IS CONGRESSIONAL OVERSIGHT OF THE INTELLIGENCE COMMUNITY EFFECTIVE?

by
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ABSTRACT

The creation of the Intelligence Community was derived from the National Security Act of 1947 which sought a need to have an organized community specifically geared towards the collection of intelligence to prevent strategic surprise. As time went on, there evolved a need to have effective mechanisms to oversee this community. Congressional oversight of the Intelligence Community (IC) is currently insufficient for several reasons. First, the IC continues to grow exponentially to address emerging threats around the world. The advent of technology allows for advanced methods of collection platforms that existing oversight policies did not consider when the policies were written. These policies require the heads of agencies to come to terms on collection tactics, techniques and procedures (TTP’s) therefore, governing policies are not written quickly enough to properly enforce compliance until violations are discovered and reported. Additionally, many of those charged with oversight (members of Congress) are not sufficiently familiar with the intelligence profession and either prefer to outsource the oversight responsibility or trust the various intelligence establishments to mind their own processes. This thesis will argue that current oversight protocols are insufficient, though mildly effective. The argument will include the rationale for ramping up intelligence capabilities at the onset of hostilities and illustrate through historical review how this process continues today. The argument will also support a method of adding proper and effective intelligence oversight to a Congressional body that will be difficult to circumvent. This paper will focus on getting to the root cause of ineffective congressional oversight.

Thesis Advisor- Dr. Dorothea Wolfson.
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As the youngest child of my parents who struggled during the “Great Depression”, but never had the opportunity to go beyond grammar school, and now the first in my family to achieve the milestone of a Master’s Degree, there are many people who deserve thanks for helping me get to this goal. I will try to acknowledge those that impacted my decision to go back to school at this late stage in life and those who will be surprised of the quiet impact they had in helping me achieve my goal to attempt a Master’s program.

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at the darkest of times and provided me with more than can be explained here. Lastly, thank you to the Veterans Administration for funding this educational benefit. Without it, this achievement would not be possible. To my friends who supported me during this process, you were all a great inspiration. Thank You.
I. INTRODUCTION TO THE PROBLEM

*Americans have always had an ambivalent attitude toward intelligence. When they feel threatened, they want a lot of it, and when they don’t, they regard the whole things as somewhat immoral.* – Vernon A. Walters, Former U.S. Ambassador to the United Nations.

Current books on the topic of intelligence oversight discuss the relationships between planners, operators and policymakers. The reporting of violations within the Intelligence Community (IC) has become the issue of the decade. Senior leaders of intelligence components have a responsibility to ensure that proper safeguards are in place to protect civil liberties as well as prevent unauthorized disclosure of classified information. Oftentimes, these oversight mechanisms/ policies are said to hinder effective collection which adds to the dilemma of whether a democracy can maintain an effective, capable intelligence service without harming the basic tenets of democracy. The interpretation of the policies are subject to the expertise and bias of those legal advisors who provide opinions to the policy makers. Additionally, the expediency and impact of some decisions may not be in concert with a particular political agenda. There is little written that discusses the motivations of policy makers in their decision making, or the political ramifications that incur when policies have an impact on political supporters such as the defense contracting industry which provides significant funding to political campaigns in return for favorable legislative policies that support the respective contractors’ agenda.
The object of this thesis is to take a comprehensive look at the subject of intelligence oversight for the Intelligence Community (IC) and to understand how such a monolithic enterprise continues to expand without an effective oversight mechanism that corresponds to the growth of the enterprise. The first chapter is devoted to the historical aspect of forming an intelligence capability for the United States. This includes a review of historical events that utilized the intelligence cycle during times of conflict. The next chapter will be devoted to the current state of a United States intelligence capability as well as a review of intelligence oversight mechanisms from policy formulation, authorities and implementation to include any associated challenges. The final chapter will examine the dichotomy of the issues of legality, security and privacy in a globally connected world that presently uses the less physically intrusive cyber domain to collect, disseminate and alter information by those entities with the technical means to do so. The paper will attempt to bring together the historical and present day issues surrounding the subject of intelligence and intelligence oversight and seek to offer recommendations for the conduct of an effective and meaningful oversight program that continues to provide respect for the civil liberties of U.S. citizens, without compromising the very effective tool sets that protect this country from foreign aggression.

In today’s world, intelligence as an activity of the U.S. Government is sometimes thought of as culminating from the Cold War. Surely much of what is seen today emanated during this period of conflict with the former Soviet Union and the deterrent strategy of Mutually Assured Destruction (MAD) to prevent nuclear war. However, the use of intelligence has been a tool of the Government since the founding of the Republic. While it has had various incarnations over time, intelligence has historically played a key
role in providing support to U.S. military forces and in shaping the policies of the United States toward other countries.

While it is asserted that intelligence is so important to the security of the nation, the imperatives of democracy must continue to hold true. A Democratic government rests on five working requirements: openness and participation, disaggregation of power, rule of law, privacy, and mutual trust.¹ These basic tenets must not be dismissed to ensure adherence and continuity in a democratic process. As the process for an intelligence capability churns, the main purpose of having an intelligence capability in the first place is to protect the nation from strategic surprise. This thesis is an attempt to bring to light the importance of intelligence collection to protect the United States from strategic surprise but highlight the need for openness and as much transparency as possible within a Democratic society. Pericles observed in 431BC “it is called ‘democracy’ because it serves the interests of not a privileged few but of the bulk of its citizens.”² Is it necessary to sacrifice civil liberties to ensure safety in America? The cornerstone of a democratic society is accountability. An intelligence apparatus with an array of significant tools to gather, collect and analyze information will certainly clash with the tenets of democracy and openness without a viable mechanism to keep the apparatus in check. As some historical facts played out, even with a significant intelligence apparatus, surprise was still garnered by America’s foes in some cases such as the infamous attack on Pearl Harbor on December 7, 1941 or the terrorist attacks on the homeland on September 11,

¹ Ott, Marvin C; Partisanship and the Decline of Intelligence Oversight, 2010
2001. Some would argue in both cases that a great deal of information was present that alluded to these events, yet these tragedies were still not prevented.

Americans will sometimes view the notion of intelligence with ambivalence because they do not see how it has an effect on their lives. Some attitudes range from condemnation to something exotic. Even with such feelings, intelligence has and continues to play a major role in security and foreign policy. As late as 2010, it was estimated that the United States spent in excess of $30 billion annually supporting an elaborate and far-flung intelligence capability, and that expenditure continues to rise even in a suffering economy.

Early on, the need for intelligence by overt and covert means became apparent in order to prevent strategic surprise. There are many reasons that could push the U.S. to increase their methods of intelligence collection. External threats from other sovereign nations or even a threat from within the U.S. would necessitate such efforts. Ensuring there would be an authorized entity with the authority and ability to deal with foreign or domestic threats would be necessary. As time moves forward, there will be those whose charge it is to collect on these threats and the challenges associated will later be revealed as these threats emerge.

A: INTELLIGENCE AS A SPECIAL COMMODITY

In most of the nations with an intelligence capability, those agencies that conduct intelligence are in many ways, treated as exceptions within their government. Because of the required secrecy, exceptional leeway to conduct sensitive activities (which oftentimes includes breaking laws in other countries) they are given almost a carte blanche to
complete their missions. The United States took a similar philosophy even as its leaders clamped down the rest of the government with the Constitution. As the country aged, this hand’s off approach continued even after the US expanded its intelligence capability. This expanded capability grew after every conflict to strengthen the nation against their foes. However, the growth rarely gets scaled back except for the politically unpopular move to shrink the defense budget.

B. THE CONCEPT OF INTELLIGENCE OVERSIGHT

Less than a month after the Rockefeller Commission began, the Church Committee (named after the Chairman, Senator Frank Church) began its own investigation. The Church committee was tasked with examining the domestic activities of the Central Intelligence Agency (CIA) as well as its covert actions abroad. This included alleged assassinations of foreign leaders, domestic spying by the military and possible interception of conversations of US citizens by the National Security Agency (NSA). The committee released its report in April 1976. It was after this committee (and ultimately the House version of the same committee by Otis Pike) which began the real effort towards the importance of oversight of the Civilian intelligence community and the military services. President Ford issued an executive order in February 1976 (E.O 11905).

Both congressional committees agreed and recommended that permanent committees be created to provide oversight of the intelligence function. The Senate was first to create the Senate Select Committee on Intelligence (SSCI). A year later the House

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3 Johnson & Wirtz, Intelligence, the Secret World of Spies
of Representatives created the House Permanent Select Committee on Intelligence (HPSCI). In 1978 under the Carter administration, Congress passed the Foreign Intelligence Surveillance Act (FISA) of 1978, providing for a special court order to authorize electronic surveillance for intelligence reasons. This forced another level of oversight upon the intelligence community.

On 4 December 1981, almost a year into his Administration, President Reagan issued his Executive Order on intelligence (E.O. 12333). It generally reaffirmed the functions of intelligence agencies (as outlined in the previous order) and continued most of the previous restrictions, but it set a more positive tone than its predecessor, and gave the CIA greater latitude to gather foreign intelligence within the United States and to provide assistance to law enforcement. The Executive Order also provided a new National Security Council (NSC) structure for reviewing intelligence activities, including covert actions.\textsuperscript{4} This order still stands today as a governing directive for the intelligence community.

The Goldwater-Nichols Act of 1986, which reorganized the Department of Defense and shifted authority from the military departments to the Joint Chiefs and theater commands, also had a major impact on intelligence activities. The Defense Intelligence Agency (DIA) and Defense Mapping Agency, also known as the National Imagery and Mapping Agency, (NIMA) and currently as the National Geospatial Agency (NGA) were specifically designated as combat support agencies, and the Secretary of Defense, (SECDEF) in consultation with the Director of Central Intelligence (DCI), was

\textsuperscript{4} Ibid
directed to establish policies and procedures to assist the NSA in fulfilling its combat support functions. The Act also required that the President submit an annual report to Congress on U.S. national security strategy, including an assessment of the adequacy of the intelligence capability to carry out the strategy. The act also states that notification is not a necessary precondition for beginning an activity. Therefore, even though the act was meant to put some teeth into the oversight process, statements such as these leave a lot to interpretation.

As all of these commissions and committees have been created in a reactive response to review or monitor (in essence, provide increased oversight) to a problem set either discovered through some violation or discovered by an outside entity. What is evident is that the increased time, manpower and costs for each of these bodies may have been better served in coordinating efforts of all the bodies rather than creating additional oversight mechanisms. The phrase divide and conquer is appropriate as a fundamental of war and also applies here. When the left hand (one committee) is not aware of the right hand (another committee) addressing similar problem sets, there is duplication, confusion and poor results.

C. OVERSIGHT

After 9/11 it was obvious that little action was taken by Congress to adjust to the terrorist threat. As the agencies were dysfunctional, so was Congressional oversight for intelligence. There were too many risks, particularly during a transitional government.

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5 ibid
6 Lowenthal, Mark; Intelligence, from Secrets to Policy,
Recommendations for intelligence oversight included having a single committee in each house combining the authorizing and appropriating committees. The oversight committees need to be made stronger and more accountable. In the US Government, stronger means having budget authority. Between 1947 and 1975, Congress introduced more than 200 bills to improve intelligence oversight. Only one ever passed. Since the end of the cold war, seven major initiatives, including blue-ribbon commissions task forces, and even the intelligence committees themselves have recommended major oversight reforms.

D. REPORT FINDINGS

The 9/11 Commission report touches several important points on the problems associated with the task of preventing terrorism and oversight of the intelligence architecture. However, oversight is more than a body of people with a title. Oversight cannot be a passive action. The report does not account for the generational struggles to

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10 11House Permanent Select Committee on Intelligence, IC21: The Intelligence Community in the 21st Century, (Washington, DC: GPO 1996); Senate Select Committee on Intelligence, Hearing on Congressional Oversight, 110th Congress, 1st session, 13 November 2007.
implement new procedures. Most of the folks in the IC and Federal Law Enforcement
realm have been there for a very long time. By virtue of the length of time to obtain a
security clearance, most people don’t leave the agency once granted a clearance. There
are cultures of compartmentalization and classification that impede proper oversight.
With the advent of leakers like Bradley Manning (WikiLeaks) and Edward Snowden,
these events highlight the reactive nature of Congressional Oversight. At present,
Congressional Oversight amounts to the respective agencies self-reporting issues of
concern to the intelligence committees. I contend that this process is too little, too late.
The 9/11 Commission report does not elaborate on more stringent measures of oversight,
but rather only describe the organizations that have the charge to perform this function.

Figure 1

<table>
<thead>
<tr>
<th>OVERSIGHT LIMITATIONS</th>
<th>PURPOSE</th>
<th>LEGALITY</th>
<th>EFFECT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Congressional leak</td>
<td>Used to gain external support</td>
<td>Depends on classification and sensitivity but normally not permitted</td>
<td>May stop program abuse or gain support from other stakeholders</td>
</tr>
<tr>
<td>Media Reporting</td>
<td>Puts pressure on policy makers/ adds transparency</td>
<td>Yes if not classified</td>
<td>Calls attention to programs that may be sensitive</td>
</tr>
<tr>
<td>Whistleblower</td>
<td>Calls attention to the issue</td>
<td>Depends if reported in correct channels such as Inspector General or Congress</td>
<td>Negative. May indicate system oversight failure and/or disclose sensitive information to adversaries</td>
</tr>
</tbody>
</table>


E.  THE DOMESTIC POLITICS OF INTELLIGENCE OVERSIGHT

As stated in The Federalist No/ 51, “if men were angels, no government would be necessary”. If angels were to govern men, neither external nor internal controls on government would be necessary.”\(^\text{11}\) This profound statement cries for the need for oversight. The Constitution never explicitly mentions the powers of Congressional Oversight, but rather implies they are rooted in the separation of powers. The Founders agreed on the overriding value of dividing power to meet those goals. The idea of effective oversight is a challenge to define. However, lack of oversight or an ineffective process is normally easy to see. Those who fall under the scrutiny of oversight (intelligence agencies for example) highlight their inability to do their jobs properly because they are hindered by the bureaucracy. The agencies perception of hindrance is providing information to those they deem not in the need to know for operational reasons. Oversight was considered a core part of Congress's constitutional duties from the Republic's earliest days. As Louis Fisher notes, "The framers understood that legislatures must oversee the executive branch."\(^\text{12}\) Historian Arthur Schlesinger writes that the Framers felt they did not need to enunciate oversight powers in the Constitution because "the power to make laws implied the power to see whether they were faithfully

\(^{11}\) Federalist #51, 8 February 1788, accessed at Yale Law School Library Avalon project, http://avalon.law.yale.edu/18th_century/fed47.asp, 14 April 2014

\(^{12}\) Fischer, L. “Congressional Investigations, Subpoenas and Contempt of Power, CRS Report RL 31836, 2 April 2003, P.1
executed.\textsuperscript{13} At the Constitutional Convention, George Mason emphasized that members of Congress "are not only legislators but they also possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices."\textsuperscript{14} Zegart hits the nail on the head when she states that Congress is not well suited to oversee intelligence agencies. Congressmen have term limits and as most politicians go, once elected they are focused on winning the next election. This leaves little time to address issues, particularly as important as the oversight of intelligence. House term limits make it difficult for on the job learning. Obtaining the necessary clearances is only part of the problem. It takes time to do a background check and provide members with access to the various programs. Especially since there are competing programs that have more visibility to the public and worthy of attention for someone seeking reelection. The assessment that secrecy in the Executive branch makes meaningful oversight difficult, but the self-inflicted weaknesses in Congress (term limits, limited expertise), make it impossible is spot on.

**F: THE EARLY YEARS OF INTELLIGENCE COLLECTION**

The study of intelligence is a complex science. There are many aspects of intelligence gathering disciplines that are utilized for military actions and assist in shaping United States policy with regard to our allies and those countries that do not


share a similar world view as the United States. Intelligence collection methods for later
discussion will include Human intelligence (HUMINT) that collects information from a
person on the ground, Signals intelligence (SIGINT) information gathered from
intercepted signals, Geospatial Intelligence (GEOINT), information gathered from
satellites, aerial photography, mapping/terrain, Measurement and Signature intelligence
(MASINT), an examination of scientific and technical intelligence information based on
quantitative and qualitative data analysis, Technical Intelligence (TECHINT) information
gathered from analysis of weapons and equipment used by the armed forces of foreign
nations or environmental conditions, and a newer collection discipline to the arena with
the advent of the internet is Cyber and Digital Network Intelligence (CYBINT/DNINT)
which is information gathered from Cyber Space. Any of these disciplines can be broken
down further into more specific types of data collection. As complex as it is to conduct
these forms of intelligence, the task of providing proper oversight of the people and tools
that have the ability to penetrate perceived walls is of utmost importance and in concert
with constitutional laws.

The need for effective intelligence became evident early on in our nation’s
history. As technology advanced and competency grew, different methods of gathering
intelligence were employed. The below table illustrates some of the major U.S. conflicts
and the methods used for collection during each period of conflict.
## FIGURE 2

<table>
<thead>
<tr>
<th>Dates</th>
<th>War in Which American Colonists or United States Citizens Officially Participated</th>
<th>Major Combatants</th>
<th>Intelligence Discipline Employed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1775-1783</td>
<td>Revolutionary War</td>
<td>Kingdom of Great Britain vs. United States</td>
<td>HUMINT</td>
</tr>
<tr>
<td>1861-1865</td>
<td>U.S. Civil War</td>
<td>Union vs. Confederacy</td>
<td>HUMINT/SIGINT</td>
</tr>
<tr>
<td>1898</td>
<td>Spanish-American War</td>
<td>United States vs. Spain</td>
<td>HUMINT/SIGINT</td>
</tr>
<tr>
<td>1914-1918</td>
<td>World War I</td>
<td>Triple Alliance: Germany, Italy, and Austria-Hungary vs. Triple Entente: Britain, France, and Russia. The United States joined on the side of the Triple Entente in 1917.</td>
<td>HUMINT/SIGINT</td>
</tr>
<tr>
<td>1939-1945</td>
<td>World War II</td>
<td>Axis Powers: Germany, Italy, Japan vs. Major Allied Powers: United States, Great Britain, France, and Russia</td>
<td>HUMINT/SIGINT</td>
</tr>
<tr>
<td>1961</td>
<td>Bay of Pigs Invasion</td>
<td>United States vs. Cuba</td>
<td>HUMINT/SIGINT/GEOINT</td>
</tr>
<tr>
<td>1983</td>
<td>Grenada</td>
<td>United States Intervention</td>
<td>GEOINT/SIGINT</td>
</tr>
<tr>
<td>Year</td>
<td>Event Description</td>
<td>Opponents</td>
<td>Disciplines</td>
</tr>
<tr>
<td>--------</td>
<td>-----------------------------------</td>
<td>----------------------------------</td>
<td>----------------------------------</td>
</tr>
<tr>
<td>1989</td>
<td>US Invasion of Panama</td>
<td>United States vs. Panama</td>
<td>HUMINT/SIGINT/GEOINT</td>
</tr>
<tr>
<td>1990-1991</td>
<td>Persian Gulf War</td>
<td>United States and Coalition Forces vs. Iraq</td>
<td>ALL DISCIPLINES</td>
</tr>
<tr>
<td>1995-1996</td>
<td>Intervention in Bosnia and Herzegovina</td>
<td>United States as part of NATO acted peacekeepers in former Yugoslavia</td>
<td>ALL DISCIPLINES</td>
</tr>
<tr>
<td>2001</td>
<td>Invasion of Afghanistan</td>
<td>United States and Coalition Forces vs. the Taliban regime in Afghanistan to fight terrorism.</td>
<td>ALL DISCIPLINES</td>
</tr>
<tr>
<td>2003</td>
<td>Invasion of Iraq</td>
<td>United States and Coalition Forces vs. Iraq</td>
<td>ALL DISCIPLINES</td>
</tr>
</tbody>
</table>

Source: The New York Public Library Desk Reference, 3rd Edition

G: HISTORICAL REVIEW

During the Revolutionary War, General George Washington was a true believer of intelligence collection as well as a consummate practitioner of the intelligence craft. Historical records indicate that after taking command of the Continental Army in 1775, George Washington paid an unidentified agent to live in the Boston area and report back to him by use of secret correspondence on the movements of British forces. George Washington recruited and managed a number of intelligence agents during this period. He set up spy cells and helped devise surreptitious methods of reporting, analyzed the raw intelligence gathered by his agents, and conducted an extensive campaign to deceive the British armies. (This use of spy networks would be noted as utilizing HUMINT intelligence). Historians cite these activities as having played a major role in the victory
at Yorktown and in the ability of the Continental Army to evade the British during the winters at Valley Forge. 15

Looking at the historical record, interest in intelligence as a tool of the Executive Office seemed to have waned during succeeding Administrations. During the War of 1812, military intelligence did not reveal that British troops were advancing on Washington until they were 16 miles from the Capital. The then Secretary of War John Armstrong, had refused to believe that the British would invade Washington, and thus military intelligence reported from this perspective. 16 After this blunder, intelligence regained prominence during the civil war. Each side valued the importance of intelligence collection. Both the Union and Confederate leadership valued intelligence information so much, they established their own spy networks and often railed at the press for providing intelligence information to the other side. The Confederate forces established the Signals and Secret Service Bureau with the primary charter of obtaining northern newspapers. On the Union side, the Departments of the Navy, State, and War each maintained an intelligence service. Union codebreakers decoded Confederate messages and learned that the plates for Confederate currency were being manufactured in New York.

Intelligence later regained prominence during the Civil War. In June of 1861, the first electronic transmission of information was sent from an aerial reconnaissance platform—in this case, a balloon—directly to President Lincoln on the ground (ELINT).


16 The Evolution of the US Intelligence Community. A Historical Overview
Two months later, Union forces established a Balloon Corps. Although disbanded after two years, it succeeded in detecting a large concentration of Confederate troops preparing to attack at Fair Oaks, Virginia.\(^\text{17}\).

**H: WORLD WAR I**

British intelligence was a major factor in bringing the United States into World War I. Public revelations of attempts by German intelligence to prevent the United States from coming to the aid of Great Britain angered the American people. British intelligence presented President Wilson with a decryption of German diplomatic and naval traffic indicating a German effort to entice the Mexican government into joining Germany against the United States in return for Texas, Arizona, and New Mexico if Germany won the war. Later declassified and disclosed to the public, this intercepted communication, known as the Zimmerman Telegram, infuriated Wilson and added support to his address before a joint session of Congress in 1917 urging that the U.S. declare war on Germany.\(^\text{18}\). This use of intelligence by the British to help gain an ally was most interesting as this collaborative effort continued between the United Kingdom and the United States. In this situation, information garnered by one nation was shared with another to gain cooperation in a joint endeavor.

**I: WORLD WAR II**

After the Second World War, President Franklin Roosevelt relied tremendously on American and British friends traveling abroad to provide him with intelligence on the

\(^{17}\) Ibid, Pg A-2  
\(^{18}\) Ibid
intentions of other leaders. One such friend was William J. Donovan, known later as Wild Bill Donovan who became the first Director of the precursor of the CIA. President Roosevelt appointed Donovan to form a non-military organization, Coordinator of Information (COI) that would collect and analyze information that would impact the national security of the United States. The authority vested in Donovan by the President, was to request data from other agencies and departments but not to interfere with the duties of military and naval advisors. During this time, the most regaled agency for their prowess in collection of information was the Federal Bureau of Investigation headed by Director J. Edgar Hoover.\textsuperscript{19} The forming of this department of information collection initialized the concept of centralized analysis. This competitive collection of information would normally be an asset since two distinctly different agencies could possibly corroborate and validate the collected information. However, because of the rising division among collection agencies, there was limited if any sharing thus causing a duplication of efforts and a waste on manpower and resources. Additionally, the desire to share information was negated by agencies competing for increased operating budgets based on performance and the collection of creditable information.

The next significant event in American history fueled the greatest need for intelligence at the time. The surprise Japanese attack on Pearl Harbor revealed a significant failure on the Intelligence Community. After action reports revealed that intelligence information was handled in a casual, uncoordinated manner and too little attention paid to collection requirements. Also cited as a major failure was the lack of

\textsuperscript{19} Hoover will later be found to have exceeded his authorities in domestic collection. Brown, Lee P. 
coordination among agencies (in this case the Army and the Navy) that resulted in information not passed to the correct people in a timely manner\(^\text{20}\) which ultimately caused the creation of several new agencies.\(^\text{21}\)

On July 27, 1947, President Truman signed into law the National Security Act of 1947, creating a postwar national security framework. The below list of Public Laws are but a few that have affected Intelligence Oversight over the years.

**FIGURE 3**

<table>
<thead>
<tr>
<th>Law Number</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>PL86-36</td>
<td>National Security Agency Act of 1959</td>
</tr>
<tr>
<td></td>
<td>State Department Basic Authorities Act of 1956</td>
</tr>
<tr>
<td></td>
<td>Inspector General Act of 1978</td>
</tr>
<tr>
<td></td>
<td>PL90-351 - Tenure and Senate Confirmation of the FBI Director</td>
</tr>
<tr>
<td></td>
<td><strong>PL96-456</strong> - Classified Information Procedures Act of 1980</td>
</tr>
<tr>
<td></td>
<td>PL98-411 - FBI Undercover Operations</td>
</tr>
<tr>
<td></td>
<td>PL99-83 - International Security and Development Cooperation Act of 1985</td>
</tr>
<tr>
<td></td>
<td><strong>PL 101-193</strong> - FBI Investigations of Espionage, 30 November 1989</td>
</tr>
<tr>
<td></td>
<td><strong>PL 101-510</strong> - Intelligence Priorities and Reorganization, 5 November 1990</td>
</tr>
</tbody>
</table>

\(^{20}\) Years later a review of the terrorist attacks of September 11, 2001 by the 9/11 Commission discovered the same issues among intelligence agencies in not being able to connect the dots with information on hand; http://www.9-11commission.gov/report/911Report_Exec.pdf

\(^{21}\) The attack on Pearl Harbor in 1941 necessitated the creation of the Office of Strategic Services (OSS) under the newly established Joint Chiefs of Staff. The attacks of 9/11 necessitated the creation of the Department of Homeland Security (DHS), and the National Counter Terrorism Center, (NCTC). Donovan moved from the billet of Coordinator to become the first Director of the OSS, a precursor to the Central Intelligence Agency. As each event that spurred the growth of intelligence, there was left this great intelligence apparatus with extraordinary capabilities and receiving minimal oversight.
A National Security Council was then created to coordinate national security policy. The Act created the position of Secretary of Defense and unified the separate military departments (the Army, the Navy, and the newly-created Air Force) under this position. The Act also established the Joint Chiefs of Staff to serve as the principal military advisers to the President and the Secretary of Defense. Finally, a Central Intelligence Agency (CIA) was established with the Director of Central Intelligence (DCI) as its head. At the time of its creation, the CIA was the only agency expressly charged with a "national" intelligence mission.²²

The origins of congressional oversight of intelligence does necessarily coincide with the enactment into law of the National Security Act of 1947. However, this oversight was not a robust process. Prior to World War II, the U.S. had very little real national intelligence capability. Instead, the State Department Foreign Service gathered and assessed information according to the gentlemanly rules prevailing in a world dominated by British and French diplomatic practice.²³

Under President Eisenhower, the National Security Council (NSC) system evolved into the principal arm of the President in formulating and executing policy on

²³ Ott, Marvin C; Partisanship and the Decline of Intelligence Oversight, 2010
military, international, and internal security affairs. Where Truman was uncomfortable with the NSC system and only made regular use of it under the pressure of the Korean War, Eisenhower embraced the NSC concept and created a structured system of integrated policy review. With his military background, Eisenhower had a penchant for careful staff work, and believed that effective planning involved a creative process of discussion and debate among advisers compelled to work toward agreed recommendations.24

The 1947 Act also included a very express prohibition on the CIA's having any "police, subpoena, law-enforcement powers, or internal security functions," reflecting the congressional and public desire to ensure that they were not creating a U.S. "Gestapo" and to preserve the FBI's primacy in domestic matters. The law also made the Director of Central Intelligence (DCI) responsible for "protecting intelligence sources and methods from unauthorized disclosure."25 This caveat would hinder the oversight process for decades, citing that oversight could disclose sensitive information if not carefully monitored. In many cases, security clearance roadblocks would prove to minimize effective oversight. These were all attempts to look for ways to ensure a proper balance of the need for intelligence with proper separation of powers. Maintaining proper internal limitations within the intelligence enterprise and ensuring democratic control was of utmost importance.

25 ibid
The 1960’s bore significant technological advances which enabled the expansion of the Intelligence Community and for many, the observation that this was the first efforts of a Director of Central Intelligence to attempt to have ultimate control. However, at this time, the CIA was seen as a dismal failure at the ill-fated Bay of Pigs invasion of Cuban expatriates in 1961. Although clear there was some need to institute a form of more robust oversight, it would not happen for several years later. That same year, Secretary of Defense McNamara formed the Defense Intelligence Agency (DIA) to consolidate the production of intelligence analysis for the military services. This was also the beginning of the Defense Attaché system which placed military personnel in embassies to collect information via overt means.

The turbulent 1960’s and 70’s initiated several reforms in the domestic collection of intelligence by members of the Department of Defense. Army military intelligence units infiltrated colleges and civilian organizations and reported on activities of members during the civil rights movement. These actions are prohibited under the Posse Comitatus Act which is the United States federal law that was passed on June 18, 1878, after the end of Reconstruction and was updated in 1981. The intent (along with the Insurrection Act of 1807) was to put a limit on the powers of Federal government to use the Federal military system to enforce state laws. This issue was loudly sounded by Theodore Roosevelt when he stated “Better twenty-four hours of riot, damage, and disorder than illegal use of troops” In 1968, Bibby called oversight ‘Congress’

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neglected function\textsuperscript{28}. Nearly 40 years later Mann and Ornstein seconded that opinion, concluding that Congress is ‘the broken branch’\textsuperscript{29}.

Since the evolution of the modern day Intelligence Community after World War II, no government entity, in particular the Executive Branch or Congress has made it an imperative to discuss the amount of money spent on intelligence issues. The Intelligence budget has typically remained classified (except for two fiscal years in the mid 1990’s where the Director of Central Intelligence George Tenet made the amount available) because there is a fear that if adversaries were aware of how much money was provided to particular agencies and for what purpose, there could be a degradation in that agency’s collection capability. After the terrorist attacks of 9/11, it was noted that Congress should pass a separate appropriations act for intelligence, defending the broad allocation of how these tens of billions of dollars have been assigned among the varieties of intelligence work.”\textsuperscript{30}

\textbf{J: THE ROCKEFELLER COMMISSION, THE NEED FOR OVERSIGHT}

The Commission on CIA Activities within the United States, chaired by Vice President Rockefeller, was created by President Ford on 4 January 1975 with E.O.

\textsuperscript{29} Thomas E. Mann and Norman J. Ornstein, The Broken Branch: How Congress is Failing America and How to Get It Back on Track (New York: Oxford University Press 2006).
11828\textsuperscript{31}, to determine whether CIA employees had engaged in illegal activities in the United States. This was prompted by the December 1974 New York Times report that revealed CIA involvement in conducting illegal domestic activities and included experiments on U.S. citizens during the 1960’s. In June 1975, the Commission issued its report which, among other things, confirmed the existence of a CIA domestic mail opening operation; found that in the late 1960s and early 1970s the Agency had kept files on 300,000 U.S. citizens and organizations relating to domestic dissident activities; found that President Nixon tried to use CIA records for political ends; and concluded that the CIA had no involvement in President Kennedy's assassination. The Commission also found "that the great majority of the CIA's domestic activities comply with its statutory authority." In looking to the future, the Commission called for a joint congressional oversight committee and a stronger executive oversight mechanism; consideration by the Congress to disclose "to some extent" the CIA's budget; and appointment of two confirmed deputy directors, one to manage the CIA and one to advise the DCI on military matters. The Commission further recommended that the DCI serve no more than 10 years.\textsuperscript{32}

**K: ATTACK ON THE HOMELAND**

The problem in the current Post 9/11 environment is the overarching desire by those in power to bend or shape legalities to potentially stop another terrorist attack on American soil. For example, The USA Patriot Act facilitated the sharing of information

\textsuperscript{31} E.O. 11828, at http://www.presidency.ucsb.edu/ws/?pid=23910
and aided cooperation among government agencies to better "connect the dots."\textsuperscript{33} (This lack of coordination is the same reason that the Japanese attacks on Pearl Harbor in 1941 were successful). The provisions of the Act removed some of the legal barriers that prevented the information flow between law enforcement, intelligence, and national defense communities. As Sen. John Edwards (D-N.C.) said about the Patriot Act, "we simply cannot prevail in the battle against terrorism if the right hand of our government has no idea what the left hand is doing" (Press release, 10/26/01). While the Act does address newer electronic technologies (cell phones, email), it was one of the quickest enactments of any law written by Congress in modern time. The law was submitted 44 days after the terrorist attacks of 9/11 and debated and signed 45 days later.

The problem lies in that the laws, policies and directives are modified to address a critical event or failure as those who are in power deem necessary. There are those who believe to some degree that civil liberties are not as important as security and to some extent, it is understandable to see that urgency of an issue may have ramifications on civil liberties. However, the “intelligence machine” has grown exponentially throughout history with political cover / funding to levels that are just now becoming apparent. Leakers like Army private Chelsea “(formerly Bradley) Manning and Edward Snowden brought to light the extent of the ongoing collection efforts of the National Security Agency within the United States and abroad, all within the boundaries of legality. Intelligence Oversight mechanisms are quickly outlined and put in place but as we now learn through the various leaks, intelligence oversight has a different meaning to different people.

\textsuperscript{33} The USA Patriot Act accessed from http://www.justice.gov/archive/ll/highlights.htm
people. According to Merriam-Webster’s dictionary, oversight means ‘watchful care’ and/or “regulatory supervision”.

Where does the enforcement come in? Having oversight mechanisms does not necessarily mean that enforcement and compliance is regularly conducted. Add to this the various classification means applied to highly sensitive matters and the conduct of oversight becomes even more challenging, if even manageable.

L: 9/11 COMMISSION REPORT

The 9/11 Commission Report was produced after the terrorist attacks upon the United States. Five Democrats and Five Republicans came together to produce a report that was supposed to analyze the attacks and determine what happened and what measures can be taken to prevent another attack. Several issues were identified in the report that provided insight as to who was the enemy, why they attacked the United States and why was our intelligence and security apparatus a failure. Several factors were instrumental in these attacks. The United States political policies abroad that were unfavorable, and the lack of transparency between the federal agencies in discussing transnational terrorism. This report highlights many deficiencies but does not get to the heart of the problem which is authority and accountability. The Federal Bureau of Investigation (FBI) was ineffective after the World Trade Center bombing in 1993. The

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FBI’s approach to investigations was then decentralized, very specific to the case, and all actions were geared towards prosecution. Attempted reforms were unsuccessful at the institutional level because of perceived legal barriers and generational stovepipes.

M. INTELLIGENCE COMMUNITY CONTRACTORS

The advent of the terrorist attacks of 9/11 proved that the US war machine was not ready to respond on many levels. It would take years of training to bring forth the necessary governmental and military manpower to bear. Plans were dusted off and the need for manpower was great. How did the administration solve this problem? They begged Congress for appropriations that were eventually coined Overseas Contingency Operations (OCO) funds. Basically, this was a separate pot of money outside of the normal funding lines to run the wars during Operation Iraqi Freedom (OIF) and Operation Enduring Freedom (OEF). The only caveat to obtaining these funds was to show the linkage to the wars overseas. The hearing taking place during the 112th Congress highlights the exorbitant costs associated with bringing on already proven talent in the form of contractors to support the mission. Concerns over governmental oversight were noted throughout the hearing but what was not considered were the overwhelming costs still associated with the use of contractors. This became painfully evident during the fiscal crisis of 2013 which forced the government to shut down and furlough government employees. What was more interesting was that government employees were sent home but many contractors who were already fully funded still worked during the shutdown. Senator Akaka of Hawaii opened the hearings with the following statement “After the attacks (of 9/11), intelligence agencies had to rapidly surge their workforces and turned to private contractors to fill gaps. While it is clear that the initial need to rely on contractors,
a concern is that 10 years later, the IC remains too heavily dependent on contractors. According to an investigation by the *Washington Post*, close to 30 percent of the current IC workforce are contractors.\(^{35}\) Requiring Intelligence Community agencies to carefully prioritize critical functions and judiciously maintain management, oversight, and control of those functions ensures that the agencies operate effectively and maintains control of their missions and operations, but it gives them the flexibility to find the right Federal employee/contractor balance when very unique skills may be required to perform the critical function. \(^{36}\)

Noticeably lacking was the mention of oversight afforded to the government contracting force other than the cost factor for services. It is quite possible that if there were not a budget crisis during 2013-2014 Fiscal Year, this would not come out for years. However, since the budget of the Defense Department is such a great piece of the pie, it is always a natural target for those looking to reduce the deficit. This hearing on the use of contractors lacks merit by not discussing the real issue at hand which is the lack of Congressional oversight on many levels. When such a large amount of money is at stake, more oversight is required not less.

Outsourcing work to Federal contractors is premised on the theory that it provides flexibility to the government to meet its needs. That may be true in certain circumstances, but outsourcing work, especially in certain sensitive program areas, may actually cost the


\(^{36}\) Ibid
government because you have to remember government employees, unlike contractors, can perform both inherently governmental functions as well as non-inherently governmental functions.  

N. INSPECTORS GENERAL AND NATIONAL SECURITY OVERSIGHT

Conducting Intelligence Oversight requires many things. First and foremost, authority. Having the authority to inspect this classified realm is the most important requirement. Placing the role of oversight in the Offices of the Inspectors General (IG) in most agencies is correct because IG’s have a statutory responsibility and unfettered access to investigate anything and everything when provided direction to investigate by the head of the agency. IG’s that are statutory must also report to Congress semiannually in the classified world to report findings. Congress created IGs, which now exist in over fifty federal agencies, for the explicit purpose of monitoring these agencies. Moreover, IGs in several agencies charged with national security responsibilities are squarely addressing individual rights violations. However, mandatory reporting is not considered effective oversight, but rather a check in the box that oversight is being conducted in some fashion. Jack Goldsmith's recent account of presidential accountability mechanisms is an important exception, describing the CIA IG’s review of extreme interrogations as an example of how IGs can constrain the President, while Ryan Check and John Radsan provide a historical discussion of the CIA IG predating the release of the interrogations.

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37 Ibid
IGs support the view of internal separation of powers theorists that institutions within the executive branch can help protect individual rights curtailed by national security policies. Although courts are usually viewed as the primary institutions for rights enforcement, IGs in several cases protected rights where courts had failed.\(^\text{40}\)

Intelligence research on oversight typically lands in two areas. The first focuses on what is so unique to intelligence that it fails to focus on oversight commonalities between intelligence and other policy domains let alone capitalize on contributions made by political scientists. Smist, for example, questions how Congress can effectively execute its oversight duty in a policy area “characterized by legitimate needs for secrecy and security that exist in few other policy areas.”\(^\text{41}\) He concludes that the intelligence committees are “unique creatures of Congress”\(^\text{42}\) and creates two oversight ‘models’ – which he calls institutional (supportive) and investigative (challenging) – to characterize the committees’ relationships with the Intelligence Community.\(^\text{43}\)

O. NEWS MEDIA IN INTELLIGENCE OVERSIGHT

Hillebrand states that Shulsky successfully illustrates that many definitions of intelligence point to government secrecy as a defining feature, maintaining that the connection between intelligence and secrecy is central to most of what distinguishes

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\(^{40}\) Ibid


\(^{42}\) Ibid., P.19

\(^{43}\) Zegart, A & Quinn, J. *Congressional Intelligence Oversight; The Electoral Disconnection*
intelligence from other intellectual activities.\textsuperscript{44} As a consequence, democratic societies find various ways to square ‘democratic’ values and intelligence, focusing on maximizing ‘the probability that intelligence is both effective and conducted properly.’\textsuperscript{45} Strictly speaking, the term oversight refers to supervisory functions whereby a person or organization oversees the performance or activities of an individual or a group. As Farson and Whitaker maintain, the term oversight is used broadly today, referring to the ‘scrutiny of government action before, during, and after the fact, dealing with both matters of propriety and efficacy. Oversight is not accountability, but it may lead to it.’\textsuperscript{46}

From this perspective, the media has an obligation to keep governments in check and investigate their activities. This includes the realm of intelligence. As Simon Chesterman pointed out, meaningful accountability of intelligence services depends on a level of public debate that may be opposed by the actors in question, proscribed by official secrets acts, and constrained by the interests of elected officials’.\textsuperscript{47}

P. CONCLUSION

Intelligence is a viable tool for the military in support of diplomatic decisions. From the early days of the revolutionary war, the gathering of intelligence on adversaries was and still is an important step in battle. Any edge garnered on the enemy could provide favorable odds in any battle. George Washington used this to his advantage on

many occasions. As time went on the use of intelligence became more important to decision makers. However, the growing dependence on intelligence as a tool is such that without it, decision making is difficult, yet impossible. Throughout the last 200 years, intelligence gathering is becoming increasingly more important at the expanse of globalizations.

Tragedies such as Pearl Harbor and 9/11 have amplified the need for intelligence. Wars fought on foreign lands have quite a different feel than wars fought on home soil. The United States bearing the beacon of freedom for the world is closer to feeling like other countries who worry of homeland attacks. Draconian measures of strip searching, eaves dropping and surveillance are now a part of the culture for Americans and will be for a long time to come.

On the subject of intelligence oversight, there is an abundance of Congressional Hearings that describe the need for oversight dating back to the 1970’s, as well as several books and articles written on the subject. However, the advent of technology in the last 4 decades begs for an answer to the question of who is watching the watchers? Congressional Oversight had the appearance of effectiveness when technology was antiquated. At that time, only the “watchers” knew the truth. Now the need for expanded oversight is greater than ever due to technological advances.

The question remains on how to define effective intelligence oversight. The answer lies in more than a system of checks and balances. It lies in the culture and integrity of those who are assigned the job of collection, management and oversight of intelligence. Perhaps if moral turpitude and integrity were woven into the fabric of training our workforce rather than the annual 1 hour required ethics class, oversight would be a much easier task.
II. CONGRESSIONAL OVERSIGHT- FIXED OR BROKEN?

The former Director of Central Intelligence Robert M. Gates underscored the impact of congressional oversight when he stated,

...some awfully crazy schemes might well have been approved had everyone present [in the White House] not known and expected hard questions, debate and criticism from the Hill. And when, on a few occasions, Congress was kept in the dark, and such schemes did proceed, it was nearly always to the lasting regret of the presidents involved.\(^48\)

Existing laws and directives regarding congressional oversight of intelligence have not caught up with technological advances and methodologies of intelligence collection for which they were originally designed. Additionally, methods of conducting oversight can be viewed in different ways. For some, trust is a key factor in the oversight process. Others would state that only proactive oversight is effective. Many would argue that too much oversight can be a hindrance while others take the position that knowing that someone is watching the watchers is in itself, a form of oversight. Technology has grown exponentially while the process of revising current laws is fraught with roadblocks. The process to enact or modify a law that provides an oversight mechanism of the use of new technology, takes years unless a crucial demand requires immediate attention. This review examines literature that discusses the challenges of Congress in providing effective oversight to the Intelligence Community writ large.

A. THE NEED FOR SECRECY

Multiple studies by Zegart, Colton, and Quinn have examined the role and associated challenges of congressional oversight. After two major World Wars, the United States inherited many global responsibilities. Subsequently, there has been a constant struggle in how to effectively manage the balance between democracy and the need for secrecy to ensure the protection of citizens. According to the Information Security Oversight Office (ISOO) the agency that monitors and keeps watch over the governments secrets, more than 3.5 million secrets are created each year. But one thing should be understood; when it comes to secrecy versus security, security will always win. A political leader would rather attempt to explain the discovery of a secret intelligence program than a security failure that resulted in loss of life. This is the difficulty within a democracy where the demand for transparency in government is expected.

In the early 1970s, alleged abuses by intelligence agencies became public. Some of the alleged abuses claimed that the CIA possessed poisonous toxins to conduct assassinations as well as the National Security Agency (NSA) having monitored communications of American citizens within the United States to follow anti-Vietnam war protestors to include civil rights leader Martin Luther King and shared that information with the Federal Bureau of Investigation (FBI). In January 1975, added to the charges of domestic spying by the FBI, investigators learned of a number of

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transgressions currently referred to as the “Year of Intelligence.” These abuses horrified the public and Congress responded with increased oversight and the formation of an investigatory committee—the Church Committee—in the Senate.

The Church Committee was formed to assess what violations may have occurred and to find a remedy via the legislative process. This investigative body was formed to look into intelligence agencies activities and although only manned with a staff of 150, (this was a huge number of personnel far exceeding the amount of people on other committees) the commission was given a year to finish the report (there was an extension of 6 months needed to complete the report and publish the findings). Thousands of documents were reviewed and although shrouded in secrecy, the committee had unprecedented access into the inner workings of these spy agencies. While it was important to weed out the illegal acts committed by intelligence agencies, it was just as important to provide solutions to prevent these abuses in the future.

McCubbins and Schwartz posit that existing laws are typically modified when either one of two things occur. An abuse of the law was reported or a failure was discovered. Intelligence Oversight (IO) laws are intended to ensure that civil liberties are not trampled for the sake of security. An extremely difficult task, especially when the

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51 The Rockefeller and Church panels produced a carefully documented record of intelligence wrongdoing. Accountability and America’s Secret Foreign Policy: Keeping a Legislative Eye on the CIA, Johnson, Loch K. 2005
52 In 1974, the Senate created the Church Committee to investigate allegations of abuses committed by intelligence agencies. See S. Res. 21, 94th Cong., 1st Sess., 121 CONG. REC. 1416 (1975)
53 On January 27, 1975, a concerned Senate voted overwhelmingly to establish a special 11-member investigating body along the lines of the recently concluded Watergate Committee. Under the chairmanship of Idaho senator Frank Church, with Texas senator John Tower as vice-chairman, the select committee was given twelve months (later extended to sixteen) and hired 150 staff to complete its work.
54 ADD FOOTNOTE TO McCubbins and Schwartz.
need for security is greatest after an attack on the homeland such as the terrorist attacks of September 11, 2001. The typical course of action by those charged with protection of the populace is to implement draconian measures to beef up the existing security posture. The media in some cases exacerbates the issue with breaking news and headlines in periodicals, thus fueling the issues. In this 24 hour news cycle, it can be very intense. On a positive note, the involvement of the media may drive the train at the very least, in the expediency to make notable changes by security professionals. The government bureaucracy however, requires several layers of institutional review from the legal and political aspects before policy changes can be made.

There must be a sound understanding by all participants on the purpose and use of the new technology and balancing that purpose with security needs before making policy revisions to oversight. Therein lies the challenge. The immediate need for security enhancements, balanced against the associated requirements to uphold democratic values. Fixing the problem is complex. Due to politicization, the problem can be exacerbated and can be seen by the opposing political party as grandstanding if an issue is close to an upcoming election. While there are means to get at the root cause, the difficulty lies in how to do it. There are different methods available to Congress to determine the root cause and provide a solution. A legislative fix would be considered a long term fix which would take more time than the creation of a bipartisan committee. Another method available to Congress is by holding a public or closed session hearing to put pressure on an agency, such as was done with the National Security Agency after the leaks by Edward Snowden claiming an abuse and excessive monitoring of American citizens, or the questions asked of the State Department regarding the Benghazi failure that resulted
in several deaths. A former Defense Department official James Bodner observed “Most commissions are created for reasons other than producing results. And most commissions don’t produce results.”\textsuperscript{55}

B. ELECTORAL MEANS

In the political world, elections are the most important event in a politician’s tenure. While it is often said that the most important issue an elected official can do once elected to office is to ensure they will be reelected,\textsuperscript{56} it would be unfair to say that elected officials only care about reelection. Unfortunately, the goals of getting reelected and making public policy are more important to most legislators than oversight.\textsuperscript{57} On a positive note, there exists a core of motivated legislators who conduct most of the oversight; these legislators are active even when lacking resources or political incentives.\textsuperscript{58} These legislators conduct oversight because they want to, not because of political benefits. Some may wish to make policy;\textsuperscript{59} others are "work horses"\textsuperscript{60} or "oversight legislators."\textsuperscript{61} There are, however, some situations where legislators are willing to spend time on oversight; public awareness of an issue may occasionally provide

\textsuperscript{55} Jordan, Terrorism and National Security Reform, How Commissions Can Drive Change During Crises
\textsuperscript{56} Mayhew, Congress, the Electoral Connection
\textsuperscript{61} Rosenthal, "Legislative Behavior," p. 126
political incentives to conduct oversight.\textsuperscript{62} Most oversight "is centered in the standing committee,"\textsuperscript{63} and many legislators confine their oversight activities to the hearings.\textsuperscript{64} Moreover, legislators like to place the information they gather through informal contacts with administrators before the hearings in the hearing's record.\textsuperscript{65} However, to disregard the fact that every decision made by a politician is relevant to how that decision will impact their reelection would be incorrect. Assuming that the good of the nation is primary, this suggests that a politician could be reticent to make an unpopular policy decision that would impact their chances of reelection. That is to not to say that there are many outstanding politicians who care more about creating meaningful and long lasting policies that benefit constituents rather than only worrying about reelection concerns. Fenno describes one such Senator Claiborne Pell whose “Pell Grant” has allowed many students to attend college that would normally not be able to afford it. \textsuperscript{66}

Oversight of the Intelligence Community (IC) is extremely complex and involves many people across the three branches of government.\textsuperscript{67} Many scholars question the rigor applied by Congress to the oversight process. The ability to control information is important in any state. Within democracies, oversight tends to be a responsibility that is co-shared by the executive and legislative powers.\textsuperscript{68} But the President, as Commander in

\textsuperscript{63} Morris S. Ogul, "Legislative Oversight of the Bureaucracy," U.S. Congress, House, Committee Organization in the House, 93rd Cong., 1st sess., p.704
\textsuperscript{65} Ibid
\textsuperscript{66} Claiborne Pell was a Senator from Rhode Island who became known as the Education Senator for his educational grant policy that later became known as the Pell Grant. Fenno, Richard; Senators on the Campaign Trail. The politics of Representation. Norman, OK: University of Oklahoma Press.
\textsuperscript{67} Gibson, Guide to Intelligence Oversight Design
\textsuperscript{68} Lowenthal, Intelligence from Secrets to Policy
Chief, is ultimately responsible for the security of the nation. Although the heads of the agencies that support this task are nominated by the President, they must be confirmed by the Senate. Presidential nominations subject to the advice and consent of the Senate, including Federal judgeships, raise some of the most controversial issues that representatives face. However, the President is under no legal obligation to consult with either body in choosing his nominees. He is entirely free to disregard their advice, although in such instances he maintains a free hand at the cost of possible retaliation in the form of with-held appropriations in the House, or in-action or adverse action in the Senate when treaty drafts are submitted for the Senate's "advice and consent."  

There are three different ways to understand legislative behavior with respect to oversight. First, legislators, while generally unwilling to oversee the bureaucracy, will do so when it benefits them politically. While legislators recognize the importance of oversight, they are sometimes frustrated by their inability to oversee the executive in a better manner. Second, legislators want to oversee the executive but because of their busy schedules do not allow for enough time. Third, a core of motivated legislators conducts the majority of the oversight making these legislators active even in the absence of resources or political incentives.

70 The Meaning of the Term Advice and Consent, Mansfield, M. 1953  
72 Scicchitano, Michael J. Patterns of U.S. House and Senate Oversight: The Clean Air Act of the 1970s  
73 Oleszek, “Congressional Oversight,” p. 722  
Congress is comprised of 535 voting members in two political parties who represent every state. By design and intent, legislation moves slowly thus making oversight a challenge. Historically, three main groups have come to share power. Political parties, committees, and elected leaders and committee chairs have historically derived their power from both political parties and chamber rules. Classification of a great deal of the subject matter adds additional challenges to the oversight process because in most cases, only the senior leadership and ranking membership of both chambers (House and Senate) are briefed. These leaders oftentimes do not have the experience or an extensive background in the IC which tends to hinder the process by not asking the appropriate questions of the intelligence apparatus to provide adequate oversight.

C. OVERSIGHT DESIGN

In 1976, President Ford issued Executive Order (EO) 11905 in response to perceived abuses by President Nixon and recommendations from the Church and Pike committee to reform the Intelligence Community after he learned of CIA assassination operations, and the military role in infiltrating college campuses and spying on dissidents. This EO was instrumental in revamping the prevailing oversight model. From another perspective on oversight, McCubbins and Schwartz pose that oversight policy rests on two forms of congressional activity known as police patrol and fire alarm oversight.

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76 For a copy of the Executive Order 11905, see Executive Order 11905, “United States Foreign Intelligence Activities” 42 Federal Register 7703, February 19, 1976.
Patrol oversight is an active, centralized and direct approach to oversight. Fire alarm oversight is less centralized and direct and is reactive when a violation occurs or is challenged. The major differences between the two models is that one model is formal (patrol) in that the primary duty for an entity is oversight while the other informal model (fire Alarm) is that oversight is presented as an additional or collateral duty. This would posit the question as to whether or not it is necessary to have a primary duty function for oversight to be effective. McCubbins and Schwartz argue that fire alarm oversight is more cost-effective for re-election seeking members of Congress.

Colton articulates that the debate on intelligence questions is based on the allocation of power between the branches. Congressional concerns on oversight tend to be focused on paramilitary activity which requires notification to a congressional committee prior to any event or at least in a timely manner. Congress has vacillated between neglect and overreaching on policy regarding intelligence oversight for decades. From the 1950s to the mid 1970s, Congress involvement in oversight was an informal mechanism. Congress focus was on the local issues of the constituency in their home state more than geopolitical issues which led to an atmosphere where accountability was the exception, and leniency the rule.

D. LEGISLATIVE DISCONNECTION

Zegart argues effectively that the Senate and House of the United States are not doing their job properly and therefore, the posture of security for the nation is not as
safe. The argument that effective oversight is hard to define while poor oversight is
easy to notice makes sense. When things are running smoothly without issue, there is no
concern for oversight because a problem has not been identified. However, when a
potential violation is discovered or a whistle blower screams foul, the media may run
with stories of conspiracies and take hold of the attention of legislators that will force the
issue to be examined. As the intelligence world is highly classified, the media does not
play an important role except when these violations become public. Arguably, the
problem with intelligence oversight is that it is a highly complex and technical business
shrouded in secrecy, and legislators are ill equipped to understand the nuances of such a
process. To understand intelligence takes time which is something that elected officials
do not have the luxury based on term limits and competing needs for their individual
states. The impacts and implications of secrecy are extensive and burdensome. The 9/11
Commission summarized the effects this way: Secrecy stifles oversight, accountability,
and information sharing.

Kibbe’s assessment of congressional oversight examines the relationship between
the problem and the solution. Kibbe cites Congress failures into pre-Iraq Weapons of
Mass Destruction (WMD) and the CIA use of interrogations and rendition tactics as the
primary failures. Where was oversight in these cases? The intelligence committees

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78 Zegart, A & Quinn, J. Congressional Intelligence Oversight; The Electoral Disconnection, Intelligence and National Security, 25:6, 744-766
79 9/11 Commission, Report, p. 24
80 CIA-sponsored reconnaissance planes such as the U-2 and SR-71 were never subjected to the criticism and scrutiny reserved for Strategic Air Command programs such as the B-52 or B-70 program. See J. RANELAGH, supra note 13, at 481; see also C. CRABB & P. HOLT, supra note 14, at 137 (noting that “[t]he intelligence community had been conditioned by more than a quarter century of experience not to tell Congress what it was doing. And Congress has been conditioned not to ask”
could have looked into any of these issues, though it could be stated that they may have to assume some of the blame for the prewar intelligence failure due to lack of oversight.

The importance of legislative oversight of the executive branch has long been recognized as a primary function of Congress.\textsuperscript{81} As stated by Woodrow Wilson “Quite as important as legislation, is vigilant oversight of administration.”\textsuperscript{82} As a measure of the difficulty in oversight, members of Congress introduced over 200 bills between 1947 and 1975 aimed at expanding their supervision of the intelligence community. Of those, exactly one was adopted.\textsuperscript{83} What this suggests on the face without data to support it is that there may have been a consensus within the Congress of those years not to expand congressional supervision of the IC.

There are several reasons that congressional oversight over intelligence is lacking, but these reasons can be summed into three main themes: the complexity of committee jurisdiction over intelligence, the disadvantage committees have regarding information flow in comparison to the executive branch, and the rise in partisanship in the committees.\textsuperscript{84} Tie these issues to the lack of intelligence experience of members of Congress, and the difficulty to review or audit classified programs, effective oversight is certain to be problematic.

There is also the issue of an intelligence budget. The budget process is separated by two main factions: those that authorize spending on programs and those that appropriate the funds. These entities by design are separate but their separation increases

\textsuperscript{81} Kibbe, 2010
\textsuperscript{82} Woodrow Wilson, \textit{Congressional Government} (Boston: Houghton Mifflin 1885) p. 297
\textsuperscript{83} Hansom, Harry. “Congress and the Intelligence Agencies”.
\textsuperscript{84} Kibbe, 2010
the inability for stringent oversight to be conducted in a timely manner as they are separate entities. One of the intelligence committees’ main responsibilities is to pass an intelligence authorization bill every year, the main vehicle through which Congress makes its will known to the IC regarding all facets of intelligence, including strategy, priorities and budget levels.\textsuperscript{85} During the years FY2006-FY-2009, the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI) were unable to pass an authorization bill for the first time since the committees were created in the mid-1970s.\textsuperscript{86} Rep. Pete Hoekstra (R-MI) explained in a statement, not passing an authorization bill means that Congress is “not able to be a full participant in that dialogue and the executive branch can disregard us…so we are irrelevant in that dialogue, and we can’t have an impact.”\textsuperscript{87}

E. INFORMATION SHARING

One of the failures noted after 9/11 was the need to share information. A widely held notion after the attacks indicates that several intelligence and law enforcement entities had knowledge of some piece of the plan to attack the United States. In response to this failure, the 9/11 Commission cited in its report the breakdown of information sharing across the IC and Law Enforcement (LE) enterprise as major factors that contributed to the lack of awareness to “connect the dots” of an impending attack. In response to this, Joint Terrorism Task Forces (JTTF) were formed in many of the states, most notable is the robust JTTF in New York City which is believed to rival the

\textsuperscript{85} Kibbe, pg 25
\textsuperscript{86} Kibbe, pg. 26
\textsuperscript{87} Rep. Pete Hoekstra, “Intelligence Reform and Oversight: The View from Congress’; Council on Foreign Relations Meeting, 26 June 2008
capability of the CIA. Additionally, Congress mandated the creation of an information-sharing environment (commonly known as the “ISE”) that would provide and facilitate the means of sharing terrorism information among all appropriate federal, state, local, and tribal entities and the private sector through the use of policy guidelines and technologies (primarily via organized JTTFs). However, due primarily to compartmentalization, these puzzle pieces were not put together. Each agency had long standing rules on what information could be shared and with whom and basically, only to share certain information that was deemed necessary. Post 9/11, the directive to the IC is to share as much as possible per the Intelligence Reform and Terrorism Prevention Act (IRTPA). This sharing now creates more of a dilemma for oversight professionals in that foreign and domestic intelligence is crossing boundaries, some of which includes information on United States citizens.

One of the discussions on the table for a few years and highlighted in a Congressional Research Service report titled “Congressional Oversight of Intelligence: Current Structure and Alternatives,” is to create a Joint Intelligence Committee (JIC) to enhance and regularize congressional oversight of intelligence. One of the most direct and immediate among the options to increase and improve the process is to replace the

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89 The Intelligence Reform and Terrorism Prevention Act of 2004 established the position of Program Manager to "plan for and oversee the implementation of, and manage the ISE," and to be "responsible for information sharing across the Federal Government." Consistent with the direction and policies issued by the President, the DNI, and the Director of the Office of Management and Budget, the PM-ISE issues government-wide procedures, guidelines, instructions, and functional standards, as appropriate, for the management, development, and proper operation of the ISE. To better assist in ISE implementation activities, the Office of the PM-ISE has staff with experience in counterterrorism, homeland security, information sharing, technology, and policy at all levels of government.
90 Halchin and Kaiser, 2012
existing committees in the Senate and the House with true standing committees.\textsuperscript{91} Unfortunately, until oversight becomes more popular with legislators, the lack of effective oversight will continue.

**F. MEASURING INTELLIGENCE OVERSIGHT**

How do we measure the effectiveness of the congressional oversight process? From the reforms conducted since the Church and Pike Committee to present day, has there been much change? Of note, since the pervasive abuses reported during the 1970s there was only one major abuse cited in the early 1980s with Lt.Col Oliver North funneling money to the Contra’s in Iran.\textsuperscript{92} Some would argue that in a post 9/11 world, security has forced the oversight structure to lack sufficient rigor as evidenced by the NSA scandal of questionable collection on U.S citizens. The NSA admitted to unprecedented collection of information on U.S citizens while looking for foreign intelligence information and states that although legally collected under the law, the

\textsuperscript{91}The 9/11 Commission emphasized the need for “substantial change” in congressional oversight, either by establishing a joint committee or by creating “a single committee in each house of Congress, combining authorization and appropriating authorities ....” Each panel would be a standing committee and hold subpoena authority. The membership would be relatively small and serve without term limits. Its composition would be nearly equal between the parties, with the majority having only one more member than the minority, and representing four panels with overlapping jurisdiction (i.e., Armed Services, Judiciary, Foreign Affairs, and the Defense Appropriations Subcommittee) with one seat each on the new committee. 9/11 Commission, \textit{Report}, p. 420-421. For further information and analysis, see CRS Report RS21908, \textit{Senate Select Committee on Intelligence: Term Limits and Assignment Limitations}, by Judy Schneider.

\textsuperscript{92}Warren B. Rudman, the New Hampshire Republican who is vice chairman of the Senate committee said he was not certain that the committee had found all the secret White House operations. "I'm reasonably sure," he said. "But I have my doubts." More Attention to TV's Role Senator Rudman and other senior members of both committees recalled that the hearings last summer had bared in painful detail a startling saga: how United States policy on Iran and Nicaragua had been set by a few members of President Reagan's National Security Council staff and carried out by a secret band of private operators behind the backs of Congress, the State Department and the Defense Department.
information is not viewed unless required for an investigation on a foreign party. As we measure changes in the oversight mechanism, numbers from a CIA History Staff Study indicate that in 1975, prior to the creation of the oversight committees, the agency was required to present 188 substantive briefings and provide 204 classified intelligence products to Congress. Conversely, in 1979, the CIA provided 420 briefings and approximately 1800 products. Clearly the numbers represent a substantial increase in the flow of information. However, if the information is not readily understood or the audience not as interested since the information is not tied to votes, then we have information overload without a purpose.

**G. CONCLUSION**

Effective intelligence oversight is a complex process that requires responsible parties to delve into issues, regardless of their impact to a politician’s reelection or the local economy of their constituency. To be effective, responsible parties need to be engaged, knowledgeable and concerned for the right reasons. The substantial reforms of the 1970’s have ebbed over the years until further abuses came to light such as was reported in the Tower Commission Report regarding the sale of arms to the Contras in the mid-1980s. This began a revitalized interest in taking a closer look at the IC. Not until the terrorist attacks of September 11th, has so much energy, effort and money been thrown into the realm of intelligence and security. Although it may appear to some that

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93 NSA Oversight and Accountability, HTTP://congressional.proquest.com.proxy1.library.jhu.edu/congressional/docview/t17.d18.cr06no2013_dat-33?accountid=11752
94 Snyder, 12
95 http://www.presidency.ucsb.edu/PS157/assignment%20files%20public/TOWER%20EXCERPTS.htm
law enforcement and intelligence personnel have been given a blank check, oversight was a strong consideration particularly after the 9/11 Commission report finding were released. The most notable effect on the IC was establishing a Director of National Intelligence to oversee the entire IC. Oversight is a process that must be a proactive, continual system that is constantly monitoring and morphing with the advent of increased technological capabilities. More importantly, oversight must not hinder the primary reason for the collection of intelligence in the first place which is to prevent strategic surprise.

III. LEGALITY VS. PRIVACY

*A free people have long had to decide where to plant the flag on that inevitable spectrum between security and liberty. We have always planted it close to liberty."

- General Michael V. Hayden USAF

Director of the Central Intelligence Agency

Transparency and secrecy are two models that are typically not discussed in the same way. In this highly charged environment after the terrorist attacks of September 11th, the increased need for enhanced security measures in the United States in particular has caused civil libertarians a great deal of consternation as they continue to argue for measures that allow for greater transparency to the citizenry. In dire times, draconian measures, secrecy of motive and actions become more prevalent as new systems, tactics, techniques and procedures (TTP’s) come online. The thought of another terrorist attack on the homeland is an unthinkable prospect and every tool to combat such an event will and should be utilized. However, as dire times prevail, the increased need for
transparency and accountability are required to ensure compliance with laws, policies and directives that adhere to the basic tenets of the constitution.

Privacy and security are sometimes described on opposite ends of the spectrum. Transparency is often valued as a means to protect privacy; secrecy is often valued as a means to enhance security. Post 9/11 enhanced security measures were significant and swift changes from previous norms, initially without significant debate or resistance. Over the next several years, these changes were institutionalized through law, without significant public debate (USAPATRIOT ACT, FISA Amendments Act). Leaks of secret programs gave opportunity for privacy advocates and media to raise the debate to public attention. There are advantages for the U.S. Government (USG) to have full throated public debates. Advantages are that transparency would be apparent and thus allow for the public to comment. Disadvantages would be the increased time to put measures into place. This brings us to the current situation: how does the USG continue to use every tool at its disposal to protect the country in a way that optimizes legality, effectiveness and enough transparency to earn public confidence and not impair foreign relations?

A. INTRODUCTION

The issues of legality and privacy with regard to the increased need for intelligence collection has become a major topic of interest particularly since the revelation of the National Security Agency’s (NSA’s) warrantless wiretapping as reported by former NSA contractor, Edward Snowden. In a world that has to balance privacy and security, free speech, the right to bear arms, law enforcement concerns, foreign relations and economic interests, security will normally take precedence but not
in a vacuum. People are more likely to accept with reticence, the need to erode some civil liberties such as pre-boarding airport searches and U.S. Customs re-entry inspections over the loss of life to a security breach. If security did not take precedence, the USG accepts risks that could possibly undermine other interests. However, the slippery slope begins with the erosion of the basic tenets of privacy in the name of security and the erosion further continues with excessive monitoring of phone conversations, internet search habits and the rapid distribution of cameras in our cities. News highlights of criminals who were caught and apprehended due to these cameras such as the Boston bomber who set off pressure cooker bombs at the finish line of the 2013 Boston Marathon, soften the image of these cameras as being intrusive. This paper will examine some of the issues that conflict the use of collection measures, the public threshold for intrusive collection, their legality of use, the threats to privacy and the challenges with provided governmental oversight to ensure these methods are consistent with current laws.

B. TRANSPARENCY

The remedy for excessive secrecy is more transparency to the public and overseers by utilizing Executive Branch oversight mechanisms, Congress, Inspectors General and oftentimes, the media. Many have argued that the best way to equalize the disparate power between the regimes of state and corporate secrecy is to provide everyone with the same access to information. However, to be transparent to some

degree provides information that is useful to those who wish to do harm. Striking this balance is the problem. The need to keep methods secure from those who would do harm, yet provide a level of openness to those who are protected is the desired outcome.

In a perfect world, any program of collection should be legal, effective and transparent. In many cases, the most probable combination to expect is two of the three but not all three. Therefore, in order to have all three components, there will be a degradation in some or all in order to strike a limited balance that will work. Too much transparency will lessen the effectiveness of the program while if not completely legal, there will be minimal transparency.

Privacy is a word that has many meanings, but for the purpose of this paper, the meaning most relevant is secrecy. In some instances, privacy (secrecy) can either be a good thing or a bad thing. Many libertarians would argue that for the government, there should be transparency but for the individual citizen, opaqueness would be a better model. As we discuss privacy for the individual, the need for privacy will have much to do about keeping personal information secure and a concern of what someone else might do with that information if in their possession. People hide from government and government hides from people, and both entities have good and bad reasons for hiding from the other.97 Too much transparency on the governmental side would provide an entry to information for terrorists or others that wish to do harm.

Normally, information collected is more likely to be voluntary than involuntary. Citizens pass their personal information freely via the internet to credit card companies, mortgage bankers, car dealers, retail stores, etc. to enable transactions and purchases. There is trust that this information will only be used in the manner assumed such as to verify credit worthiness or purchase a product. The expectation in these cases is that companies will not do more with personal information than what is outlined in their policies. External collection of this information by an unintended third party is in many cases a breach of a company’s privacy policy and its legal responsibility to its customers. However, it is not illegal for the USG to collect while under a warrant or National Security Letter.

C. LEGALITY AND POLITICS

For some time now, political and public officials as well as several commentators have treated the law as something to be followed when it produces results that the officials believe to meet political agendas, but discarded or slighted for actions pursued for independent reasons. Politicians will care when their constituents care and politicians will act when it’s an issue their constituents will be asked to cast a vote.

The Bush administration at times treated the law as an annoying obstacle when the Foreign Intelligence Surveillance Act\(^8\) (FISA) interfered with what the administration believed was the valuable or necessary warrantless domestic surveillance

of American Citizens. What about state and local officials? Are they worried about public opinions or formal legal sanctions? To whatever extent these issues truly reflect the political aspect of legality, it would appear that acquiescence to the law depends on the political flavor of the moment or the moral convictions of the decision makers.

Perhaps policy officials will “interpret” the rule of law in an effort to meet certain issues that happen to be publicly reprehensible if those issues come to public attention. What if a decision to invade Iraq by the Bush administration in response to the terrorist attacks was based on moral, political and foreign policy matters rather than including the aspect of international rule of law?

The Constitution is silent on intelligence matters, thereby inviting repeated inter-branch struggle. Yet, where the Constitution is most explicit-granting exclusively to Congress the power to declare war, the law of the land has been followed only sporadically. Executive authority is more ambiguous. Where it is spelled out in the Constitution, there is a constructive tension that provides an “invitation to struggle.” Constitutional power has since evolved to embrace a strong executive who directs all international diplomatic initiatives and commands U.S. military forces. However, political decisions, although made by elected officials on behalf of their constituents has a

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102 Project on National Security Reform, Turning ideas into Action, executive summary, September, 2009. This latest report is part of a multiphase study, funded by Congress and led by James M. Lecher, but included notable members of the new Obama administration.
103 Stares, Paul B., and Zenko, Micah, Enhancing U.S. Preventive Action (Council on Foreign Relations Special Report No. 48, October 2009
broader implication and therefore should not be solely made on personal beliefs or motivations but in accordance with the rule of law. There is a process whereby laws can be changed and until such time, the standing law should rule.

D. JUDICIAL OVERSIGHT

Beyond the bubble of Washington DC and its cast of characters, there is a belief in the heartland of America that sinister intelligence personnel are beyond the legal grasp of the law.\textsuperscript{104} Many television shows, although fictional, present people with good intentions on behalf of the government breaking the law and getting away with it only to show up the next episode. While this is fictional television, this is what is depicted and people tend to get a sense that this is reality. Take a newspaper article that reports widespread abuses in intelligence collection. The reaction of many readers ignorant of the political process is that “it must be true, or at least have some elements of truth if it is in the paper”. In reality, there are several lawyers who examine these classified intelligence issues on a regular basis and do their best to hold people accountable.

Of course, the inevitable classification of information sometimes makes it difficult, not impossible to receive legal oversight. With any legal case regarding sensitive or classified information, the lawyers must be vetted and cleared to receive this information. This would entail a background check and signing a Non-Disclosure Agreement regarding the information viewed to ensure confidentiality. This takes an exorbitant amount of time during a legal review process and oftentimes, lawyers who

finally get cleared, tend to stay in the classified realm as they practice law. The good thing is that over time, they are more familiar with the issues and gain more exposure to the challenges of providing legal sufficiency in a classified setting. In this way, one could argue that this process is a form of legal oversight.

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. Justice Sutherland found powers inherent in sovereignty to be extra-constitutional in the 1936 *Curtiss-Wright* case.\textsuperscript{105} As stated by Thomas Jefferson:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest (emphasis in original). The laws of necessity, of self-preservation, of saving our country, by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us: thus absurdly sacrificing the end to the means.\textsuperscript{106}

### E. ADVANCING CIVIL LIBERTIES AND PRIVACY

\textsuperscript{105} *U.S. v. Curtiss-Wright*, note 5. Justice Sutherland’s observations were *dicta*, not essential to the majority’s holding in the case, and his theory has not been accepted by most legal authorities as a basis for wide executive discretion in foreign affairs. See also *The Chinese Exclusion Case*, 130 U.S. 581. 603-04 (1889), in which the Supreme Court held that Congress could legislate to exclude aliens because jurisdiction over its own territory is an incident of every independent nation.

Recommended by the 9/11 Commission report was an attempt to aid the Executive Branch with oversight and accountability, particularly with regard to civil liberties. In 2004, the Privacy and Civil Liberties Oversight Board (PCLOB) was legislatively created. The board is more commonly known as the Civil Liberties Protection Office (CLPO) and its role is to ensure that privacy and civil liberties are considered with regard to implementation of laws, policies and directives are implemented. Although enacted, the vacancies are not always filled by the President in a timely manner. President Obama waited two years into his term before nominating anyone to the board. In addition to this board, the Office of the Director of National Intelligence (ODNI) has a Civil Liberties Protection Officer. The underpinning argument is that although the board was created, how important is the commitment of the executive branch to civil liberties when it took two years to nominate board members?

F. LIBERTY AND SECURITY

Loch K. Johnson

*We know that many Americans are uneasy about CIA and U.S. intelligence activities. They understand the need for information, and even, on occasion, for covert action. But they are uncomfortable with secrecy. And therein lies the value of congressional oversight: the reassurance to Americans that the laws are being obeyed and that there is accountability*.

DCI Robert M. Gates, Hearings, U.S. Senate Committee on Intelligence, 1991

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Congressional efforts to have meaningful oversight have had mixed results particularly in the surveillance area of government. Until leaked information on warrantless surveillance, the executive branch typically refused to bring to light vital areas of concern with regard to these programs. The executive branch has consistently defended the legality and efficacy of these surveillance programs, insisting that the administration acts in accordance with the rule of law and that secrecy has been necessary, and that leaks by government insiders have been criminal and counterproductive. After the terrorist attacks of 9/11, all measures of collection, particularly U.S. surveillance efforts were increased because there was a perception that the Intelligence Community failed to receive vital information to prevent the attacks. The 9/11 commission concluded that the inability of intelligence agencies to learn about and prevent the attacks was not attributable to a lack of legal authority. Of course after the revelation of NSA contractor Edward Snowden regarding the NSA’s Metadata collection on foreign and U.S. persons, the tenor had changed. This initiated immediate public scrutiny and debate over the programs. Could this uproar have been avoided if this debate had taken place prior to initiating the collection efforts? Possibly. The down side

is that so much transparency could be argued to have minimized the effectiveness of the program from inception. This collection has been described at times as lawless,113 yet the architecture constructed to support arguments as to the domestic legality114 and constitutionality of the NSA Metadata Program is extensive.

In the months after the Snowden leaks in 2013, the Obama administration sought to emphasize several aspects of the NSA’s work with regard to the public debate: the danger that transparency could compromise the utility of the NSA’s surveillance efforts;115 the efficacy of the NSA Metadata Program in security intelligence essential to


114 See, e.g., U.N. Secretary-General, Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, U.N. Doc. A/69/397 (Sept. 23, 2014). The question of the NSA’s international law compliance is beyond the scope of this project.

detect and disrupt terrorist threats; and the fact that there had been very few abuses of the power granted to the NSA.\textsuperscript{117}

Presidents have long ordered electronic surveillance without any judicial or congressional participation.\textsuperscript{118} More than a year before the Pearl Harbor attacks, but with war clearly looming with the Axis powers, President Franklin Roosevelt authorized the FBI to intercept any communications, whether wholly inside the country or abroad, of persons “suspected of subversive activities against the Government of the United States, including suspected spies.”\textsuperscript{119} Clearly, the President of the United States can employ any means possible to protect the country from outside aggression.

G. CONCLUSION

The case of legality vs privacy, as complex as it is, appears to make the case that where privacy is connected to law enforcement activities, the expectation of privacy shall be maintained in accordance with the 4\textsuperscript{th} Amendment of the Constitution ("[t]he right of the people to be secure in their persons, houses, papers, and effects, against

\textsuperscript{116} See August 2013 Remarks by the President, supra note 32. During this press conference, President Obama noted the efficacy of the surveillance programs arguably authorized under various sections of the Patriot Act and the Foreign Intelligence Surveillance Act: “[M]y determination was that the two programs in particular that had been an issue—215 and 702—offered valuable intelligence that helps us protect the American people, and they’re worth preserving”); see also Glennon, supra note 26, at 26-27, 29 (discussing the structural incentives for national security administrators to exaggerate the nature and scope of threats to U.S. security).

\textsuperscript{117} See August 2013 Remarks by the President, supra note 32. President Obama insisted that the surveillance programs were not being abused and were being adequately overseen by the Foreign Intelligence Surveillance Court (“What you’re hearing about is the prospect that these could be abused. Now part of the reason they’re not abused is because they’re—these checks are in place, and those abuses would be against the law and would be against the orders of the FISC”).


\textsuperscript{119} United States v. U.S. District Court, 444 F.2d 651, 669–70 (6th Cir. 1971).
unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation). However, where privacy is concerned (as described in this paper to mean surveillance of communications) it takes on a different meaning in the context of protecting the United States from foreign enemies. While civil libertarians desire a model of transparency that allows for sufficient oversight of the intelligence community, the battle of complete transparency vs effectiveness continues. What appears to come through is that there may be limited transparency in overarching policies of collection platforms (the more technical details will remain classified). However, the inherent mistrust of government by its citizenry begs for sufficient oversight mechanisms to allay the fears of government overstepping its bounds. Illustrated throughout this thesis is evidence that after every war or conflict, the intelligence apparatus becomes larger and larger. The greater need for more robust oversight is obvious but appears only superficially in committee meetings, oversight boards, and Offices of the Inspectors General throughout the government. It appears to the untrained masses that until some external force with a voice such as a major news outlet, or the leak of classified information to a news outlet, oversight lays in the background.

Loch Johnson stated, for “most of their history, the nation’s intelligence agencies have enjoyed immunity from close oversight by outside supervisors.”120 It is true that in the realm of intelligence, the task of oversight is handed to a select few who have been vetted with a background investigation, polygraph and any other measures at the disposal of the reviewers. However, throughout this thesis it is noted that real effective

120 Johnson, Bombs, Bugs, Drugs, 201
congressional oversight is reactive in nature, particularly if the information is shared with
the public. Certainly there are required submissions of quarterly and annual reports on
classified activities that are conducted but only the high priority, or more importantly, the
“high visibility” issues garner the most attention. To say that Congress does its due
diligence with regard to oversight of the intelligence community would be a fallacy. The
honest brokers in the intelligence community welcome oversight but in such a dark
world, the process is cumbersome and therefore, extremely ineffective.

In light of the record of abuse revealed by our inquiry, the Committee is not
satisfied with the position that mere exposure of what has occurred in the past will
prevent its recurrence. Clear legal standards and effective oversight and controls are
necessary to ensure that domestic intelligence activity does not itself undermine the
democratic system it is intended to protect.
Church Commission Report

H. CASE STUDIES
Warrantless Surveillance

“Nothing is better worthy of legal protection than private life, or, in other
words, the right of every man to keep his affairs to himself”. E. L. Godkin, written in
1880

In view of today’s technology, it is more important to protect privacy today than
in 1880.\textsuperscript{121} This is especially important when examining the processes of oversight within
the federal government. Accountability mechanisms involving decisions that require
multiple layers of authorization, in some cases, tend to overlap and provide additional

\textsuperscript{121} For clarity of understanding and usage, privacy is used as Alan Westin’s concise definition of privacy:
“Privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to
what extent information about them is communicated to others.” Alan Westin, Privacy and Freedom 7
(1967)
oversight that was not originally considered. Take for example, a decision to collect a phone message on a particular person who was targeted due to affiliation with a known terrorist. Of course the agency conducting the collection has their own process for authorizing the operation which most likely includes, first and second line supervisors, branch chiefs, respective lawyers, etc. But then there are others who are also vested in the collection process along the way that have their own respective approval processes that sometime do not coincide with those providing the original tasking order. Although conflicting in policy, this adds for additional scrutiny by allowing others to become involved in the process.

In the case of the NSA warrantless surveillance program, there were several layers of accountability both within and outside of government that still permitted the program to continue. After an extensive review of the program as it was later challenged, it was deemed that in the interest of national security secrecy, information was withheld that permitted the accountability mechanisms to fall apart, primarily due to lack of information. Clark states in her accountability model that the process of accountability can be viewed in the following stages: informing (the accounting agency or person relates its conduct, or can also be in the form of a self-report), justification (where the legality of the conduct is justified), evaluation (this is where the recipient examines and reviews the conduct and rectification (where the recipient possibly imposes a penalty if not satisfied with the justification).\footnote{Clark, Kathleen, \textit{The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program}, 2010 BYU L. Rev. 357 (2010)} Information at the beginning of the process is the key component because without it, the other three stages cannot take place effectively. When
information is not provided from the beginning, the process will start with the “realization or disclosure” as was the case with Edward Snowden’s release of classified information after the fact. While important to understand the mood of the country in light of the terrorist attacks of 9/11, the underlying fears of the executive branch was to ensure that another attack like this could never happen again, particularly during the current Bush administration. Every possible and “necessary” security measure needed to be undertaken. The justification of the NSA’s collection of phone records where there was a foreign nexus (connection to a foreign entity) was deemed within the interests of national security. Although the extensive collection was cumbersome to manage, it became evident later that collection of every phone record was conducted and if needed, specific targeted information was researched as needed.

In spite of the multiple checks on the executive branch, this program continued from October 2001 until January 2007 when the Foreign Intelligence Surveillance Court (FISC) allowed for the targeting of communications into or out of the United States where there was connection to a terrorist organization.123

National Security Internal Investigations

*It is difficult for me to foresee that increased staff scrutiny of CIA operations would result in either substantial savings or a significant increase in available intelligence information...if there is one agency of the government in which we must take some matters on faith, without a constant examination of its methods and sources, I believe this agency is the CIA.*124 - Senator Richard B. Russell, 1956


124 Smist, 6
Another example of accountability to be examined is during an internal investigation of wrongdoing such as the CIA’s 1973 national security internal investigation of their own illegal conduct. This was prompted by media reporting that the CIA may have aided burglars in the Watergate break in. This prompted then Director of CIA Schlesinger to direct all employees to report any activities conducted by the agency that could possibly be outside the legal purview of the agency.125 (Interesting that DCI Schlesinger directed employees to report illegal activities rather than initially beginning an investigation into the matter). This investigation became known as the “Family Jewels” which detailed illegal activities such as spying on American citizens, political surveillance, interrogation and detention after a NY Times expose revealed the illicit conduct.126 This expose caused severe repercussions throughout the Intelligence Community. A commission formed to examine these allegations found many violations to include:


• Opened approximately a quarter of a million first-class letters between 1953-1973, producing a CIA computerized index of nearly one and one-half million names.

• At least 130,000 first class letters were opened and photographed by the FBI between 1940-1966, in eight U.S. cities.

• Some 300,000 individuals were indexed in a CIA computer system and separate files were created on approximately 7,200 Americans and over 100 domestic groups during the course of CIA’s Operation CHAOS (1967-1973).

• Millions of private telegrams sent from, to, or through the United States were obtained by the National Security Agency from 1947-1975 under a secret arrangement with three United States telegraph companies.

• An estimated 100,000 Americans were the subjects of United States Army intelligence files created between the mid 1960’s and 1971

This form of accountability is “transparency after the fact” when the media broke the story. However, in cases such as these, the likelihood of all information coming forward to the public domain is unlikely, particularly if the activities are classified.

These case studies shed light on the dysfunctional relationships between Congress, the Executive Branch and the Intelligence Community. As this thesis points out throughout, lack of information from the Executive Branch funneled to Congress created an opening for the IC to exceed their authorities in several instances. Only until revelations either by news media, whistleblowers and sometimes diligent legislators would reactive oversight ensue. The lack of intelligence experience of legislators coupled

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127 The Select Committee to Study Government Operations, with Respect to Intelligence Activities.
with issues that do not relate to electoral issues in home states is problematic and until this issue is resolved, effective oversight will not be possible.
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IV. CURRICULUM VITAE - Edwin T. Vogt

Experience

01/2005-Present  US Marine Corps  Arlington, VA.

Assistant Inspector General, Intelligence Oversight

Oversight of USMC Intelligence sensitive and special activities worldwide. Implement policy and training guidance with respect to intelligence oversight issues. Coordinate HQ MARINE CORPS support to the Naval Sensitive Activities Review Board and Senior Review Board. Plan, conduct and report on inspections, evaluations and investigations of intelligence impropriety and waste fraud and abuse in the intelligence arena.

Provided guidance and direction on multi service inspections at CONUS and OCONUS secure locations. Conduct assessments of Sensitive Activities and Sensitive Compartmented Information Facilities and prepared reports with findings and recommendations.

Conducted a 3 year high visibility multi agency investigation of a highly classified security compromise. Briefed senior members of the Office of the Director of National Intelligence, DOD IG, NCIS, representatives of affected Original Classification Authorities, and members of the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence. Briefed members of the Presidents Intelligence Oversight Board on a weekly basis on the status of the investigation.

03/2003  MARINE FORCES CENTRAL COMMAND  KUWAIT

Detachment Chief, Marine Forces Central Command

Provided leadership, direction and supervision for subordinates to support operations in Kuwait and Southern Iraq.

Ensured proper employment / utilization of Counter Intelligence Human Intelligence Equipment. Prepared, delivered instruction in CI HUMINT support; Anti-terrorism Force Protection (AT/FP), Threat Assessment, Enemy Prisoner of War (EPW), and Country/Area studies.

Performed CI FP Source Operations (CFSO's), investigations and debriefs as required. Conducted tactical CI/HUMINT operations to include counter surveillance (CS), threat vulnerability assessments, (TVA's) and security planning for expeditionary airfields in Kuwait to include access, ingress, and egress. Conducted liaison with coordinating agencies.

03/2002  USMC/DEFENSE INTELLIGENCE AGENCY  WASHINGTON, DC
Watch Officer, National Military Command Center

Work in the National Military Joint Intelligence Center (NMJIC), National Alert Center
USMC Watch Floor Desk Officer, assigned to the Intelligence Operations Division, (IO),
Intelligence Estimates Branch, (IOE), Intelligence Situational Awareness Cell, (ISAC).

Maintain situational awareness of the ongoing terrorism crisis for Headquarters Marine
Corps (HQMC) Intelligence Department. Tasks included monitoring of message traffic
for counter terrorism issues, preparation of the intelligence portion of the daily
Operations / Intelligence Summary Brief, draft point papers on terrorism issues, and brief
the Commandant, Assistant Commandant and principal staff officers on a daily basis.

Collect, evaluate, and analysis of potential terrorist threats against the U.S. and its
interests overseas

10/1995   Vertical Systems Analysis Inc.   New York, NY

Owner/Partner

Provided elevator/escalator consulting services for a varied range of property managers,
architects and building owners. Principal duties included drafting proposals for bidding,
preparing specifications for modernization of elevator systems.

Performed the duties of CFO (Chief Financial Officer) required for the Corporation.

Coordinated and managed a work flow of approximately 80 Million Dollars annually to
support elevator construction and modernization within the tristate area. Left business
due to recall to active duty after 9/11 because of critical Military Occupational Specialty

Education   02/2014   University of Phoenix, Phoenix, AZ

BS, Organizational Security and Management (3.82 GPA)

08/2015 Johns Hopkins University   Baltimore, MD

MA, Government, Concentration in National Security

Army Inspector General School, Intelligence Community Officer Course, Federal
Executive Institute, Strategic Debriefing School, Interrogator Prisoner Of War School,
Statement Analysis Course, DEA Counter Drug Managers Course, Counter Intelligence
Officers Course, Security Managers Course

Interests   All facets of Intelligence Operations to include collection, management,
oversight and compliance

References   References are available on request