



## Guide to the Study of Intelligence

# Commission on the Intelligence Capabilities of the United States

## Regarding Weapons of Mass Destruction

by Elbridge Colby and Stewart Baker

**B**y 2002, the administration of President George W. Bush was persuaded that Saddam Hussein's Iraq constituted a major threat to US and international security and that, in the atmosphere following the 9/11 attacks, the threat needed to be addressed. The Bush administration was particularly concerned that Baghdad was beginning to restart its weapons of mass destruction (WMD) programs and that it would use any WMD it acquired in intolerably menacing and possibly irrational ways.<sup>1</sup> Over the course of 2002, the administration launched a major political initiative to build domestic and international support for undertaking decisive action against Iraq; by the fall of 2002, most of the focus of this initiative centered on the assessment, grounded in the estimates of the US and allied intelligence services, that Iraq was reinitiating its WMD programs. Most notably, the administration pointed to the findings of a 2002 National Intelligence Estimate – the US Intelligence Community's flagship medium for communicating its consensus views – entitled *Iraq's Continuing Programs for Weapons of Mass Destruction*.<sup>2</sup> This Estimate formed an important part of the baseline of the Congress' contentious vote in October 2002 to authorize the use of force against Iraq.

1. Following the American-led ejection of Iraqi forces from Kuwait in 1990-1991 and the discovery that Baghdad had advanced nuclear and other weapons of mass destruction (WMD) programs underway, Iraq was placed under United Nations sanctions designed to prevent it from reinitiating its WMD efforts. These sanctions were strengthened after the revelation in 1994 that Hussein had restarted covert WMD programs.  
2. A declassified redacted version is available here: <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB129/nie.pdf>.

Based in part on that authorization, in March 2003 the United States and a coalition of allied nations launched an invasion of Iraq. Coalition forces swiftly reached Baghdad and deposed the Saddam Hussein-led Ba'ath government. Over the course of 2003, however, as the American-led occupation came under attack from a growing insurgency in Iraq, it also became clear that the WMD assessments that provided the primary public justification for the attack were at the very least seriously exaggerated and in many respects wrong. Following months of careful investigation, in January 2004 David Kay, the head of the Iraq Survey Group (originally chartered to document evidence of Hussein's WMD programs), announced to Congress and an increasingly skeptical American public that his group had found no evidence that Iraq had in fact stockpiled WMD.<sup>3</sup>

Kay's announcement and others like it generated a firestorm of criticism that the American people and their representatives had been misled. This in turn created intense political pressure to determine just what had happened to lead American intelligence so far astray. Why had the US Intelligence Community, the most formidable and well resourced in the world, been so far off the mark in its estimates of Iraq's WMD programs? Had the American people been deliberately misled? How could such an enormous intelligence failure be averted in the future?

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### THE COMMISSION AND ITS FINDINGS

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Responding to this rising political tide and hoping to head off the appointment of a congressional panel, President Bush decided to create a commission of distinguished national leaders on his own authority to investigate the matter. Given the raw political sensitivities surrounding the role of intelligence in the lead-up to the Iraq War, the fact that the Commission was appointed by the President stirred controversy, as did the fact that the White House limited the Commission's scope of investigation to examining the failures of the Intelligence Community rather than to probing the actions and decisions of the policymaker consum-

3. <http://www.cnn.com/2004/WORLD/meast/01/25/sprj.nirq.kay/>. The Iraq Survey Group continued its work following Kay's resignation under the directorship of Charles Duelfer but likewise found no evidence of a significant WMD program in pre-war Iraq, "though it did suggest that Hussein was maintaining the option to do so once sanctions were removed and Iraq's economy stabilized." Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD. September 30, 2004, available at [https://www.cia.gov/library/reports/general-reports-1/iraq\\_wmd\\_2004](https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004).

ers who had decided policy on Iraq.<sup>4</sup> For these reasons, some voices had urged that the Commission should be chartered by Congress and given subpoena power, like the earlier 9/11 Commission, to ensure independence from the Executive Branch and the willingness to take on the administration. This political dynamic formed the background in which the Commission undertook its work.<sup>5</sup>

To lead the commission, Bush appointed appellate court judge and former ambassador Laurence H. Silberman, an experienced hand in intelligence and foreign policy issues, and former Virginia Senator and Governor Charles S. Robb, one of the most prominent contemporary congressmen on national security issues, as co-chairmen. The other members were: Senator John McCain, Yale President Richard Levin, former NSA Director and Deputy DCI Admiral William Studeman, former Under Secretary of Defense Walter Slocombe, retired appellate court judge Patricia Wald, former Pentagon and National Intelligence Council official Henry Rowen, and former MIT President Charles Vest.<sup>6</sup> The commissioners were balanced between Republicans and Democrats. As a Presidential creation, the Commission was chartered by Executive Order 13328 of February 2004 and conducted its work supported by the Executive Office of the President, the administrative arm of the White House.

To address concerns about independence and subpoena power, Judge Silberman promised other members of the Commission that he would resign if any of the Commission's requests for information were denied – a promise that he would later invoke.

Beginning preliminary operations (largely administrative and legal) in the spring of 2004, the

Commission began bringing on staff, mostly current or former intelligence professionals along with a number of lawyers with military or security experience, over the course of the summer and began work in earnest in the late summer of 2004. In the following nine months, the Commission conducted an in-depth investigation of how the Intelligence Community came to its assessments regarding Hussein's WMD programs. Commissioners and staff pored over thousands of intelligence cables and reports; interviewed hundreds of officials and experts, senior and working-level, serving and retired; and hashed out consensus positions in lengthy and detailed meetings of the Commissioners. Commissioners conducted often probing and even contentious interviews of key figures such as former DCI George Tenet, DDCI John McLaughlin, Secretary of Defense Donald Rumsfeld, Secretary of State Colin Powell, other serving officials, and distinguished former officials such as Henry Kissinger. Staff members also conducted extensive interviews with relevant CIA and other IC officials.

The Commission operated essentially wholly autonomously. Although the co-chairs talked regularly to White House and intelligence officials, and the Commission adopted a "responsible" rather than "muckraking" *modus operandi*, the Commission conducted its work independently and, in the view of most observers, objectively.

The personal and political stature of the Commissioners, as well as their divergent political backgrounds, allowed the Commission to operate from a position of political strength and independence. Two early efforts to restrict the Commission's inquiry or staffing authority were turned back by Judge Silberman. In one instance, the Commission sought to review the President's Daily Brief on Iraq WMD issues. Access to the PDB had been a matter of bitter contention with the 9/11 Commission, and it looked as though the WMD Commission might go down the same road until Judge Silberman said that denying access to the PDB would require him to resign as promised. Shortly thereafter, the executive branch agreed to let a small group of commissioners review the PDBs. Judge Silberman used similar leverage to turn aside Justice Department objections to the Commission's hiring of a Democrat and former Supreme Court clerk for the General Counsel's office. The attorney, Mike Leiter, went on to have a brilliant career in government under Democratic and Republican Presidents, most recently as head of the National Counterterrorism Center.

4. Richard K. Betts, *Enemies of Intelligence: Knowledge and Power in American National Security*, New York: Columbia University Press, 2009, 136. The Commission did not look, for instance, at the advisability, propriety, or legality of the attack on Iraq but rather solely on the Intelligence Community's performance in assessing Iraq's WMD programs. Many commentators asserted that this was not the central issue – rather, they contended that the Bush administration had "stretched" or gone beyond the Intelligence Community's assessments and/or had used the IC's WMD assessments as a convenient public rationale for a war undertaken for different reasons. The Commission did not in fact investigate the policy uses or rationales for the war, but focused solely on the performance of the IC. See, for a typical reaction, Ellen Laipson, "The Robb-Silberman Report, Intelligence, and Nonproliferation," Arms Control Association, June 2005, [http://www.armscontrol.org/act/2005\\_06/Laipson](http://www.armscontrol.org/act/2005_06/Laipson).

5. For a discussion of the background of the creation and appointment of the Commission, see Bob Woodward, *State of Denial*, New York: Simon & Schuster, 2006, 283-287.

6. Former White House Counsel Lloyd Cutler was to be a serving member of the Commission but was compelled to bow out of active participation due to illness.

In its report of May 31, 2005 (with the basic findings released March 31 of the same year), the Commission unanimously found that the Intelligence Community was “dead wrong in almost all of its pre-war judgments about Iraq’s weapons of mass destruction,” which constituted “a major intelligence failure.” The Commission attributed this failure to “the Intelligence Community’s inability to collect good information about Iraq’s WMD programs, serious errors in analyzing what information it could gather, and a failure to make clear just how much of its analysis was based on assumptions, rather than good evidence.” The Commission also found no evidence of politicization and “no indication that the Intelligence Community distorted the evidence regarding Iraq’s weapons of mass destruction.”<sup>7</sup>

While the Commission was quite stern in its basic judgments concerning the Intelligence Community’s performance on Iraq’s WMD programs, it did note that obtaining accurate and relevant intelligence on hard targets such as Iraq’s unconventional weapons programs “is no easy task” and that, on such targets, “failure is more common than success.” The Commission observed that it did “not fault the Intelligence Community for formulating the hypothesis, based on Saddam Hussein’s conduct, that Iraq had retained an unconventional weapons capability and was working to augment this capability...[n]or...for failing to uncover what few Iraqis knew [as]...only a handful of Saddam Hussein’s closest advisors were aware of some of his decisions [on WMD issues].”<sup>8</sup>

Despite these balancing considerations, however, the Commission “conclude[d] that the Intelligence Community could and should have come much closer to assessing the true state of Iraq’s weapons programs than it did. It should have been less wrong – and, more importantly, it should have been more candid about what it did know.”<sup>9</sup> The Commission chastised the Intelligence Community for allowing uncertain and, in some cases, known bad information to exercise a high degree of influence over its assessments, and to obscure this evidentiary weakness from policymakers and, in many cases, from the Community’s own senior leadership.<sup>10</sup>

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7. Cover letter, Commission report.

8. Commission report, 46-47.

9. Commission report, 47.

10. See, for instance, the report’s discussion of the failure to convey clearly the inadequacy of the reporting and the unreli-

More broadly, the Commission criticized the Community for allowing a reasonable and intuitive judgment – that Saddam Hussein would again try to covertly restart his WMD program – to harden into a near-certainty that was essentially impervious to disproof.<sup>11</sup> As co-chairman Silberman explained in the press conference announcing the report’s findings, “[T]he bottom line is the Intelligence Community operated on presumptions or assumptions based on what they had seen in 1991...[A]lthough it was perfectly reasonable for them to speculate or assume [based on this], what the Intelligence Community should have done is said, ‘Look, we...have...very little evidence of this [the IC’s assessments]; we really don’t know.’”<sup>12</sup>

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 INTELLIGENCE REFORM
 

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Though the Commission’s genesis and most prominent focus lay in the controversies surrounding the erroneous Intelligence Community assessments regarding Iraq’s WMD, the breadth of the Commission’s mandate (and the Intelligence Community’s failures), required a much more wide-ranging report. Thus, a good part of the Commission’s work and much of the final report’s substance dealt with the reform and management of the Intelligence Community. Under the terms of the Executive Order, the Commission was tasked with investigating broadly whether the Intelligence Community was adequately and appropriately authorized, organized, and resourced to respond to the challenges posed by the proliferation of WMD “and other related threats.” The Commission was specifically given the writ to examine the ability of the Intelligence Community to collect on and analyze the doings of the fullest range of WMD and related threats.<sup>13</sup> The Commissioners took this writ seriously

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ability of the source codenamed Curveball, Commission report, 87-105.

11. As the Commission observed, “The failure to conclude that Saddam had abandoned his weapons program was...an understandable one...[But t]he Intelligence Community did not even evaluate the possibility that Saddam would destroy his stockpiles and halt his work on his nuclear program...Rather than thinking imaginatively, and considering seemingly unlikely and unpopular possibilities, the Intelligence Community instead found itself wedded to a set of assumptions about Iraq, focusing on intelligence reporting that appeared to confirm those assumptions.” Commission report, 155.

12. <http://www.washingtonpost.com/wp-dyn/articles/A15908-2005Mar31.html>.

13. Executive Order 13328 available at: <http://www.fas.org/irp/off-docs/eo/eo-13328.htm>.

and focused much of their and the staff's efforts on developing a blueprint for intelligence reform.

In light of this, the Commission report, in addition to its Iraq findings, delivered 74 recommendations for improving the Intelligence Community's performance in its report. These recommendations were particularly appropriate because of the uncertainty about how to implement changes in the Intelligence Community's structure that had been recommended by the 9/11 Commission and largely passed into law by the Congress in the Intelligence Reform and Terrorism Prevention Act of 2004. This law created a Director of National Intelligence and a supporting Office to oversee the Intelligence Community, established National Counterterrorism and Counterproliferation Centers (NCTC and NCPC, respectively), and provided a broad template for what became the "intelligence reform" effort.<sup>14</sup>

The Commission's recommendations emphasized four main themes: endowing the new position of Director of National Intelligence with the authorities needed to carry out his responsibilities; integrating the Federal Bureau of Investigation and Justice Department more fully into the Intelligence Community; demanding more of and creating a culture of accountability in the Community; and rethinking the President's Daily Brief.

More concretely, the Commission called for a variety of concrete steps to focus, systematize, and generally improve the IC's collection, analysis, and dissemination of intelligence, such as: the creation of mission managers to integrate collection and analysis against key intelligence targets such as Iran and North Korea; providing blueprints for designing the IRTPA-formed NCTC and NCPC; recommending oversight mechanisms such as a strengthened President's Intelligence Advisory Board; and urging focused action on the better sharing of information within the Community. In the crucial and sensitive matter of the role of the FBI and Justice Department in domestic intelligence, the Commission recommended creation of a National Security Division at Justice and organizational and other changes designed to foster a culture within the Bureau more oriented to intelligence collection in the post-9/11 era rather than traditional counterespionage and prosecution alone.

14. For background on the formulation of the IRTPA law, see Michael Allen, *Blinking Red: Crisis and Compromise in American Intelligence After 9/11*, Dulles, Virginia: Potomac Books, 2013. See also Dr. Bill Nolte's article, "A Guide to the Reforming of American Intelligence," *Intelligencer*, Vol. 19, No. 1, Winter/Spring 2012, 57-61, on the history of reform efforts since 1947.

The Commission's report received an initial flurry of news attention, but, in part due to its length and detail, quickly fell off the news pages. Within the Intelligence Community and at the White House, however, the Commission's recommendations received significant and lasting attention and achieved considerable influence.

In late June 2005, President Bush endorsed 70 of the Commission's 74 recommendations and issued directives that they be implemented, giving the Commission's recommendations the imprimatur and, to some degree, the political support of the White House.<sup>15</sup> The newly formed Office of the DNI, and particularly the new DNI, John Negroponte (who came from outside the IC and thus had a natural tendency to look for ideas and inspiration to a body such as the Commission), also sought to implement the Commission's reforms.<sup>16</sup> Key staff from the Commission also moved into the IC and other relevant parts of the US Government, where they were able to influence intelligence policy along the lines recommended by the Commission; other senior staff in the Office of the DNI in particular had also been intimately involved in the development of IRTPA and were supportive of the Commission's recommendations.<sup>17</sup> The Justice Department and FBI were more resistant to some of the organizational changes proposed by the Commission but eventually adopted the bulk of them.

Overall, the Commission exercised its most substantial influence on the implementation of the often

15. <http://iipdigital.usembassy.gov/st/english/text-trans/2005/06/20050629184054esnamfuak0.538479.html#ax-zz2ngEpkujA>

16. See, for instance, the ODNI effort to track its implementation of the Commission's approved recommendations: <https://www.fas.org/irp/dni/prog072706.pdf>.

17. For instance, Commission Executive Director, Scott Redd, was appointed the first Director of the National Counterterrorism Center; Commission General Counsel Stewart Baker became Assistant Secretary for Policy at the Department of Homeland Security; Deputy General Counsel Brett Gerry joined the White House Counsel's office before becoming Chief of Staff to Attorney General Michael Mukasey; and Deputy General Counsel Michael Leiter became Deputy Chief of Staff of the Office of the DNI and subsequently Deputy Director and then Director of the National Counterterrorism Center. Several Commissioners also remained involved in public advocacy and commentary on intelligence issues, such as Charles Robb and William Studeman. David Shedd, who had been the senior NSC official for intelligence and had been intimately involved in the formulation of the IRTPA legislation, became Chief of Staff to DNI Negroponte and was a key figure in the ODNI pushing intelligence reform for several years before becoming Deputy Director of the Defense Intelligence Agency.

general and even vague IRTPA law, fleshing out the skeletal provisions contained within the legislation.<sup>18</sup>

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## READINGS FOR INSTRUCTORS

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Besides the references in the footnotes the following are recommended readings for instructors:

Richard K. Betts, *Enemies of Intelligence: Knowledge and Power in American National Security*, New York: Columbia University Press, 2007. Professor Betts examines the complexities, and sometimes unintended consequences, of intelligence reform efforts.

Robert L. Jervis, *Why Intelligence Fails: Lessons from the Iranian Revolution and the Iraq War*, Ithaca, NY: Cornell University Press, 2010. Professor Jervis examined the failure to anticipate the 1979 Iranian revolution for CIA. He compares the reasons for that failure with the reasons for the Iraq WMD intelligence failure.

Richard A. Posner, *Uncertain Shield: The U.S. Intelligence System in the Throes of Reform*, Stanford: The Hoover Institution, 2006. US Court of Appeals Judge Posner opines that the intelligence reforms following 9/11 have created a top-heavy intelligence bureaucracy with all its attendant challenges.

Bob Woodward, *State of Denial*, New York: Simon & Schuster, 2006. Woodward addresses the policy conflicts within the George W. Bush Administration as the Iraq War

continued in a fashion not envisioned before the 2003 invasion.

Finally, recommended is the Comprehensive Report of the Special Advisor to the DCI on Iraq's WMD, dated 30 September 2004, available on the CIA website at [https://www.cia.gov/library/reports/general-reports-1/iraq\\_wmd\\_2004](https://www.cia.gov/library/reports/general-reports-1/iraq_wmd_2004).

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Stewart Baker is a partner in the law firm of Steptoe & Johnson in Washington, D.C., with a law practice that covers homeland security, international trade, cybersecurity, data protection, and travel and foreign investment regulation. He was General Counsel of the Silberman-Robb WMD Commission in 2004-2005. From 2005 to 2009, he was the first Assistant Secretary for Policy at the Department of Homeland Security. Mr. Baker has also been General Counsel of the National Security Agency and is the author of *Skating on Stilts*, a book (and blog) on terrorism, cybersecurity, and other technology issues (Stanford: Hoover Institution Press, 2010).

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18. See, for instance, M. Kent Bolton, *U.S. National Security and Foreign Policymaking After 9/11: Present at the Re-Creation*, Lanham: Rowman & Littlefield, 2008, 286.