

DRAFT of FORTHCOMING ARTICLE IN AFIO INTELLIGENCER

A Guide to Intelligence Oversight Design

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Oversight of the U.S. Intelligence Community (IC) is complex and involves many people and institutions across all three branches of the government. This essay introduces the major players, powers, roles, and jurisdictions of those charged with the oversight of our nation's intelligence agencies.

The President

Some of the president's powers are enumerated in the Constitution, for example those related to his role as commander-in-chief. Other powers may be only implied by the Constitution, such as the use of the executive orders to direct executive branch bureaucracies. The president, as the nation's chief executive, bears primary responsibility for directing the Intelligence Community (a management task) and is also responsible for its oversight to ensure its adherence to laws, policies and its effectiveness.

As commander in chief, the president is charged with the nation's security. As such, he largely controls the nation's military capacity, which is a key influencer of the IC, partly because approximately eighty percent of the intelligence budget goes to the Department of Defense. Moreover, eight of sixteen intelligence agencies are subsets of Defense, including an intelligence group in each branch of the military, as well as the Defense Intelligence agency, the National Security Agency and others. Therefore, as commander in chief, especially when coupled with his duty to submit the initial budget to Congress each year, the president plays a major role in managing the intelligence community.

The president has oversight power of intelligence agencies by virtue of his role in nominating the heads of these departments and agencies. For example, the president nominates the Secretaries of Defense, State, Treasury and Homeland Security. He also names the Director of National Intelligence and the heads of individual agencies such as CIA and FBI. These appointments are subject to approval by the Senate.

Executive orders have historically had major impact on executive policy and national security. Three executive orders, 11905, 12036, and 12333, have played especially large roles in intelligence oversight. In 1976, President Ford issued 11905, implementing many changes in the wake of President Nixon's perceived intelligence abuses. According to 11905, the National Security Council was to review intelligence activities twice a year, and created the Committee for Foreign Intelligence (CFI) and was to have fiscal influence over the National Foreign

Intelligence Program .¹ The CFI had only three members, the Director of Central Intelligence (DCI), who was also the chair of CFI, the Deputy Secretary of Defense for Intelligence; and the Deputy Assistant to the President for National Security Affairs. CFI reported to the NSC. The proposed intelligence budget was subject to approval by the OMB.

EO 12036, issued by President Carter, replaced 11905, and allowed the DCI to play a more central role in intelligence budget recommendations. This budgetary power of the DCI became a primary source of irritation with DCI Stansfield Turner, in particular from those agencies housed in the DoD.² 12036 also cut the committees of the NSC to two, gave these committees a broad oversight and review duties related to the quality of information the IC was providing.

Executive Order 12333, issued by President Reagan in 1981, allowed the DCI to establish advisory boards as needed, and specifically named the DCI as the chair of these advising bodies. Reagan also sought to increase the “analytical competition” between IC agencies to improve the quality of the finished intelligence product.³

According to some, 12333 further granted the CIA power to covertly operate within the United States, though the Agency was prohibited from gathering intelligence on domestic activities of citizens and corporations. CIA was also allowed, with presidential approval, to use covert actions domestically, as long as the intention was not undue influence of public opinion and the like. Similarly, FBI was granted permission to operate domestically in support of foreign intelligence collection.⁴

President George W. Bush amended EO 12333 to make the new Director of National Intelligence (DNI) the nation’s chief intelligence officer. The DNI is the primary intelligence advisor to the president and the National Security Council; the Director of Central Intelligence position and title were abolished.⁵

The president also manages the IC by more secret measures, including National Security Directives (NSD).⁶ NSDs are used as “...formal notification to the head of a department or other government agency informing him of a presidential decision in the field of national security affairs and generally requiring follow-up action by the department or agency addressed.”⁷ Although NSDs are similar to EOs, they often remain classified. They are not issued in the Federal Register and are often not acknowledged to exist by presidential administrations.⁸ NSDs have been used to impact intelligence agencies in several ways. For example, in an effort to limit information leaks, President Reagan required that intelligence employees with access to

¹ Garthoff, 115-116. [See Bibliography for all references.]

² *Ibid.* 143, 152.

³ EO 12333 Part 1.1A.

⁴ Richelson, 19, 153.

⁵ *Ibid.*, 464.

⁶ The nomenclature for National Security Directives can change from administration to administration. For example, Clinton called them Presidential Decision Directives; George W. Bush referred to them as National Security Presidential Directives; President Obama prefers Presidential Policy Directives (Cooper, 144; <http://www.fas.org/irp/offdocs/ppd/index.html>).

⁷ President Lyndon Johnson, as quoted by Cooper, 144.

⁸ *Ibid.*, 145.

classified material be subject to polygraph tests and were monitored for their contacts with foreign nationals.⁹

Additional Oversight in the Executive Branch

The Secretaries of Defense, State, Treasury and Homeland Security oversee intelligence gathering by their departments. The Secretary of Defense, in particular, because of the number of agencies within, and the allotted funds to Defense, has a particularly important oversight role. State, Treasury and Homeland Security have intelligence capabilities, and are important players in the IC, making the Secretary of each department important cogs in the oversight process. The Secretary of State reviews intelligence activities consistency with U.S. foreign policy.

The heads of individual agencies are essential in directing their individual agencies. The Director, CIA, for example, must direct the CIA to provide the best intelligence possible to the policymakers who depend on the information. Failure to do so can lead to questionable, or even horrendous, policy decisions.

The Director of National Intelligence is charged with directing the intelligence agencies. President Bush's amendment to EO 12333 directed the DNI to "oversee and direct implementation of the National Intelligence Program budget" and ordered the heads of individual intelligence agencies to "provide all programmatic and budgetary information necessary to support the Director in developing the National Intelligence Program."¹⁰ This has proven to be a more difficult task than expected, however. For example, DNI Dennis Blair was let go by President Obama after controversy arose when he tried "to exert too much operational control over CIA."¹¹

This weakness seems to be in the design of the Office of the DNI (ODNI). Thomas Fingar describes the ODNI as "limited by ambiguity, ambivalence and animosity."¹² Indeed, DNI Mike McConnell spoke publicly about the DNI's inability to direct IC activities. When Congress considered giving the DNI more power "Secretary of Defense Donald Rumsfeld waged a successful campaign within the executive branch and with key members of Congress to preserve his (and other cabinet members') authorities."¹³ Although the Intelligence Reform and Terrorism Prevention Act provided the DNI more power than the DCI possessed, the Act nonetheless limited the ODNI's power by requiring that it "must respect and not abrogate the statutory responsibilities of the heads of departments."¹⁴

The President's Intelligence Advisory Board (PIAB) and its Intelligence Oversight Board (IOB) reside in the Executive Office of the President (EOP). The PIAB provides the president with nonpartisan intelligence advice, and has served every president from Eisenhower to Obama, save Carter. The PIAB's recommendations to improve intelligence agency performance are reported to the president as needed, but at least twice a year. The Board, which does not exceed sixteen members, has full access to intelligence data. The IOB, created by President Ford, is

⁹ *Ibid.*, 187.

¹⁰ As quoted in Richelson, 464.

¹¹ George, 165.

¹² Fingar, p 139.

¹³ *Ibid.*, 142.

¹⁴ *Ibid.*

charged with ensuring the intelligence community's adherence to the Constitution, statutes and presidential fiats, and its members are also members of the PIAB.¹⁵

The Joint Intelligence Community Council (JICC) was created in 2004 to serve as an oversight body. The body is chaired by the DNI, and includes the heads of the departments of State, Defense, Homeland Security, Treasury, Energy and Justice. JICC was intended to advise the DNI on budget issues, and to support the performance of policies established by the DNI. It also was intended to help interagency cooperation, with advisory roles in matters of finance and budget, as well as oversight and evaluation of the IC. Some critics believe it is underutilized.¹⁶

The Office of Management and Budget (OMB), described by Gordon Adams as “one of the least understood, most influential, and sometimes most disliked institutions in the executive branch,”¹⁷ has played an increased role in intelligence budgeting since the 1990s, including often being involved in discussions about covert actions. Moreover, because of the budgetary roles of ODNI, OMB is more active with IC budgeting. These activities include helping ODNI “develop an integrated budget planning system to examine the intelligence agencies’ budget submissions, and...participat[ing] in a joint intelligence budget review with ODNI.”¹⁸

The Office of Legal Counsel in the Department of Justice also plays a major, if understated, role in intelligence oversight. First, OLC is the original clearinghouse for executive orders, empowered to review executive orders prior to issuance for “form and legality.” Second, OLC serves as a primary legal advisor for the president and the executive branch as a whole.¹⁹ The legal advice of OLC can have serious impact on the actions of the IC. For example, according to the Hughes-Ryan amendment of 1974, the president should inform Congress of covert actions “in timely fashion.” Reagan authorized a covert action connected with the Iran-Contra scandal, but required that Congress not be informed. In the wake of this unreported action, OLC determined that it was the duty of the president to interpret what constituted a timely report, and that he had “virtually unfettered discretion” to do so.²⁰ More recently, opinions issued by the OLC gave legal permission and protection to controversial interrogation methods, such as waterboarding, employed by CIA.

Congress

Unlike the Executive Branch, which has a singular head,, Congress is comprised of 535 voting members, divided between two independent chambers and two parties and who represent fifty states and 435 congressional districts. Moreover, by organization and intent, the terms of office and rotating election of senators are designed to slow the course of legislation, and makes oversight, at least in some ways, more difficult by Congress than by the president. Despite the comparative weakness of Congress, it has many oversight tools at its disposal.

¹⁵ “About the PIAB”.

¹⁶ Richelson, 470.

¹⁷ Adams, 57

¹⁸ *Ibid*, 67

¹⁹ Gibson.

²⁰ Crabb and Holt, 180.

Perhaps the most powerful tool that Congress has to ensure its role in the oversight process is that of appropriating funds. Although the president presents a recommended budget to Congress, constitutionally the power of “the purse” belongs with Congress. If Congress is unhappy with an agency or department, or if an organization is non-responsive to Congress’s preferences and attempts at oversight, Congress can reduce or restrict the budget in retaliation. Every bureaucrat, knowing this to be the case, has an incentive to stay within the particular bounds that Congress establishes.

While there are currently two congressional committees with primary jurisdiction over intelligence, the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, there are other committees with indirect oversight ability. In particular, both the House and the Senate have Appropriations subcommittees in charge of defense spending, which play important oversight roles as well. Although the intelligence committees have primary jurisdiction, the House and Senate Armed Services committees, and various committees in both chambers with jurisdictions over Homeland Security, Energy, courts and justice have overlapping jurisdictions with the select intelligence committees.

Hearings and investigations allow Congress to examine any agency. Although there are some protections offered to members of the intelligence community, especially when testifying about policy, one should recall the hearings related to the Iran-Contra scandal and the acrimony and nation’s eye on covert operations during the congressional hearings related to that scandal.

The Government Accountability Office (GAO) is a non-partisan body that assists Congress with its fiscal oversight. In May, 2011 DNI James Clapper, at Congress’s behest in the 2010 Intelligence Authorization Act, ordered intelligence agencies to cooperate more fully when being reviewed by the GAO. Although some restrictions remain, the GAO has been able to play an increasingly active role in IC review. For example, GAO recently reviewed FBI counterterrorism activities after the FBI had balked at providing the information necessary for years.²¹

There are three particular caveats to the above discussion about congressional oversight that bear discussion. First, due to the classification and sensitivity of much of the information that intelligence agencies are asked to deliver to Congress, briefings to Congress often only include the leadership of both chambers and the chairs and ranking members of the chambers’ intelligence committees.²² Second, budget adjustments are difficult for Congress to make, especially with precision. Finally, there is literature, originating in political science, which suggests that Congress will often not take an active role in oversight. In particular, rather than embarking on continued, steady oversight actions, dubbed “police patrols,” that account for much of its resources, Congress may prefer reacting to “fire alarms,” or issues that arise sporadically and require congressional attention—but which do not require many oversight resources. A fire alarm system of oversight depends on “individuals and organized interest groups”²³ and other sources, such as whistleblowers and the media, to alert Congress to violations of law, policy, or congressionally directed preferences.

²¹ Aftergood.

²² Lowenthal, 214.

²³ McCubbins and Schwartz, 166.

The fire alarm style of oversight seems reasonable, especially when the reader learns that many forms of active oversight attempts by Congress go unheeded by intelligence agencies.²⁴ For example, NSDs, discussed above, are often not revealed to Congress. Even during the Iran-Contra scandal, as Congress was seeking active oversight of the intelligence community, the Reagan administration failed to reveal the full extent of its issued NSDs. Congressman Lee Hamilton (D-IN), who was chair of the select committee investigating the scandal, testified that NSDs are used “to create policy [that] infringes on Congress’ constitutional prerogatives by inhibiting effective oversight and limiting Congress’ policymaking role.”²⁵

Courts

The Supreme Court and other Article III federal courts rarely exercise direct oversight of intelligence operations. They do hear cases with ramifications for intelligence, however. Some of the more recent examples are the cases involving questions of *habeus corpus* stemming from the War on Terror. For example, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld* and *Rasul v. Bush* all impacted the manner in which the United States could hold unlawful combatants who were suspected of terrorist activities.

A court with more direct oversight is the Foreign Intelligence Surveillance Court (FISC). Authorized by Congress in the Foreign Intelligence Surveillance Act (FISA), passed in the wake of revelations that the Johnson and Nixon administrations had participated in lawless domestic spying, the FISC is intended to provide intelligence agencies with a legal warrant while also retaining the secrecy necessary to a successful intelligence operation. The judges on the FISC are placed on the court by the Chief Justice of the United States. Via statute, and expanded by executive order, the FISC is charged with issuing warrants related to wiretapping, electronic surveillance and the collection of physical evidence.

Critics of the FISC note that the warrant requests are rarely denied. Between 1979 and 2004, of the 18,748 warrant requests that were reviewed, only five were rejected;²⁶ others were altered significantly. Despite the willingness of the FISC to issue the requested warrants, the George W. Bush administration chose to ignore the FISC and under the “Terrorist Surveillance Program,” wiretap American citizens without telling the court.²⁷

The federal judiciary, described by Alexander Hamilton as “the least dangerous branch,” is even more dependent on executive branch cooperation with constitutional and statutory compliance regulations to exercise oversight than is Congress. When a president fails to comply, whatever the reason, the oversight capabilities of the judiciary are severely compromised.

Conclusion

²⁴ Lowenthal, 211.

²⁵ As quoted in Cooper, 195.

²⁶ Leonnig.

²⁷ *Ibid.*

Oversight of the agencies within the IC is an exceptionally difficult, but decidedly important, task. On paper, the executive, legislative and judicial branches seem to be designed with oversight in mind. With the changes in the oversight procedure in the wake of the attacks of September 11, 2001, hope remains that as the ODNI, as well as the political institutions with oversight capability and duty, matures on the job, that effective, consistent oversight can become a norm rather than a luxury.

This article is meant only to serve as an introduction to this material. Because of time and space constraints, this effort purposefully limits discussion of the history of the intelligence agencies founding, which the executive and legislative branches, working in concert, are responsible. There is little discussion of the ebb and flow, or the cyclical *laissez faire* and overcorrection models of oversight seemingly practiced by the elected and appointed officials who are responsible for overseeing the IC. There is very little history of the individual intelligence agencies, all of which play an important role in understanding the strengths and weaknesses of the models of oversight. Finally, there is very little said about the personalities which shape the intelligence community and those who oversee it, many of whom can have significant impact.

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