities with significant connections to foreign powers or their agents.<sup>32</sup> Thus, although *Keith* challenged exclusive executive authority over surveillance, foreign intelligence still remained outside the scope of the decision. The Court’s perception of its appropriate jurisdiction limited the application of this decision, narrowing it to provide discretion to executive decision-making. The *Keith* Decision contributed to the separation between foreign and domestic realms for the purposes of intelligence surveillance, and to the acceptability of different standards being used in these two separate arenas.<sup>33</sup> An odd quote from the decision rather ambiguously reinforces this separation:

Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the order application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection.<sup>34</sup>

The history related above is intended to place FISA and current judicial oversight of intelligence—the next section of this chapter—in a historical context. The judiciary has deferred to a great degree to the president’s constitutional authority on matters of national security and intelligence. The level of deference and the path to mechanism development marks a different trajectory than the path of oversight development in the legislative branch. This relationship brings up ancient issues of presidential power, the question of appropriate judicial review that is rooted in *Madison*, and the difficult trade-offs that are made in a context of national emergency. FISA, seen through this lens, was a monumental shift in the relationship among the branches regarding foreign intelligence.

### **The Foreign Intelligence Surveillance Act (FISA): The Core of Judicial Oversight of Foreign Intelligence**

The decisions above, while not comprehensively addressed in this brief summary, demonstrate that active judicial oversight over foreign intelligence gathering is a relatively recent development, and how complex the installation of FISA would be, intruding as it was on what had always been presidential prerogative. FISA strikes a delicate balance between the on-going demands of the intelligence community and the requirement that there be a structure for these demands to flow through in order to maintain order and protection for those being investigated.

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<sup>31</sup> Bedan, “Echelon’s Effect,” 428.

<sup>32</sup> Cinquegrana, “The Walls (and Wires) Have Ears,” 802.

<sup>33</sup> *Keith*, 407 U.S. at 320. Quoted in Bedan, “Echelon’s Effect,” 429.

<sup>34</sup> 407 U.S. 297 (1972), at 322-22. in Nola Breglio, “Leaving FISA Behind,” 184.

The structure of this oversight mechanism is different—with different expectations of efficacy—than those we are accustomed to in the legislative branch. FISA is an extreme inflection point in terms of the relationship between the executive and judiciary. The statute not only clarified the terms of judicial oversight, it acted directly to constrain presidential activities that had up to FISA’s inception been entirely unfettered by external oversight. In the words of legal scholar, David Cole: “... [T]he President’s authority before FISA was enacted was radically different from his authority thereafter. As is clearly demonstrated by the judicial history described above, before FISA was enacted, Congress expressly recognized the president’s ‘constitutional power ... to obtain foreign intelligence information deemed essential to the security of the United States.’ When Congress enacted FISA in the wake of demonstrated abuses of that power, however, it repealed that provision and ... made it a crime to conduct wiretapping without congressional authority.”<sup>35</sup>

FISA emerged out of a process similar to the development of congressional oversight mechanisms. It was the product of an oppositional relationship between Congress and the executive regarding the questions of how electronic surveillance could be controlled, and what mechanisms should be put in place to monitor this type of activity. Discussion between Congress and the executive regarding the genesis of FISA centered on how to set the standard for targeting US persons with surveillance and, once again, as the central theme of this project—on the status of the President’s inherent authority to conduct foreign intelligence operations.<sup>36</sup> Further, FISA was the product of intra-Congress deliberation and conflict. While FISA is usually touted as the natural outcome of the Church Committee recommendations, there were extensive negotiations in Congress about whether tethering the NSA and FBI to any type of judicial oversight was indeed appropriate. Some legislators argued that the intelligence agencies should be bound to the standard law enforcement procedure of obtaining a court order prior to surveillance, while on the other side of the divide, other legislators argued that the agencies should remain unregulated.<sup>37</sup> Other concerns centered on whether FISA itself was unconstitutional itself as it encroached on executive authority. Along these lines there was concern that limiting the executive in this way could harm the national security of the country.<sup>38</sup> FISA is the primary judicial mechanism for supervising foreign intelligence gathering through surveillance.<sup>39</sup> More explicitly: “[FISA provides] the exclusive means by which [foreign intelligence] electronic surveillance ... and the interception of domestic wire, oral and electronic communications may be conducted.”<sup>40</sup>

FISA was established to “regulate the collection of ‘foreign intelligence information’ from foreign powers or agents of foreign powers in the United States.”<sup>41</sup> In more specific detail, under FISA, “foreign intelligence information” is defined as information about 1) an actual or potential attack or other grave hostile acts of a foreign power, 2) sabotage or international terrorism by a foreign power or an agent of a foreign power, 3) clandestine intelligence activities

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<sup>35</sup> David Cole, “Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief and Executive Power in the War on Terror”, *Washington and Lee Journal of Civil Rights and Social Justice* 13 (2006): 17-18.

<sup>36</sup> Cinquegrana, “The Walls (and Wires) Have Ears,” 810.

<sup>37</sup> Bamford, *The Puzzle Palace*, 463.

<sup>38</sup> Interview with senior CIA official, November 10, 2011.

<sup>39</sup> Breglio, “Leaving FISA Behind,” 188.

<sup>40</sup> Cited in Baldwin and Shaw, “Down to the Wire,” p. 454. Title III Omnibus (1968). 2511 (2)(f)

<sup>41</sup> Lee S. Strickland, “Civil Liberties vs. Intelligence Collection: the Secret Foreign Intelligence Surveillance Act Court Speaks in Public,” *Government Information Quarterly* 20 (2003), 2.

by a foreign power or agent, or 4) other intelligence concerning a foreign country that is necessary to the national defense or the security of the United States or the conduct of the foreign affairs of the United States.<sup>42</sup> In order to receive an order, among other requirements already listed above, the official had to prove that the “purpose of the surveillance is to obtain foreign intelligence information.”<sup>43</sup> As Seamon and Gardner point out, this last requirement was interpreted by lower courts to mean that the “primary purpose” of the surveillance had to be for foreign intelligence and not criminal investigation. According to their argument, the “wall” dividing law enforcement from intelligence activities was thus built.<sup>44</sup>

FISA created a framework for the use of pen registers and trap and trace devices – for use in federal investigations to obtain foreign intelligence.<sup>45</sup> It was expanded in 1994 to permit covert physical intrusions by providing for “sneak and peek” orders.<sup>46</sup> FISA’s framework thus provides judicial check on executive decision in terms of gathering foreign intelligence but the restrictions themselves incorporate quite a range of flexibility in operation. As mentioned above, originally, FISA allowed surveillance to be directed at a US person if there was probable cause that the target was an agent of a foreign power and that the surveillance was directed at the facilities being used by this agent or foreign power.<sup>47</sup> FISA marks a compromise decision in terms of the judicial role in intelligence activities. As Banks point out: “In return for subjecting the executive branch to regulation of its electronic surveillance activities, FISA does not provide the traditional protection against government abuse of its electronic surveillance in enforcing criminal laws. FISA put in place a much more government-friendly process.”<sup>48</sup> Part of this “government-friendliness” lies in the structure and procedures of the Foreign Intelligence Surveillance Court (FISC).

The Foreign Intelligence Surveillance Court (FISC) originally composed of, seven judges now, post 9/11, has eleven, district court judges. The judges are appointed by the Chief Justice and assume their roles in a staggered fashion, with a new one taking up his or her post every year. The tenure of the position is seven years. They are tasked with reviewing applications for electronic surveillance, physical searches, and other demands, such as for business documents.<sup>49</sup> The process of applying for a FISA court order is rather onerous and requires the involvement and approval of numerous senior executive branch authorities, including the Secretary of Defense – in the case of an NSA application, and the Attorney General. The cases are presented *ex parte* and *in camera*. This means that the information gathered is strictly limited to one side of the issue, in contrast to normal judicial proceedings where the adversarial process leads to a broader range of, potentially, conflicting material. Department of Justice attorneys from the

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<sup>42</sup> Quoted in Strickland, “Civil Liberties vs. Intelligence Collection,” fn 8.

<sup>43</sup> 50 U.S.C. § 1804(a)(7)(B)(1980)

<sup>44</sup> Richard Seamon and William Gardner, “Does (Should) the PATRIOT ACT Raze (or Raise) “the Wall” Between Foreign Intelligence and Criminal Law Enforcement” (forthcoming) 2.

<sup>45</sup> Title IV of FISA, 50 U.S.C. §1841

<sup>46</sup> Bedan, “Echelon’s Effect,” 429. The catalyst for this expansion was physical search of spy Aldrich Ames’ home in October 1993. Physical searches were included under the FISC purview under the Intelligence Authorization Act of 1995.

<sup>47</sup> David Cole and Martin S. Lederman, “The National Security Agency’s Domestic Spying Program: Framing the Debate,” *Indiana Law Journal* 81 (2006):1356. See 50 U.S.C. 1801(b).

<sup>48</sup> William C. Banks, “The Death of FISA,” *Minnesota Law Review* 91 (2007): 1231.

<sup>49</sup> Seamon and Gardner, “Does (Should) the PATRIOT ACT Raze (or Raise),” 2.

Office of Intelligence Policy and Review present the cases, the records of which are then sealed and secret. In case an order request is denied, the matter can be appealed to the Foreign Intelligence Surveillance Court of Review, a three judge panel. The relationship between the FISC and the Court of Review has conventionally been seen as somewhat irrelevant to the maintenance of judicial oversight of surveillance as very few orders have ever been denied.

The Foreign Intelligence Surveillance Act (FISA) was designed to provide a trade-off of the fundamental security issue—between civil liberties and security—affording protection to those being investigated, while also providing flexibility, speed, and secrecy so that the requirements of the executive could be met in terms of these sensitive issues.<sup>50</sup> It also codified a legal framework for foreign intelligence surveillance that was distinct and separate from the legal constraints concerning law enforcement operations.<sup>51</sup> Its intention was to provide a framework that would allow monitoring of surveillance activities while not binding intelligence gathering to the same constraints as the Fourth Amendment's standard of probable cause. As described by the FISC itself:

In order to preserve both the appearance and the fact that FISA surveillances and searches were not being used *sub rosa* for criminal investigations, the [FISC] routinely approved the use of information screening "walls" proposed by the government in its applications. Under the normal "wall" procedures, where there were separate intelligence and criminal *investigations*, or a single counter-espionage investigation with overlapping intelligence and criminal *interests*, FBI criminal investigators and [DOJ] prosecutors were not allowed to review all of the raw FISA intercepts or seized materials lest they become de facto partners in the FISA surveillances and searches. Instead, a screening mechanism, or person, usually the chief legal counsel in an FBI field office, or an assistant U.S. attorney not involved in the overlapping criminal investigation, would review all of the raw intercepts and seized materials and pass on only that information which might be relevant evidence. In unusual cases such as where attorney-client intercepts occurred, [DOJ] lawyers in [the Office of Intelligence Policy Review] acted as the "wall." In significant cases ... where criminal investigations of FISA targets were being conducted concurrently, and prosecution was likely, [the FISC] became the "wall" so that FISA information could not be disseminated to criminal prosecutors without the Court's approval.<sup>52</sup>

In a further move to create a divide between foreign intelligence and criminal cases, minimization procedures required that foreign intelligence information gathered from non-FISA criminal surveillance could not be provided to intelligence authorities without a court order.<sup>53</sup> The Attorney General was required to supply to the United States Court and to Congress the total number of applications granted, modified, and denied under FISA. The duration of FISA orders

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<sup>50</sup> Breglio, "Leaving FISA Behind," 187.

<sup>51</sup> David S. Jonas, "The Foreign Intelligence Surveillance Act Through the Lens of the 9/11 Commission Report: The Wisdom of the PATRIOT ACT Amendments and the Decision of the Foreign Intelligence Surveillance Court of Review," *North Carolina Central Law Journal* 27 (2004-2005): 96.

<sup>52</sup> *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 620 (Foreign Int. Surv. Ct. 2002). Quoted in David Hardin, "The Fuss over Two Small Words: The Unconstitutionality of the USA PATRIOT Act Amendments to FISA Under the Fourth Amendment," *The George Washington Law Review* 71, no. 2 (2003): 313.

<sup>53</sup> Hardin, "The Fuss over Two Small Words," 313.

and extensions was limited to 90 days.<sup>54</sup>

The original intention of FISA was to develop a pathway for the judiciary to grapple with intelligence gathering, to both the process and substance of which they were entirely unaccustomed. In the words of a 1978 report distributed by the, at that point, recently created House Permanent Select Committee on Intelligence, the view of judicial involvement in decision-making regarding intelligence was damning:

[T]he development of the law regulating electronic surveillance for national security purposes has been uneven and inconclusive. This is to be expected where the development is left to the judicial branch in an area where cases do not regularly come before it. [T]he development of standards and restrictions by the judiciary ... [threatens both civil liberties and national security, because it] occurs generally in ignorance of the fact, circumstances and techniques of foreign intelligence electronic surveillance not present in the particular case before the court.

... the tiny window to this area which a particular case affords provides inadequate light by which judges may be relied upon to develop case law which adequately balances the rights of privacy and national security.<sup>55</sup>

Understanding the depth of change that FISA introduced is an important key to gauging the increased strength of the judicial oversight mechanism after that point. Further, it also proved pivotal in later arguments when the executive tried strenuously to abrogate judicial supervision, particularly under the George W. Bush administration. The fact that FISA specifies statutory claims over the right to oversee foreign intelligence-gathering highlights two issues that conflict with each other: first, that FISA was a large step toward balancing government branch powers over intelligence gathering; and second, that although FISA provided a reasonable supervisory mechanism, it also covers just a small segment of intelligence activities, and its authority—even over those specific activities—has been questioned at times.

The strengths and weaknesses of the FISC are the core of many polarizing arguments about executive authority over foreign intelligence. I must add, the ambiguity of terms, process, and decision-making by the court, as well as the classification of parts of the instructions relating to the statute, make definitive arguments virtually impossible to win. First, there is a great deal of margin within this construct for what constitutes a “foreign agent” and there is flexibility in terms of how the orders are used. While court approval must be sought, FISA allows surveillance to begin before approval as long as it is sought within 72 hours. Further, surveillance is permitted without approval for the first fifteen days of a war.<sup>56</sup> There is a further exception for surveillance that includes foreign powers, allowing a year of surveillance without a court order following certification from the Attorney General to both HPSCI and SSCI that the target falls within the foreign power definition; that there is no substantial likelihood that US persons will be involved

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<sup>54</sup> Hardin, “The Fuss over Two Small Words,” 313.

<sup>55</sup> H.R. Rep. No. 1283, 95<sup>th</sup> Congress, 2<sup>nd</sup> Session, pt. 1, at 21-22 (1978) in Cinquegrana, “The Walls (and Wires) Have Ears,” 808.

<sup>56</sup> David Cole and Martin S. Lederman. “The National Security Agency’s Domestic Spying Program: Framing the Debate.” *Indiana Law Journal* 81 (2006): 1356. See 50 U.S.C. 1801(b), 2.

in the surveillance; and that reasonable minimization procedures are followed.<sup>57</sup> Aside from this fairly straightforward flexibility, critics of the FISC also point out that a very small number of order requests are denied.

The other side of the argument became part of the rationale for the Terrorist Surveillance Program; that the reason very few order requests are rejected is that the process of preparation for the application is lengthy, detailed, and onerous, requiring the involvement of a range of senior officials. The burden of presentation of process in order to obtain a FISA order could be seen as having a chilling effect on frivolous cases. Further, as has been mentioned by several attorneys in the intelligence community, an iterative process between the DoJ and the FISC allows for any deficits that could hinder the progress of the order request to be corrected prior to potential denial by the court. Thus, many argue that the process itself results in a system that would actually deny outright very few requests.<sup>58</sup> As former DNI Mike McConnell described it, applications for orders under FISA resemble “finished intelligence products”, including “detailed facts describing the target of the surveillance, the target’s activities, the terrorist network ... and investigative results or intelligence information that would be relevant to the Court’s findings.”<sup>59</sup>

This argument will never be resolved as there is, frankly, far too much ambiguity when it comes to whether and how FISA and the FISC are, or are not, effective. There is no publicly available record, the cases are argued *ex parte*, and there is no way of knowing how the court is deciding using FISA, meaning whatever rationale used in the decision-making process about the court orders also remains secret. Further, the entire issue of surveillance and oversight is politically polarized, meaning that the inherent absence of data from the internal processes is compounded by opinion and bias from external commentators. Some argue that the FISA process is too cumbersome for modern warfare, particularly in the “war on terror,” in which targets move quickly, use a range of communications devices that cross the boundaries between domestic and foreign, making FISA obsolete. They argue that the process of asking for the order, involving extensive paperwork, requires too much time and needless effort. Others argue that the court still provides a bulwark against uncontrolled spying on both foreign and domestic targets. The Terrorist Surveillance Program presses upon this tension, exposing the holes in both sides of the argument, and also very much bringing to the fore the question of what is an appropriate tradeoff in terms of civil liberties in favor of security, *and* who is empowered to make this tradeoff.

FISA opened a narrow aperture to enable a secret court to see a small slice of a specific type of intelligence activity. Judicial oversight of intelligence, thus, occupies a unique position within the range of tools intended to maintain external accountability because its range of responsibility is narrow and very technical. The court was established to provide orders authorizing this type of intelligence gathering because of the abuses that occurred using this technique without oversight, particularly from the 1950s-1970s. The judicial mechanism is limited by the information asymmetry discussed throughout this project, and the aspect of

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<sup>57</sup> Robert M. Bloom and William J. Dunn, “The Constitutional Infirmity of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment,” *William and Mary Bill of Rights Journal* 15 (2006): 165.

<sup>58</sup> Interview with senior CIA official, November 10, 2011.

<sup>59</sup> Cooper Blum, “What Really is at Stake with the FISA Amendments Act of 2008 and the Future of Foreign Surveillance Reform,” *Public Interest Law Journal* 18 (2009): 294.

intelligence activities overseen by the judicial branch is very arcane—electronic foreign intelligence gathering conducted within the United States. Finally, the stream of applications the court can handle is slim as the process for review and approval is rigorous. This type of intelligence is particularly controversial because it touches upon American expectations of privacy within the borders of their country, and it challenges legal constraints on search and seizure under the Fourth Amendment.

The creation of the FISC by the FISA legislation was a major turning point in the development of the judicial role in intelligence oversight. If one considers the judiciary to be a balance with the other two branches of government, then one could suppose that the introduction of FISA re-established a balance—although not one in equilibrium—in terms of foreign intelligence surveillance. In theory, in a series of steps, post-Church Committee legislation re-introduced both congressional and judicial control over what appeared to be an executive run amok. FISA marked a radical turning point in terms of structuring domestic intelligence and surveillance; however, in the wake of 9/11, almost any level of judicial control over electronic surveillance has been challenged. The earlier trends and expectations of executive privilege over national security issues have been pushed to extremes, partially as a function of established historical precedent but especially as a function of the Bush administration's interest in increasing the power of the president.<sup>60</sup> It could be argued that under this onslaught, the ability of the judiciary to supervise intelligence activities has crumbled. Others argue that the judicial review function of intelligence activities has simply adapted to the exigencies of an emergent and dynamic threat environment.

In terms of the criteria supporting the theoretical framework for accountability that drives this project, one can only conclude that the FISC is weak. In fact, in many ways judicial oversight of intelligence through the court is controversial because the characteristics of the composition and practice of the court collide with expectations of what constitutes an independent judiciary and a strong mechanism for the assurance of accountability. First, to reinforce the centrality of the information asymmetry issue, the court is entirely dependent on the intelligence community regarding the essentials of each particular case. While process for the application of an order allow the judges to require further information if they believe it necessary in granting an order, the baseline of which targets to focus on and why reside wholly in the executive branch. This was demonstrated when it was disclosed that the FBI had provided the court with fraudulent or incomplete information in several of its order requests. Also, the membership of the court rotates, thus expertise on these matters varies. However, I believe that minimal expertise on the part of the FISC judges is actually *less* of a problem when compared to legislative oversight, as the orders are granted based on their merits; congressional overseers are expected to understand the nuance of intelligence operations in greater depth.

External independence from the overseen is the category that is most controversial when it comes to the FISC. One reason for this controversy is linked to the absence of the final

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<sup>60</sup> See Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (Oxford: Oxford University Press, 1997) for a discussion of the trend of executive primacy over issues of foreign policy and national security. For a particularly disturbing popular account of the plan behind the Bush administration's focus on increasing power see, Barton Gellman, *Angler: The Cheney Vice Presidency* (New York: The Penguin Press, 2008).

category: transparency of the court. The proceedings are secret—even some of the instructions to the court are classified. Although the court has a process by which it reviews order requests, this process is secret, and the files drawn from it sealed. With no requirement to provide external documentation regarding decisions about orders, it is impossible to know how and why decisions are being made. In terms of the secret, *ex parte* nature of the court’s proceedings, these procedures and the materials gathered therein have withstood FOIA requests based on the national security exception.<sup>61</sup> The only external reporting required from the court is a yearly report to Congress on numbers of orders granted or denied.<sup>62</sup> Thus, the court raises interesting questions of what constitutes “independence.” Is it linked to a chain of accountability, or is remote from governance? Is it independent in its decisions, or is it locked in a subordinate role with the executive branch? As mentioned above, some have argued that it is purely a “rubber stamp” of approval for executive activities. This argument has been made because the number of orders turned down is very small.

On the other side of this debate, as mentioned above in this text, the argument is made that the process is so rigorous and judges’ expectations and demands for information are so high that order requests are revised until they are acceptable. But a solid answer to this question will never be forthcoming due to the almost opaque nature of the court. Another aspect of independence that remains weak is process of recourse in changing the behavior of the overseen. A court order from the FISA court is granted prior to the conduct of the intelligence activity, or in the case of emergency, immediately after the start of the activity. The court may stipulate requirements prior to the event, but has very little capacity to change the activity once it has begun. In terms of temporality of oversight, the court does have the capacity to prevent action until its stipulations regarding the parameters of the activity are met. Once again, however, very few order requests are ever permanently denied. Finally, in terms of overall accountability of the intelligence community to the judiciary, the FISC is responsible for supervising a small set of intelligence activities: electronic surveillance used to gather foreign intelligence within the US. Thus, although there are still ambiguities with how independent the court actually is, the larger questions are why the purview of judicial oversight of intelligence is so narrow, and, normatively if it should be more comprehensive.

One further feature of the judicial oversight mechanism is the FISC Review Court. Appeals of decisions made by the FISC can be referred to the review court for its adjudication by three judges. The review court also has an ambiguous role—mainly because FISC decisions are rarely referred to it. The FISC Review court has issued one decision since its creation in 1978. This decision will be discussed in depth later in this chapter. It has been argued that this decision—siding with the administration against the FISC—was definitive in demonstrating the passive dependence of the review court. I argue that while it was striking that the review court published its one decision siding with the executive, an N of 1 in this particular, very opaque environment establishes nothing definitive. The FISC Review Court does bring up another penetrating issue for this project; ostensibly it was established to provide an additional level of accountability to the procedure of applying for orders under FISA. What does it mean that it has made only one decision? Further, in the case that a FISC Review Court decision is contested, the final decider is

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<sup>61</sup> Alison A. Bradley, “Extremism in the Defense of Liberty?: The Foreign Intelligence Surveillance Act and the Significance of the USA PATRIOT ACT,” *Tulane Law Review* 77 (2002-2003): 480.

<sup>62</sup> 50 U.S.C. § 1807 (1994).

the Supreme Court. No order has ever advanced to the Supreme Court.

The sections above first introduced the theoretical framework I am using to explain the range of characteristics key to accountability through effective oversight, and second, described how a series of judicial decisions kept foreign intelligence firmly outside the purview of the judicial branch. This was the case until revelations of decades-long intelligence abuses forced a reframing of the relationship between the executive and judiciary in terms of the supervision of the electronic gathering of foreign intelligence. Finally, I described the first oversight mechanism institutionalized within the judicial branch, the Foreign Intelligence Surveillance Court. Notable themes throughout these sections are the information asymmetry between the executive and judiciary regarding intelligence activities, including lack of independent judicial access to intelligence information, the dependence on the executive both for scoping and planning intelligence activities, and for providing appropriate and complete information about these plans for the court's review. Two other key themes involve the narrow scope of judicial oversight, and continued controversies over the question of to what degree the executive still does and should maintain exclusive authority over foreign intelligence activities. This last theme is still contentious in matters of judicial oversight, whereas the legislative branch—also originally very deferential to the executive regarding intelligence matters—generally considers that issue closed. This is a striking contrast. The next sections describe challenges to the FISA regime, including not only changes to the statute governing FISC procedures, but also challenges to the role of the mechanism itself. Throughout, I will describe how each of these challenges fits within the theoretical framework of accountability that is core to this project.

### **USA PATRIOT ACT: Emergency Legislation and the Expansion of FISA**

The USA PATRIOT Act of 2001, signed into law on October 26, 2001, expanded the authority of federal agencies to operate domestically, broke down the “wall” constructed from the Church Committee recommendations, expanded the limit on how information gathered under FISA could be used, and redefined what constitutes “domestic terrorism.”<sup>63</sup> Catalyzed by the 9/11 attacks, the PATRIOT Act was drafted, passed, and signed remarkably quickly. In comparison, it took two years of debate and compromise between the administration, the agencies, and Congress to enact FISA.<sup>64</sup> Of course the debates around FISA occurred in a calmer threat environment; however, the post-9/11 environment notwithstanding, six weeks to pass legislation that had a great deal of impact on the balance between security and civil liberties was considered hasty, in some cases, extreme, and potentially ideologically driven rather than responsive to the actual demands of the threat. Even close to the trauma of the 9/11, there were concerns that the Act was a huge, and perhaps unnecessary, step that expanded federal powers at the cost of civil liberties, without even being aimed at detecting terrorists.<sup>65</sup>

The Act marked once again a polarizing moment in executive authority and foreign intelligence gathering. One set of arguments asserts that out-dated legislation, such as FISA and the “wall” that had developed through custom, hindered counterterrorism efforts that were

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<sup>63</sup> Natsu Taylor Saito, “Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent,” *Oregon Law Review* 81 (2002): 1059.

<sup>64</sup> Bradley, “Extremism in the Defense of Liberty?” 473.

<sup>65</sup> Bradley, “Extremism in the Defense of Liberty?” 473.

needed as the country turned to a new type of war. On the other hand, passage of the PATRIOT Act could be ascribed to widespread panic at the time, increased public support for more stringent security measures, and the need for perceived political action to assuage public anxieties. It must be remembered that President George W. Bush's approval rating stood above 80% at that time, and it also must be remembered that there *was* actually a time when terrorism was a widely under-explored topic, among elites as well as the public. Policy options were cruder at that time.

The Act expanded the use of four main surveillance tools: wiretaps, search orders, pen-trap orders, and subpoenas.<sup>66</sup> Wiretaps were expanded to include “roving” surveillance, that is, surveillance was no longer tied to a particular location, but rather could be tied to the suspect and whatever means of communication he/she was using, which freed up investigation in a time of cell phones and other personal electronic devices. In a congressional press release at the time of the passage of the Act, a member praised its modernization in the face of technological advance:

The PATRIOT Act modernizes wiretapping laws to keep up with changing technologies such as cell phones, voice mail and e-mail. Current wiretapping laws are outdated. In today's technologically advanced society, people communicate through a variety of means ... By allowing ‘roving surveillance’ of suspected terrorists, law enforcement officials will be able to more effectively monitor their communications and intercept terrorist activity.<sup>67</sup>

As Bradley points out, roving, or multipoint, wiretaps are not new. They are, in fact, used in criminal investigations, but the use of them for intelligence activities, permitted based on much lower standards of proof, expands the scope of their use greatly, while also expanding the possibility of target errors; in this case, non-target individuals who may be caught up in surveillance activities by accident.<sup>68</sup> Pen register, and trap and trace surveillance were extended under the PATRIOT Act, allowing the government to forego the specific requirement that the line or communications device be used in communication with someone targeted by FISA, i.e. someone involved in international terrorism or intelligence activities, that could be violating US law, or a foreign power or its agent, whose communications are believed to concern terrorism or intelligence activities that violate US law. Instead, the government—under the Act—must only certify that the information gathered by these methods is “relevant to an ongoing criminal investigation.”<sup>69</sup>

The PATRIOT Act allowed for the purpose of surveillance to be redefined, greatly loosening the restrictions fundamental to the original passage of FISA. Specifically, the language of FISA was changed from requiring that *the purpose* of surveillance was to gather foreign intelligence information to the significantly looser *significant purpose*.<sup>70</sup> This means that the scope of FISA is broader, but also that the division between law enforcement and intelligence

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<sup>66</sup> USA PATRIOT ACT §201-201, 206-207, 209-220 cited in Bradley, “Extremism in the Defense of Liberty?” 485.

<sup>67</sup> Press Release of Representative Saxby Chambliss, October 12, 2001 quoted in Bradley, “Extremism in the Defense of Liberty?”, 485.

<sup>68</sup> Bradley, “Extremism in the Defense of Liberty?” 487.

<sup>69</sup> USA PATRIOT ACT §214a(1)(amending 50 USC §1842(c)(2), cited in Bradley, “Extremism in the Defense of Liberty?” 488.

<sup>70</sup> Parker and Pate, “Judicial Oversight of Intelligence,” 64.

use of information gathered under FISA was greatly diluted. Because court orders under FISC required a much lower standard for probable cause, there was a significant problem if the evidence gathered under the FISA order was used in a criminal case.<sup>71</sup> The “wall”, however, also became symbolic as an inflection point for the intelligence failure on 9/11. As has been discussed in great detail, the failure to share information between the FBI and CIA, the culture of turf protection and “need to know” (the compartmentalization of information) all contributed to a failure to recognize the signs leading up to 9/11.<sup>72</sup>

Breaking down the divide was deemed a partial solution to the operational problem of the difficulty of sharing information. Arguably, one of the more challenging changes to FISA advanced by the PATRIOT Act was the section that allows intelligence information drawn from grand jury proceedings and wiretaps to be shared with “any federal law enforcement, protective, intelligence, immigration, and national defense or security personnel, provided that recipients of the information may only use such information in connection with their official duties and subject to the disclosure limitations in existing law.”<sup>73</sup> This may seem an innocuous addition within the context of the other, more clearly invasive measures but, in practice, it breaks down long revered boundaries between the use of information by law enforcement as opposed to intelligence officers. The “wall”, as it is known, kept information gathered under the looser standards of proof—by intelligence—separated from criminal investigations, which required information to be gathered based on the Fourth Amendment’s standard of probable cause. At this point, under the PATRIOT Act, orders provided by the FISC can be used in criminal prosecutions, given that this is not the sole purpose of the original investigation, and prosecutors and intelligence officers may consult over the FISA order and application.<sup>74</sup> This blending of information is problematic enough, but when linked to the post-9/11 fever to correct specific mistakes, such as contentious intelligence information-sharing among agencies, the control and appropriate use of information could become problematic.

Not only was this new language interpreted as allowing greater and more flexible usage of domestic surveillance for law enforcement, but it also catalyzed a debate leading to a new standard for FISA orders that was challenged by the FISC itself.<sup>75</sup> Procedural concerns drove the FISC, while ostensibly accepting the new language, to reject the new measures outlined in the PATRIOT Act. The FISC, which modified specific stipulations thereby challenging the administration, appealed to the FISC Court of Review, an unprecedented move. This decision, *In re Sealed*, struck down the primary purpose test, removing the “wall” between intelligence and law enforcement, and allowing material gathered by electronic surveillance to be used in a criminal prosecution.<sup>76</sup> This decision effectively overturned 25 years of FISA case law.<sup>77</sup> In the explanation of the FISC:

[The primary purpose] analysis, in our view, rested on a false premise and the line

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<sup>71</sup> Bradley, “Extremism in the Defense of Liberty?” 484.

<sup>72</sup> See *9/11 Commission Report* for details.

<sup>73</sup> Bradley, “Extremism in the Defense of Liberty?”, 492. §203 PATRIOT ACT.

<sup>74</sup> USA PATRIOT ACT. §218 (50 U.S.C. § 180(a)(7)(B)), quoted in Nola K. Breglio, “Leaving FISA Behind,” 180.

<sup>75</sup> Breglio, “Leaving FISA Behind,” 65.

<sup>76</sup> J. Christopher Champion, “The Revamped FISA: Striking a Better Balance Between the Government’s Need to Protect Itself and the 4<sup>th</sup> Amendment”, *Vanderbilt Law Review* 58 (2005):1672.

<sup>77</sup> Champion, “The Revamped FISA,” 1687.

the court sought to draw was inherently unstable, unrealistic, and confusing. The false premise was the assertion that once the government moves to criminal prosecution, its ‘foreign policy concerns’ recede. . . . [T]hat is simply not true as it relates to counterintelligence. In that field the government’s primary purpose is to halt the espionage or terrorism efforts, and criminal prosecutions can be, and usually are, interrelated with other techniques used to frustrate a foreign power’s efforts.<sup>78</sup>

What does the PATRIOT Act signify for our theoretical framework of accountability? The Act was a big step in changing the delicate balance of the court and reducing its constraints. There are two sides to the expansion of FISA: on the one hand with loosened constraints and the breakdown of the strict division between surveillance for foreign intelligence gathering and criminal investigation, the court could actually be seen as having more power than when its jurisdiction was strictly limited to foreign intelligence gathering within the United States. On the other hand, this loosening of the rules arguably comes at a cost, potentially to the public, with challenges to their civil liberties and constitutional protection under the Fourth Amendment against unreasonable search and seizure. The Act allows law enforcement officers greater access to surveillance gathered under FISA. Proponents of the Act argue that the “wall” was never written in statute and only came about through custom and bureaucratic practice. They state that the wall artificially hampered the smooth integration of investigations and information sharing between services. This, of course, was the major point of the 9/11 Commission in its statements regarding the intelligence community’s inability “to connect the dots,” the contention being the components of the intelligence community were artificially divided from one another through culture, regulation, and parochial approaches to turf and information ownership.<sup>79</sup> The move thus appears to be a weakening of the external independence of the judicial mechanism, in favor of loosened constraints on intelligence projects and administration objectives.

The decision of the FISCR supports this assertion. According to one scholar, the Court of Review’s decision returned responsibility for balancing national security and privacy rights to where it should be: the executive and Congress.<sup>80</sup> This argument points to this balance as a political issue, rather than one, which can be settled in a secret court. [unpack this] The counter-argument is, of course, that the Fourth Amendment clearly gives the judiciary the responsibility for ensuring the privacy rights of citizens.<sup>81</sup> The two sides of the argument point to an interesting inflection point drawn from my theoretical framework. *Transparency* is the missing ingredient tying the contention together. Stationing deliberations over the balance between national security and civil liberties in the legislative branch makes a certain level of sense; legislators are proxies for the public and thus this is one way of making sure that the decisions made regarding this relationship are restrained by the chain of accountability. On the other hand, this approach to national security would take any responsibility for review or checks/balances on the part of the judiciary.

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<sup>78</sup> In re Sealed Case, 310 F.3d 717, 743 (FISA Ct. 2002), quoted in Stephanie Cooper Blum, “What Really is at Stake with the FISA Amendments Act of 2008 and the Future of Foreign Surveillance Reform,” 282.

<sup>79</sup> See 9/11 Commission’s critique of the “wall” *9/11 Commission Report*, 78-79.

<sup>80</sup> Lerner, quoted in Champion, “The Revamped FISA,” 1691.

<sup>81</sup> Champion, “The Revamped FISA,” 1692.

This argues that national security, and by extension intelligence, is not only removed from regular government, but that it can seemingly operate outside the bounds of the Constitution. Decades have been spent arguing that the opposite is the case—that intelligence, in particular, must be controlled through regular chains of accountability, otherwise repeats of intelligence abuses that occurred unchecked over decades will occur. Although I am unwilling to argue that this decision means that the FISC and Review Court have no actual oversight traction on executive activities, the decision to dismiss the FISC’s concerns and align with the executive, gutting procedural requirements, is a rather profound step toward weakening the independence of the judicial oversight mechanism. Interestingly, while potentially weakening independent oversight on the one hand, the FISC Review Court improved the transparency of the FISA process by publishing its first decision. It was an unprecedented move and gave the public some insight into how these procedures function. The irony, of course, is that this moment of transparency was revelatory about a diminished safeguard against potential civil liberties violations.

While the PATRIOT Act was seminal in terms of a relatively radical broadening of FISA, which had been in place for over 20 years at that point, the real contention about judicial oversight of intelligence within the context of our theoretical framework was the complete exclusion of judicial oversight by the Bush administration. The next section of this chapter discusses the program that found a way around the judicial oversight mechanism, and concludes with an analysis of whether the evasion mattered in terms of the continued development of judicial oversight over intelligence activities.

### **FISA, the National Security Agency, and the Terrorist Surveillance Program**

FISA was developed to strike a balance between foreign intelligence gathering requirements and protection of the civil liberties of US persons. It has been argued that there has been much attrition via statute to this framework in the post-9/11 environment, but an incident that points possibly to judicial subordination in terms of the control of intelligence gathering by electronic surveillance is the program of warrantless surveillance that was undertaken by the National Security Agency under orders of the Bush administration. The timing of the Terrorist Surveillance Program (TSP) overlaps with the developments under the PATRIOT Act discussed above. The specific timing for the authorization of the TSP remains unclear. I have listed these two events sequentially to clarify the analytical points key to the theoretical framework.

The Terrorist Surveillance Program, authorized by the Bush administration in 2002, allowed the NSA to intercept communications between individuals in the United States and individuals abroad without FISC order; the objective being to discover evidence of terrorist activity.<sup>82</sup> The focus of this surveillance was on the communications of those suspected of having links with Al-Qaeda or other terrorist organizations.<sup>83</sup> The discussion of TSP here, a program conducted outside of the bounds of the judicial oversight mechanism, is intended to demonstrate how arguments against the necessity of judicial oversight have been offered and whether or how they have been successful.

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<sup>82</sup> -----, Recent Developments, “The NSA Terrorist Surveillance Program”, in *Harvard Journal on Legislation* (Vol. 43, 2006) p. 517.

<sup>83</sup> Banks, p. 1254.

The program, in operation for three years at the time of its disclosure, was announced to the public in a front-page story in the *New York Times* on December 16, 2005.<sup>84</sup> By the time of its publication, the *Times* had held the story for a year due to national security concerns and the appeal of the administration not to “out” the program. The story described how the program was conducted outside of the auspices of the FISA statute and FISC, and thus had not been subject to any external judicial review. Based on normal statutory interpretation, the program was illegal. The FISC was created to be the sole authorizer of electronic surveillance. The main thrust of the argument for the legality of the program relies upon its basis in the president’s Commander-in-Chief authority, which includes authorization to collect intelligence information in a time of war.<sup>85</sup>

The perceived need that drove the development of TSP, designed to circumvent FISA, highlights several issues regarding how FISA was perceived to be inadequate to meet the task of post-9/11, 21<sup>st</sup> century electronic surveillance. FISA focused the location of the target – that is, it was assumed when an order was requested that the government knew where the target was and what type of communications devices he was using.<sup>86</sup> FISA did not apply to surveillance gathered outside the United States, or to communications strictly between foreigners within the United States. FISA was very specific, targeted to known cases and focused on gathering material from specific targets of interest. Technological developments have challenged the assumptions upon which FISA was built. The need for change is illustrated by the arguments surrounding TSP above. Whether one accepts the government’s argument for the legality of the program or not, there is unanimous agreement that the challenges of the non-state threat coupled with technological advancement made changes in the supervisory legal framework necessary. The Internet alone challenges traditional interpretations of communication and location by breaking information into digital packets that reach their destination through the most efficient pathway, in some cases passing through the United States to reach a foreign destination; in others packets cross through foreign territory to reach a domestic destination.

Further, the current approach to locating potential terrorists is quite different from the close, focused practice required under FISA. While General Hayden argued strenuously that TSP did not constitute a “dragnet,” the approach to acquiring targets of interest is much different from when FISA was developed, although the operational details remain vague.<sup>87</sup> It has been asserted that the NSA gathered large quantities of information at switching stations, with the assistance of telecommunications companies. The data was then searched for patterns and relationships through data-mining methods. Potential targets of interest were drawn out of these patterns, and finally the targets chosen were referred to the FBI for further investigation.<sup>88</sup> There is a multitude

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<sup>84</sup> Eric Lichtblau and James Risen, “Bush Lets US Spy on Callers Without Courts,” *New York Times* Dec. 16, 2005.

<sup>85</sup> Yoo, “The Terrorist Surveillance Program”, 566.

<sup>86</sup> William C. Banks, “Response to the Ten Questions”, *William Mitchell Law Review* (Vol. 35, No. 5, 2009) p. 5008.

<sup>87</sup> Remarks by General Michael V. Hayden, “Address to the National Press Club: What American Intelligence and Especially the NSA Have Been Doing to Defend the Nation”, National Press Club, Washington DC, January 23, 2006.

<sup>88</sup> William C. Banks, “Response to the Ten Questions”, *William Mitchell Law Review* (Vol. 35, No. 5, 2009) p. 5010. As a caveat to *all* descriptions of TSP. The actual details of the program have not been divulged to the public and thus most descriptions evolve from scholars piecing together small bits of data regarding its operations. The

of concerns buried in this rather technocratic explanation for the alleged change in targeting process.

Aside from the issues of the legality of the TSP, one of the striking aspects of the program is the change in focus on the part of the NSA's targets. As was remarked upon above, the NSA under General Hayden was very careful about overstepping its bounds regarding the scope of its surveillance. Mirroring the overall trend of intelligence gathering in the post-9/11 security environment, the TSP marked a rapid shift from a few, carefully chosen targets based on specific personal details, such as employment history, and connections to others, to a wider range of targets chosen to represent nodes in larger networks or inputs into patterns of behavior.<sup>89</sup> Data-mining, social network analysis, and other computer-based pattern-finding tools are all in use by the NSA and most of the other analytic components of the intelligence community. The objective of all of these types of tools is to increase concurrently the breadth of field while narrowing the specificity of target.

The TSP introduced new techniques that virtually could not avoid including a wide range of non-target individuals within the broad nets intended for pursuit of terrorism suspects, and also changed how the targets themselves were chosen. Under FISA, as described above, there was a distinct process for describing the nature of the individual chosen to be investigated as well as the methods chosen to pursue this investigation. With the advent of TSP, the targets were chosen along a more functional, bureaucratic level—by the NSA's "operational work force" and then approved by a shift supervisor.<sup>90</sup> The idea that a "shift supervisor" would decide targeting for the program caused a good deal of controversy. As explained by Hayden, the "shift supervisor" is drawn from a number of very senior executive officers. In his words, "... In military terms, a senior colonel or general officers equivalent; and in professional terms, the people who know more about this than anyone else."<sup>91</sup> I mention this quote here to point out the continued reference to the professionalism argument that was commonly used to support TSP. It is inarguably true that the NSA officers responsible for conducting surveillance under this program know most about the specific programs conducted by the NSA. However, any concerned observer would find it striking that this professionalism argument is being used to persuade audiences that their concerns about accountability can be dealt with adequately in-house.

Within the context of the accountability framework serving as the analytical tool in this project, the audacity of the legal arguments surrounding the TSP are somewhat breathtaking. As Bush administration Attorney General Alberto Gonzales testified before Congress: "The President's constitutional powers include the authority to conduct warrantless surveillance aimed at detecting and preventing armed attacks on the United States."<sup>92</sup> The argument about TSP also

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former NSA officials with whom I discussed this program were very defensive about any perceived indiscriminate data gathering.

<sup>89</sup> -----, Recent Developments, "The NSA Terrorist Surveillance Program", p. 518.

<sup>90</sup> -----, Recent Developments, "The NSA Terrorist Surveillance Program", p. 519.

<sup>91</sup> Remarks by General Michael V. Hayden, "Address to the National Press Club: What American Intelligence and Especially the NSA Have Been Doing to Defend the Nation," National Press Club, Washington DC, January 23, 2006.

<sup>92</sup> Attorney General Alberto Gonzales quoted in Daniel J. Solove, *Nothing to Hide: The False Tradeoff between Privacy and Security* (New Haven, CT: Yale University Press, 2011), 82.

obliquely highlights the central purpose of this project—to understand how oversight has developed and to explain why its effectiveness is constrained—by returning to the core argument asserted by the Bush administration. This argument is, of course, that the president is the “sole organ for the nation in foreign affairs” and thus was not over-reaching in conducting orderless surveillance.<sup>93</sup>

In more concrete terms, the administration argued that Congress vested in the president the authority to prevent future attacks against the United States in the Authorization for Use of Military Force (“AUMF”), passed shortly after the attacks on September 11. In the words of FISA: “A person is guilty of an offense if he intentionally engages in electronic surveillance under color of law except as authorized by statute.”<sup>94</sup> The administration argued that AUMF provides this statutory authorization in its “all necessary and appropriate force” clause. The argument thus was that surveillance of the enemy is an appropriate use of force.<sup>95</sup> The administration’s argument states that the program was legal and, further, that it facilitated the gathering of useful intelligence information on the adversary.<sup>96</sup> Another argument advanced by the administration asserted that the program was lawful under the Fourth Amendment, because surveillance for the purposes of national security qualifies as a “special needs” search.<sup>97</sup> In such cases, it is argued, the government may undertake searches, even when there may be no individualized suspicion, in such instances where “special needs, beyond the normal need for law enforcement” are present; where the expectation of privacy is diminished, or intrusion is minimal; and and/or where there is an increased need to act expeditiously.<sup>98</sup>

Another contention was made by General Michael Hayden, among others, who asserted that FISA was outdated because of the telecommunications revolution that had occurred since it was passed.<sup>99</sup> Linking the first to the last argument, the NSA argued that the president’s inherent constitutional powers granted him the authority to conduct this surveillance outside of the supervision of the FISA court, while the increased number of targets post-9/11 challenged the court’s ability to process the number of orders required. It has been argued that the purpose of the FISA court go-around was due to the sheer number of order requests, not due to any failing on the part of those requests potentially to achieve the court’s standards of appropriateness.<sup>100</sup>

Finally, it has been argued that the TSP is legal due to the fact that it was reviewed by Department of Justice attorneys and approved by the Attorney General.<sup>101</sup> The program was reviewed and re-authorized every 45 days by the Attorney General. In General Hayden’s words, “The trigger is quicker and a bit softer than it is for a FISA warrant, but the intrusion into privacy

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<sup>93</sup> *US v. Curtiss-Wright Export Corp* (1936), quoted in Yoo, “The Terrorist Surveillance Program and the Constitution”, 567.

<sup>94</sup> Quoted in Michael C. Miller, “Standing in the Wake of the Terrorist Surveillance Program: A Modified Standard for Challenges to Secret Government Surveillance,” *Rutgers Law Review* 60, no. 4 (2008): 1053.

<sup>95</sup> *Ibid.*

<sup>96</sup> John Yoo, “The Terrorist Surveillance Program and the Constitution”, *George Mason Law Review* (Vol. 14, No. 3, 2007) p. 565.

<sup>97</sup> Adam Burton, “Fixing FISA for Long War: Regulating Warrantless Surveillance in the Age of Terrorism”, *Pierce Law Review* (Vol. 4, No. 2, 2005-6) p. 392.

<sup>98</sup> Burton, “Fixing FISA for Long War,” 397.

<sup>99</sup> Remarks by Hayden, 2006.

<sup>100</sup> Interview with senior CIA official, November 10, 2011.

<sup>101</sup> Remarks by Hayden, 2006.

is also limited: only international calls and only those we have a reasonable basis to believe involve al Qaeda or one of its affiliates.”<sup>102</sup> He also describes the internal oversight framework devised for the program, mentioning that it is “the most intense oversight regime in the history of the National Security Agency,” requiring the program to be thoroughly reviewed by the NSA’s General Counsel and Inspector General, in addition to the requirement of DoJ approval mentioned above.<sup>103</sup>

In terms of legal analysis, a real friction here was over whether the TSP superseded FISA or vice versa. Critics argued that FISA dealt directly with the issue of surveillance during war by allowing the President a fifteen-day exception before application for court order was required.<sup>104</sup> Further, the original text of FISA was very explicit that FISA would be the sole means of authorizing electronic surveillance. Finally, as legal scholars Baldwin and Shaw argue, AUMF does not compare to FISA in terms of specificity. FISA explicitly focuses on clarifying processes for dealing with wartime domestic surveillance, whereas AUMF broadly grants an authorization to wage war. AUMF does not address in any explicit language the exigencies of intelligence gathering.<sup>105</sup> Rather, the use of AUMF to support TSP was built upon inference. The precedence of specificity over generality in the rules of statute generation was articulated by the court decision in *ACLU v NSA*, which stated that the specific commands of FISA overruled the general authorization of AUMF.<sup>106</sup>

The argument behind all of these measures on the part of the administration was always that they worked, that they were effective, and thus, how could they not be used in pursuing adversaries of the United States? General Hayden often argued that he was *morally* bound to go to the edge of the constraints of the law in order to protect the country from its adversaries.<sup>107</sup> In terms of TSP, Yoo and others argued that even critics did not doubt that the program yielded important information useful to the prevention of Al Qaeda plans directed at the United States.<sup>108</sup> In Yoo’s words: “The main criticism has not been that the program is ineffective, but that it violates the Constitution and cannot be undertaken, no matter how successful or necessary to protect the public.”<sup>109</sup> Attorney General Gonzales argued the “professional” case—that the intelligence professionals should make the decisions about appropriateness in intelligence gathering. This argument in itself is an outgrowth of the age-old argument regarding the superior efficacy and efficiency of the executive branch in terms of emergency decision-making:

The optimal way to achieve the speed and agility necessary to this military intelligence program during the present armed conflict with al Qaeda is to leave the decisions about particular intercepts to the judgment of professional intelligence officers, based on the best available intelligence information. These officers are best situated to make decisions quickly and accurately. If, however, those same intelligence officers had to navigate through the FISA process for each of these intercepts, that would necessarily introduce a

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<sup>102</sup> Remarks by Hayden, 2006.

<sup>103</sup> Remarks by Hayden, 2006.

<sup>104</sup> Miller, “Standing in the Wake,” 1053.

<sup>105</sup> Baldwin and Shaw, “Down to the Wire,” 454.

<sup>106</sup> Provisions of *ACLU v NSA*, discussed in Baldwin and Shaw, “Down to the Wire,” 471.

<sup>107</sup> Interview with General Michael Hayden, April 7, 2010.

<sup>108</sup> Yoo, ““The Terrorist Surveillance Program,” 572.

<sup>109</sup> Yoo, ““The Terrorist Surveillance Program,” 572.

significant factor of delay, and there would be critical holes in our early warning system.<sup>110</sup>

At issue here, of course, is the fact that the executive claimed the legality of this program based on 1) Congressional support for the war on terrorism and 2) more interestingly, in terms of the executive privilege of the president as commander in chief to undertake whatever he deems necessary to support national security requirements. Leaving aside the merits of these two assertions, it does seem immediately apparent that if the executive is claiming purview over electronic surveillance that should by the requirements of FISA be supervised by the FISC, there is a significant weakening of any judicial supervisory traction over the conduct of domestic intelligence operations. It seems a strange move—to claim absolute executive privilege regarding foreign intelligence—particularly in terms of the fact that the FISC had worked fairly consistently in support of executive demands, and the president had even invoked FISA in his description of the administration’s activities. In President Bush’s words: “...Any time you hear the United States government talking about wiretap, it requires ... a court order. Nothing has changed. When we’re talking about chasing down terrorists, we’re talking about getting a court order before we do so.”<sup>111</sup> This was clearly not so. The political response to the program was intense, with House and Senate Democrats and Republicans demanding hearings, and in a surprising move for a member of the secret court, a FISC judge resigned from the court.<sup>112</sup>

Ultimately, the Bush administration, under pressure, placed TSP under the supervision of the FISC in 2007, and did not reauthorize it. This decision was in response to a FISC ruling that an aspect of the program was illegal. The result of the ruling was a series of immediate attempts to amend the FISA legislation.<sup>113</sup> In addition to pointing to the complexities of judicial oversight, the details of the debate about TSP are illustrative of the complexities of the relationship between executive power, surveillance, and public opinion. For example, when the program was described in the *New York Times* in 2005, it was met with a wave of negative reaction at the political level but the general public remained remarkably unmoved by the revelations. In Posner’s words (writing in 2008): “... It is remarkable how tepid the public reaction to the Terrorist Surveillance Program has been.”<sup>114</sup> This rather supine reaction to what could be perceived of as a gross infringement of civil liberties contrasts not only with the angry reactions to the intelligence abuses uncovered in the 1970s but also with congressional response to the program, at least immediately after it was disclosed. The dynamics of public response to intelligence activities are not easy to measure and most public reaction polling yields meager data. In this case, I would argue that the absence of heated response to what could have been a major public scandal was due to several factors. By 2005, the American public was very familiar with increased stages of security precautions that were very public, including the color-coded

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<sup>110</sup> Former Attorney General Alberto Gonzales’ congressional testimony quoted in Solove, *Nothing to Hide*, 83.

<sup>111</sup> President George W. Bush’s Remarks in a Discussion on the PATRIOT ACT in Buffalo, NY, April 20, 2004, quoted in Banks, “Response to the Ten Questions,” 1255.

<sup>112</sup> Baldwin and Shaw, “Down to the Wire,” 432. There is no concrete clarification for the resignation of the FISC judge. It does remain a signal move, however, regardless of how it is interpreted. Most argue that it was in protest of the TSP, and from the hostile reactions I have received from Bush administration officials when asked about the resignation, I believe this is the case.

<sup>113</sup> Carol D. Leonnig and Ellen Nakashima, “Ruling Limited Spying Efforts: Move to Amend FISA Sparked by Judge’s Decision,” *Washington Post*, August 3, 2007.

<sup>114</sup> Posner, “Privacy, Surveillance, and the Law,” 259.

threat index issued by the Department of Homeland Security, invasive levels of security at airports, and increased security in virtually all public places in major cities.

This “crisis fatigue” was compounded with a sense of distance from the NSA program in two ways: first, the NSA is virtually unknown among the public and access to even a limited awareness of its activities extremely difficult. This distance from a federal agency, no tangible proof of personal invasion of privacy, and the program’s focus on terrorism and, specifically, individuals drawn from Al-Qaeda compounded this distancing effect. Further, by 2005, the public had had decades to get to understand the nature of the security and intelligence agencies in the United States. Concerted efforts, such as publicity campaigns on the part of the CIA and FBI, or exposure to movies, television shows, and museums, such as the International Spy Museum in Washington DC have familiarized the public with the activities of the intelligence community. This was not the case in the 1970s, when the revelations of domestic intelligence activities conducted by the CIA, FBI, and NSA were first made public.

Finally, as a senior CIA official mentioned to me, there is a vast difference in the political environment between the mid-1970s—when the first crises regarding intelligence appeared—and now. Then, the United States was struggling with the final throes of the Vietnam conflict and the resignation of President Nixon.<sup>115</sup> There was very little institutional legitimacy left to cover the egregious abuses propagated by the intelligence services. Finally, the threat environment was less personal in the 1970s. Yes, vast numbers of young men were drafted and sent to Vietnam during that period, leaving families to deal with absence, injury, and death, but there was not a sense that the “homeland,” as it were, could come under attack; that ordinary employees showing up to work could be killed simply by showing up on time. This sense of vulnerability on the part of those most likely to be exposed to news of the TSP created a public response evocative of Goldsmith’s pendulum approach to intelligence and intelligence oversight. News, also, of TSP was buried under the unending flow of information about security issues that was a function of the increased attention to security and terrorism post-9/11, but also to the unending news cycle. This is a very different dynamic from the network news body counts of the Vietnam era that were the public’s main exposure to the war at that time.

While the TSP was a brief and still ambiguous interlude, the legality of which continues to be argued about strenuously on both sides of the political spectrum, it marks a unique moment in the institutional development of the intelligence oversight mechanisms I discuss throughout this project. TSP was, indeed, a schism in the development of judicial oversight of intelligence. FISC did not cease to exist during the period of the TSP—beginning and end-dates are still unknown—but the administration chose to argue that the prior executive authority over foreign intelligence surveillance took precedence over the constraints of the FISA-created mechanism. I have described how the sequence of decisions regarding foreign intelligence surveillance developed prior to FISA, each decision leaving an exception for the purposes of national security. TSP took enormous advantage of this exception by arguing that the pre-FISA precedent of non-involvement made the program legal. As one senior CIA official commented, TSP simply went back to the executive authority era, turning a full circle back from all of the developments that had created FISA and FISC.<sup>116</sup> A break this drastic would prove to be untenable within

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<sup>115</sup> Interview with senior CIA official, November 10, 2011.

<sup>116</sup> Interview with senior CIA official, November 10, 2011.

legislative oversight structures and thus the conflict around TSP introduced real questions regarding whether judicial oversight of intelligence is actually perceived of as legitimate, constituting an independent check on intelligence, or whether, it is, in fact, so subordinate that it has difficulty balancing the asymmetrical relationship at all.

### **Protect America Act and the FISA Amendments (2008)**

The legislative implications of both the political and technological complexities were realized in a two step revision of FISA, undertaken in 2007 and 2008. While the PATRIOT Act had for most purposes dismantled the “wall,” the division between law enforcement and intelligence activities, amendments to FISA included in the Protect America Act (2007). This Act amended FISA to allow orderless surveillance of foreign-to-foreign communications routed through the United States, allowed orderless surveillance of US citizens communicating with individuals overseas, as long as the target of surveillance was reasonably believed to be located outside of the United States, and “[gave] the attorney general and the director of national intelligence (DNI) the power to approve the international surveillance,” thus removing the FISA court from this supervisory role.<sup>117</sup> According to the Protect America Act, the FISA court’s only role was “to review and approve the procedures used by the government in the surveillance *after* it had been conducted.”<sup>118</sup> The Protect America Act is, thus, interesting that in that it legitimized TSP *after* the fact through legislation. In fact, it absorbed the TSP, with the main difference between them being that TSP allowed surveillance of targets within the United States with the criterion for collection the target’s alleged relationship with Al-Qaeda, while the Protect America Act allowed surveillance based on the location of the target.<sup>119</sup>

The argument regarding whether TSP was constitutional or not is so politically polarized, that there will no doubt never be a firm decision on this point. What is notable, however, is that the administration *did* know it was at least breaking a law by bypassing the FISC. Even if Bush administration officials refuse to cede violating FISA as law breaking, it is undeniable the administration broke a *rule*. I differentiate *rule* from *law* here because FISC was intended to be the source of supervision regarding electronic surveillance; this was established by norm, custom, and legal regime. When the administration chose to bypass this regime by appealing to another legal authority, it certainly bypassed a regime of rules that governed behavior on these matters. When required to bring the program back under the auspices of the FISC, the administration did so, but demanded change to statute, including providing *retroactive immunity* to the private telecommunications companies that provided the information to the NSA’s arguably illegal program.

One could argue that one factor in the change and development of judicial oversight is executive challenge to existing law through operational practice. Another way of putting this is that executive law breaking in this context, led to expansion of legal constraints, compared to the 1970s, when executive lawbreaking led to the creation of oversight mechanisms and the strengthening of constraints on the intelligence community. Development of the judicial

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<sup>117</sup> Stephanie Cooper Blum, “What Really is at Stake with the FISA Amendments Act of 2008,” 296.

<sup>118</sup> Protect America Act of 2007, Pub. L. No. 110-55 Stat. 552 quoted in Cooper Blum, “What Really is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform,” 296.

<sup>119</sup> William C. Banks, “Response to the Ten Questions,” *William Mitchell Law Review* 35, no. 5 (2009): 5013.

mechanism of intelligence oversight is driven by the requirements of a changing threat environment and developing technology, both of which have driven the statutory changes governing the court's makeup, role, and the scope of its purview, but also by rule breaking, as the broken rules were absorbed into a new legal regime that expanded to include executive branch transgressions. There are arguments to be made that the reason the changes were absorbed into the new regime was that there was merit to the administration's objections to oversight controls at that time. I am not passing value judgments on the merits of these changes according to the law. I am simply underscoring the importance of assessing law-breaking as a pathway to intelligence oversight regime change.<sup>120</sup>

The Patriot America Act expired in February 2008 because of disagreement between the Bush administration and Congress concerning retroactive immunity for the telecommunications companies that had participated in TSP.<sup>121</sup> It was followed by the second of FISA revisions, the FISA Amendments Act of 2008, which diluted FISA significantly but re-introduced significant procedural mechanisms. For example, added were such requirements that the order application be presented to the FISA court *prior* to the proposed surveillance, that the targeting be limited and focused on individuals believed to be located outside of the United States, intended, of course, to limit the purposeful acquisition of domestic information; that minimization procedures must be in place; and that the Attorney General and DNI must certify that a "significant purpose" of the surveillance is to obtain "foreign intelligence information."<sup>122</sup> While certain FISA constraints were hardened, further revisions to FISA completed in 2008 served definitely in the executive's favor. These included an increased range of acceptable surveillance activities by no longer requiring the FISC to consider individual surveillance operations but rather requiring only that the court monitor whether the general procedural requirements of FISA were being followed. The amendments also granted retroactive immunity to the telecommunications firms that assisted the NSA in conducting the orderless surveillance of American citizens. The amendments also expanded FISA to address the surveillance of Americans living overseas—thus actually protecting Americans from invasion of their personal privacy while living overseas.<sup>123</sup> In the words of Senator Dianne Feinstein, "This bill does more than Congress has ever done before to protect Americans' privacy regardless of where they are, anywhere in the world."<sup>124</sup>

In the political and public levels, as Gill points out, the post-9/11 context caused those charged with oversight of intelligence to be pressured strenuously to "look the other way" when it came to checking these operations. This is also linked to the enormous pressure for

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<sup>120</sup> See Cooper Blum, "What Really is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform," 296 for the argument stating the merits of the Bush administration's challenges to the FISA regime at that time. Several of my intelligence community interlocutors made the same argument.

<sup>121</sup> Cooper Blum, "What Really is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform," 296.

<sup>122</sup> 50 U.S.C. 1881

<sup>123</sup> S. 2248, 110<sup>th</sup> Congress. Discussed in Jonathan D. Forgang, "'The Right of the People': The NSA, the FISA Amendments Act of 2008, and the Foreign Intelligence Surveillance of Americans Overseas," *Fordham Law Review* 78, no. 217 (2009-2010): 237-239.

<sup>124</sup> 154 Cong Rec. S6097, S6119 (Jun. 25, 2008) quoted in Stephanie Cooper Blum, "What Really is at Stake with the FISA Amendments Act," 300.

governments to deliver on their promises of safety and security.<sup>125</sup> This political pressure was alluded to by a FISC judge speaking on a conference panel, when he commented that no FISC judge wants another attack to happen “on his watch.”<sup>126</sup> While the intensity of this feeling may have waned as years have passed since 9/11, political tension and potential blame in the public eye infiltrated even this most secret of courts.

## Conclusions

From the perspective of an accountability and oversight researcher, the trends in judicial oversight of intelligence activities are much more troubling than the post-9/11 changes that have been made, for example, to congressional oversight of the same era. Congress has been slow to enact reform in its oversight procedures, even though slipshod oversight was blamed, in part, for the intelligence failure that led to the success of the attacks, although it has been quick to draft legislation loosening the constraints on federal law enforcement. An argument could be made that the strong response in terms of legislation could be the byproduct of public reaction to the attacks, whereas strenuous congressional oversight has always been the victim of the range of countervailing impulses discussed at length in chapter two of this project.

FISA was originally installed because of evidence of vast domestic intelligence abuses conducted during the Cold War. While there were some zealots in the intelligence agencies during that period, many intelligence officers felt that they were responding appropriately to a penetrating domestic threat to the country. In the current threat environment, strides to weaken judicial oversight have been supported by arguments asserting that the nature of a non-state threat and advancement of technology require that the oversight regime be diluted. When the regime has been perceived to be slow or unwieldy, it was bypassed with impunity, as with the NSA’s TSP. In the words of one of senior CIA official: “judicial oversight now is pretty thin gruel.”<sup>127</sup>

The themes that emerge from the debates over the appropriateness of the FISC to meet the challenges of the post-9/11 threat environment highlight very clearly the importance of the accountability categories of the theoretical framework. The external independence of the court is still a question – not just for this analysis, but also in practice. The question of even whether the judiciary *has* a role in supervising intelligence activities has reappeared multiple times in the more than two decades that a judicial mechanism has existed, and highlights the asymmetry in the relationship between the executive and the judiciary regarding intelligence information. The questionable external independence of the mechanism comes to the fore particularly when one looks at the politics of the changed FISA statutes. On the one hand, normal political processes operated to change the statute to absorb the emergent exigencies of the threat environment.<sup>128</sup> On the other, change was driven by executive rule breaking and prerogative. Further, the issue of

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<sup>125</sup> Peter Gill, “Democratic and Parliamentary Accountability of Intelligence Services after September 11,” Paper prepared for the Workshop on Democratic and Parliamentary Oversight of Intelligence Services, Geneva, October 3-5, 2002: 305, 312.

<sup>126</sup> Comment by FISC judge, Los Angeles Terrorism Early Warning Group/RAND Corporation Conference, “Terrorism and Global Security.” May 9, 2008.

<sup>127</sup> Interview with senior CIA official, Nov. 8, 2010.

<sup>128</sup> “Normal” is relative here. There was an extreme level of anxiety about national security in the political environment during the period immediately following 9/11.

knowledge and scope – access to intelligence information and the question of how wide the purview of the mechanism should be have both been crucial issues in analysis of the changing nature of the FISC. Dual problems have been caused by faulty provision of information on the part of the executive and overwhelm on the part of the individuals involved in the process on the part of the judiciary. Organizational complexity is not overly problematic as the judiciary deals with only a small slice of the intelligence enterprise and the procedures, when they are followed, are clear cut.

Temporality receives more of an emphasis within the context of judicial oversight than with the other types of oversight discussed in this project. The issue of temporality was core to the arguments regarding the Terrorist Surveillance Program. Those arguing for the necessity of the program stated that the increased flow of order requests in the post-9/11 pursuit of terrorist suspects would overwhelm the procedural machinery of the judicial oversight process—which involves, incidentally, officials from both the executive and judicial branches to act in concert—and this would hinder the effective and timely processing of the orders. Beyond the TSP, the “wall,” discussed throughout this project, did limit the timely transmission of information between sides of the investigation. Thus the issue it raises is not purely one of privacy protections and Fourth Amendment protections, but also one of the oversight mechanism being changed to facilitate more efficient transmission of intelligence information. A tension that General Hayden mentioned often in interviews was the “hot pursuit” of terrorist suspects. The process of FISA would not only hinder the efficiency of gaining an order to monitor a suspect, but, according to his argument, could curtail surveillance if the means or location changed during the course of monitoring.

The final category in the theoretical framework of accountability—transparency—is extremely complex. Rather than eliciting yet another statement that the court is not transparent, this opacity raises the question of whether variations within the overall category transparency would be useful to measure, and how this would be operationalized. This is similar to requiring a breakdown of the category of “internal independence” of the CIA with regard to the executive into constitutive variables. As expected, the emphasis within the framework is different depending on the branch of government responsible for the accountability of the intelligence community.

## Chapter Five:

### Conclusions and Future Research

The theoretical framework of accountability has driven this project, providing core themes to be used across the branches of government in the assessment of intelligence and accountability. The categories used illuminate the weaknesses of the mechanisms in all three branches of government. The core of intelligence and accountability is the problem of asymmetric information. Information is key to the process of intelligence programs and thus it is highly guarded within the executive branch. Interestingly, while an increase in access to intelligence information could improve accountability, both the legislative and judicial branches have not pressed for further access to intelligence information in recent years. This lack of political will to expand external oversight mechanisms has many causes: first, the post-9/11 security environment became highly politicized due initially to a sense of penetrating national anxiety about terrorism, and later to the political polarization of the second term of the Bush administration. The politicization subdued criticism of the national security apparatus in the early period after the attacks and even later in the Bush period, as Democrats did not wish to appear weak on national security – the usual taunt thrown at them. By the second term, political polarization in the intelligence committees deadlocked expansion or change in the process of intelligence oversight. Small structural changes, such as the end of term limits in the SSCI, or the creation of sub-committees were the norm in Congress. These changes bear mentioning within the context of the development of mechanisms discussed throughout this project, but they pale in comparison with the wide-ranging re-organization of the intelligence community after 9/11.

The supine behavior among congressional overseers in this period provides an interesting contrast to the post-Church Committee era, when progress in expansion and specification of the oversight process did occur. Again, it was incremental but there was advancement. The pendulum swing, however, during the earlier era was headed toward increased intervention and the bringing in of the security services out of the dark in response to political scandal. The Iran-Contra scandal highlighted the weaknesses of the oversight system in yet another scandal, but movement toward greater transparency was halted in response to the attacks on 9/11. It is not surprising that there was a general upsurge in patriotic rhetoric and support for the hallmarks of patriotism: the military, law enforcement, and national security agencies. What is interesting in this context is that in a time of drastic organizational change within the intelligence community and throughout the United States, as resources were poured into law enforcement and counterterrorism efforts, that the congressional oversight committees changed so minimally to address these changes. Explanations for this are the politicization of the committees, lack of political will to engage with the “wrong side” of an issue in a trying national time, and lack of general personal engagement on the part of the overseers.

In many ways, it appears that the overseers took a large step back from intelligence activities during this period. I would argue that this was also due to the controversial, and extensively argued about, fact that the tools used by the community expanded during this period, under the order of the administration. Issues of covert action and espionage are an expected

aspect of intelligence activities, whereas the complexities of whether a method constitutes torture, or whether it is appropriate to render and incarcerate suspected terrorists in “black sites,” is both legal and appropriate for an intelligence agency to do complicate discourse and endanger careers based on political legitimacy. The complications and ethical issues here are legion, and only touched upon briefly above. Questions will always remain, however, in terms of what appropriate behavior for an intelligence agency is, to what extent it should be permitted to expand its tools in pursuit of intelligence information, and what trade offs should be made, not just between civil liberties and security, but *human rights* and *American* security. It is not surprising that legislators would be loathe to engage when the benefits of criticism ending up looking like obfuscation—such as Speaker Pelosi’s unwillingness to admit she had been briefed on enhanced interrogation techniques. In terms of the framework, knowledge and independence remain stagnant. I would argue, however, that legislative overseers have allowed this to happen – or even, helped it, in an attempt to avoid responsibility. This charge is harsh, but the failure to acknowledge the committees’ important role in passing authorization bills, for five years, and a general unwillingness to press for change and greater responsibility point to a lackadaisical view of the importance of their mission – ironic considering the original efforts taken to institutionalize and legitimize their role.

I believe, however, that as the immediate experience of 9/11 fades, other more complex criteria will govern the focus—or lack of focus—on intelligence oversight. This complexity will not just guide homeland security decision-making but will also vary over time how the public views the requirements of security and intelligence. This variation will be driven by the combination of specific intelligence activities, and the vicissitudes inherent to both the prestige of security and the dynamic political environment. Early examples of this could be the gradual shift of attention away from intense scrutiny of domestic intelligence and homeland security issues and toward a foreign intelligence and integrated military presence as the focus of American activities. Next steps in oversight development will also require that a realistic assessment of the state of the intelligence community be made. By this, I mean, the proliferation of intelligence entities in the post-9/11 security environment, the rampant use of contractors, muddying the divide between what constitutes public in contrast to private use of information, and the increased integration of the military into national intelligence activities must all be considered challenges to conventional conceptions of the division of labor among the intelligence agencies. This, then, challenges the current framework of mechanisms, that either focus on such a narrow slice of activity, such as the FISC, or are spread far too thin to conduct effective oversight, such as Congress.

Beyond the structural components of the intelligence community and the mechanisms that have been discussed at some length here, there are the further conceptual complexities of accountability that I have introduced through the accountability framework. By separating and analyzing the component parts of accountability, I hoped to provide a basis for a more nuanced set of policy recommendations regarding where intelligence oversight should go from here. What has the framework indicated in terms of the weaknesses in maintaining the accountability of intelligence agencies? First, the information asymmetry is still extraordinarily oriented to benefit the executive branch. I say “extraordinarily” here because this analysis demonstrates that even after decades of development, oversight is still heavily dependent on executive acquiescence in the sharing of information about intelligence. While reporting requirements have certainly

improved over the years, the fact is there is little recourse should the intelligence community choose not to be forthcoming about its activities. The limits in terms of reporting audience have proven difficult across the board in terms of external oversight mechanisms. In the judiciary, the secret court has been overwhelmed with order requests—this deluge being one of the rationales for the TSP’s creation. In Congress, limitations on reporting audiences, such as the Gang of Eight, mean that the information is not even distributed to the wider committees, let alone to the full Congress. This requires that eight individuals are charged with maintaining the accountability of the intelligence programs considered the most difficult and sensitive. The burden is simply unfair and the process unsustainable if *effective* oversight is the objective.

In terms of recommendations to strengthen the mechanisms, they come down to the requirements of good governance. The existing external mechanisms are barely transparent and the internal mechanisms not transparent at all. While security is the paramount concern when it comes to intelligence, the mechanisms *must*, in some way, provide a greater degree of openness to the activities of the intelligence community. I make this assertion understanding how difficult this would be to carry out, as well as how naïve the statement would sound to an intelligence officer. Further, I realize that a fundamental question here is: who decides? Who decides how transparent the intelligence services or the mechanisms that supervise them should be? Legislators, the judiciary, the executive, or interest groups? As has been demonstrated throughout this project, the first two of these have vested interests in *not* making this type of judgment call, the third wants to keep this world as opaque as possible, and the fourth has no access to any information nor does it possess very much traction on policy-making.

In order to facilitate improved active oversight and mechanism engagement, the processes by which the external mechanisms function must be updated and made more efficient. It is easy to blame a supine congressional oversight process, but it is much more difficult to find a solution to the task of supervising 17 agencies, engaged in highly technical work, with minimal, or in some cases, no staff, and minimal expertise. The expertise issue should shift as the term limits on Senate committee members have been lifted, but still, the task is huge, onerous, and thankless. I would suggest strengthening the link between the oversight mechanisms and the *boundary crossers* in order to facilitate a more efficient flow of intelligence information. This proposal would be wildly opposed in the intelligence community, but perhaps this opposition indicates that the internal oversight mechanisms could provide legitimate supervision and disseminate information to the external world in a far more effective fashion than the limited breadth and technical skill of the current format of congressional committees. In order for this to function, however, the normative expectations of the boundary crossers, in the case of the CIA, the statutory Inspector General (IG), must change and the position must be legitimized. The issue of legitimacy is not so problematic for Congress, but rather for the Agency itself, which fought against what were perceived of as invasive practices.

Linking the strong attributes of both internal and external accountability mechanisms could tighten recourse and smooth the transmission of information – two of the main sticking points of intelligence oversight. Further, in a very optimistic vein, the problems of temporality could be ameliorated with a tighter and more trusting information-sharing relationship between the Agency and Congress. I do not suggest with this approach that it would solve all problems, or would even be practicable or possible, but it is necessary to move beyond exhortations that

Congress stiffen up and get more focused on intelligence. The complexities of the task are simply too great to be dealt with effectively via this particular external mechanism, and the political motivation for the legislative overseers is clearly lacking. Another avenue or type of structure may be able to aid the rather feeble congressional attempts at appropriate intelligence supervision.

The issues inherent to the dysfunction of the legislative branch in terms of intelligence oversight extend in a slightly modified fashion to the judiciary and its process of oversight as well. In the case of the judiciary, the process of application for orders must be simplified. This is not to suggest that the standards should be lowered, but rather that the onerous bureaucratic burden be lightened a little to enable a greater volume of requests to pass through the FISC. The application process for a FISA order requires the engagement of a number of individuals up to the Attorney General. While this careful system of checking and double-checking the merits of a particular applications should assuage anxieties of a surveillance organ gone rogue, the process limits effectiveness of the mechanism by slowing it and not allowing it the nimbleness it needs to deal with a dynamic threat that has blended the boundaries between foreign and domestic operation. Further, some level of transparency of the court is important in order to re-establish somewhat broken ties between the branches and the public when it comes to issues of surveillance. This is particularly the case because the boundaries of what constitutes appropriateness in terms of electronic surveillance became somewhat muddled in the post 9/11 years, as programs such as the Terrorist Surveillance Program evaded the constraints provided by FISA and the FISC. Openness need not be total; this would obviously be impossible given the temporal point of this mechanism's responsibilities. Some transparency is, however, key so that the other branches and the public may understand both the limitations and the extent of judicial control of these matters.

In terms of internal mechanisms, one approach, as mentioned above, is to strengthen their role in the overall project of intelligence and accountability, allowing the internal mechanism to integrate more thoroughly with the external. I believe this would be an ideal approach to solving some of the manifold problems described and explained throughout this project. More realistically, however, internal mechanisms remain the most stable and opaque of all, throughout the trajectory of oversight development. This is partially because their responsibilities are protected by the needs of the executive branch, but also because their activities are off limits to the public and, generally, the other branches of government. They are considered *control* tools, rather than those that enrich and maintain accountability through traditional democratic modes of transparency.

The post-9/11 era has seen its share of extreme behavior on the part of the intelligence community. While this activity has not generally directed toward American citizens, some of it, such as orderless wiretapping, has. Activities that don't immediately affect Americans tend not to get a public reaction. The idea that the CIA could be using techniques that could be considered torture on detainees is distasteful to most, but not something considered worthy of active public agitation. Finally, transparency comes down to a public role in deciding what the United States stands for in terms of human rights, rule of law, and acceptable international citizenship. The link between the public and the intelligence community can be tightened but the relationship hinges on the active involvement of the mechanisms, particularly congressional oversight, to provide an

aperture. Whether they can engage remains an open question, but it is important that they claim their rightful role, regardless of procedural constraints, or the demands of political expediency.

## **Future Research**

There are many future avenues I hope to pursue with this research. I find that I have only scratched the surface of the complexities of the issues of intelligence and accountability. Next steps would be to investigate the legislative history of oversight and accountability in greater depth. While my history below touches upon the pivotal points in the institutional development of oversight mechanisms within both chambers, the discussion is by necessity brief. Process tracing the decision-making processes in each of the pivotal moments could add depth and help me further specify the framework of accountability. Further analysis of the judicial decision-making surrounding the FISC would also allow me a little more room to develop my own theories about the efficacy of that court. I was limited in only having access to one FISC judge, although several attorneys very familiar with national security law were very helpful in explaining the intricacies of legal decision-making and electronic gathering of foreign intelligence information.

Overall, I view this project as the beginning of a second, much larger and more detailed project that will allow the space and time to explore all of these issues in greater depth and nuance. This will also feed back into my framework, facilitating, I hope, a step forward in its specificity. As mentioned throughout this project, I have been incredibly fortunate in having exceptional access to interview partners, drawn particularly from the intelligence community and congressional oversight committees. All have offered continuing engagement on these matters and thus I look forward to adding their voices to the next stages of this research. Finally, an addition I greatly look forward to in a next stage of this project is that of the public and media. My interest in intelligence and accountability was initially peaked by the consideration of when public outrage causes institutional change in intelligence agencies and the mechanisms that oversee them. The public appears here and there in this project but due to lack of space as well as a thought that the institutional foundations of intelligence oversight and accountability are best explored first, I did not delve into this rather more amorphous topic. The role of the public is also linked closely to the structure of laws, such as the Freedom of Information Act, that enshrine the public's right to information about internal government workings. National security issues are conventionally exempted from the usual provisions of these laws; thus, it is time that the body of information laws be reviewed and assessed for relevance, particularly in the post-9/11 environment of loosened restrictions on national security agencies. New challenges, including the addition of contractors and other private sector entities tasked with government work, challenge the old rules and make public access to internal information much more difficult.

The press, as well, serves as an additional conduit of accountability and I have left its role in this current project at the margins. Analysis of not only how information passed to the press has gained public and oversight attention, as well as *when* the media feels that information gained on sensitive matters should *not* be shared are both fascinating topics for future research. A final topic within the realm of intelligence and accountability that I would add to future research is the one of special investigations. Intelligence—because it is generally so opaque, but its perceived failures so obvious—tends to generate anxious political reaction and the investigation

through special commissions and committees. Examples of these include the Aspin-Brown Commission, the Robb-Silberman Commission, and, of course, the 9/11 Commission. Analysis of how these types of investigations fit within the theoretical framework that drives my project could be very interesting in terms of understanding how failure, accountability mechanisms, and public response fit together.

This dissertation has dealt with issues of intelligence in depth up to the point of the George W. Bush administration. This is due both to the fact that intelligence officers may only speak openly about their ideas and opinions once they are out of active service, and also because the crucial challenges to the intelligence community and the oversight mechanisms occurred under President Bush's watch. That is not to say that President Obama has not been faced with intelligence problems, but the radical changes occurred prior to his inauguration. Having said this, I hope to augment the framework provided here with details drawn from the Obama administration as soon as they become available. I hope I have contributed a structure that will enable many different avenues of future analytical research on these issues.

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