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PRESIDENTIAL INTELLIGENCE

Samuel J. Rascoff

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Samuel J. Rascoff[*]

When scholars — especially legal academics — talk about intelligence oversight, they typically have in mind a set of processes and institutions designed to deter and detect illegality and abuse. In this Article, I focus on another sense of intelligence oversight and a different institutional actor capable of providing it. The kind of oversight that I describe and endorse is distinguished by its concern with promoting effective intelligence collection while seeking to minimize a wide range of costs, including diplomatic blowback, economic harm to American firms, and intrusiveness that threatens privacy rights. The institution that has begun to furnish this more holistic sort of oversight, and that enjoys conspicuous advantage over preexisting bodies in doing so, is the President, aided by his staff (including those serving on the National Security Council).

Pressured by a constellation of prominent interest group actors, including allied governments and technology firms, the President has begun to weigh in on surveillance policy and to shape the metes and bounds of intelligence collection in a systematic fashion. This development — which I call presidential intelligence — bears a family resemblance to presidential administration, the turn to centralized, political control that has dominated the scholarship and practice of administrative law for over a generation. In this Article, I offer a descriptive account of the rise of presidential intelligence, a qualified normative defense of its value (as an addition to, rather than a replacement of, existing oversight bodies), and a set of prescriptions for how to design institutions in order to realize its full potential.

INTRODUCTION

For a generation we have "live[d] . . . in an era of presidential administration."[1] Whether exercising power directly or through White House units like the Office of Information and Regulatory Affairs[2] (OIRA), Presidents of both parties, employing a variety of mechanisms and summoning a range of justifications,[3] have sought to leave

* Professor of Law, Faculty Director, Center on Law and Security, New York University School of Law. I would like to thank William Banks, Rachel Barkow, Gabriella Blum, Philip Bobbitt, Robert Chesney, Noah Feldman, John Ferejohn, Zachary Goldman, Jack Goldsmith, Ryan Goodman, Philip Heymann, Gavin Hood, Aziz Huq, Samuel Issacharoff, Michael Leiter, Daryl Levinson, Richard Morgan, Trevor Morrison, Matthew Olsen, Richard Pildes, David Pozen, Richard Revesz, and Stephen Slick as well as workshop participants at New York University School of Law, Columbia Law School, and Hofstra Law School for helpful comments and suggestions. David Hoffman, Tyler Infinger, Nishi Kumar, Stephanie Spies, and Timothy Sprague provided excellent research assistance. Gretchen Feltes furnished characteristically superb library assistance.

1 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

2 OIRA is a component of the Office of Management and Budget (OMB), which functions as a clearinghouse for major rules. *See generally* RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008).

3 *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1878–79 (2013) (Roberts, C.J., dissenting).

an imprint on the regulatory state.[4] Presidential administration serves not only as a font of centralized power and control, but also as a source of democratic accountability for an administrative state perennially anxious about its legitimacy. The tectonic shift toward presidential control of agencies has reverberated throughout the federal bureaucracy, including a large swath of the national security state[5] — with the striking exception of the so-called "intelligence community."[6]

A major reason for intelligence's exceptionality is historical. In the aftermath of Watergate and the intelligence scandals exposed by the Church[7] and Pike[8] Committees, the reigning assumption was that, of the three branches of government that might exercise meaningful oversight of the intelligence apparatus, the possibility of heightened presidential authority ought to be taken off the table. That is because the architects of the new oversight took presidential control as a given and saw in the White House–intelligence complex the capacity for tyranny and abuse. To resist executive dominance, they chose to empower the other branches of government and to interpose a range of traditional, as well as internal, separation of powers checks. These checks include the Foreign Intelligence Surveillance Court[9] (FISC), specialized congressional oversight committees,[10] inspectors general within the vari-

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[4] Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 5–7 (1994).

[5] *See* Aziz Huq, *Imperial March*, DEMOCRACY (Winter 2008), http://www.democracyjournal.org/7/6571.php [http://perma.cc/6GHR-ENEC] ("From one angle, the Bush Administration's freewheeling unilateralism when it comes to interrogation and detention is merely the dark side of Clinton's exuberant, and often celebrated, unilateral use of executive agencies."). A similar claim could be sustained with respect to President Obama's significant involvement in drone strikes. *See generally* DANIEL KLAIDMAN, KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY (2012).

[6] *See Member Agencies*, INTELLIGENCE.GOV, https://www.intelligencecareers.gov/icmembers.html [https://perma.cc/2FRZ-E9W7] (listing the seventeen separate organizations that form the "Intelligence Community").

[7] S. Res. 21, 94th Cong. (1975) (establishing a "select committee of the Senate to conduct an investigation and study with respect to intelligence activities carried out by or on behalf of the Federal Government," later called the "Church Committee" after its chairman, Senator Frank Church). For the report issued by the Church Committee, see FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-755 (1976).

[8] H.R. Res. 138, 94th Cong. (1975), *replaced and expanded by* H.R. Res. 591, 94th Cong. (1975) (establishing a committee that came to be known as the "Pike Committee" after its chairman, Representative Otis Pike, to parallel the Senate's "Church Committee"). For the report issued by the Pike Committee, see RECOMMENDATIONS OF THE FINAL REPORT OF THE HOUSE SELECT COMMITTEE ON INTELLIGENCE, H.R. REP. NO. 94-833 (1976).

[9] FISC was established by the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 18 and 50 U.S.C.). 50 U.S.C. § 1803(a) (2012).

[10] *See, e.g.*, *About the Committee*, U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE, http://www.intelligence.senate.gov/about.html [http://perma.cc/HA9T-9VEZ]; U.S. HOUSE OF

ous agencies,[11] and the Intelligence Oversight Board (currently organized as a component of the President's Intelligence Advisory Board (PIAB)).[12] Leading national security law scholarship has also characteristically regarded presidential abuse as one of its points of departure. From Professor Harold Koh's pioneering work 25 years ago[13] to Professor Jack Goldsmith's recent emphasis on the role of "soft law" norms and civil society institutions in constraining the national security executive,[14] scholars have tended to assume that the White House is and ought to be an object, not a source, of intelligence oversight. To practitioners and scholars in this area, the idea of entrusting the President to oversee intelligence is deeply counterintuitive.[15]

But the arrangement seems strange only because of a basic misconception that the intelligence community marches in lockstep with the White House. It does not.[16] In fact, a decentralized intelligence community that has proved adept at empire building[17] and has been largely unconstrained by the political executive has revealed itself to be profoundly vulnerable to questionable intelligence-gathering practices. Indeed, the intelligence community has carried out a range of activities that, while conferring uncertain benefits, have led to significant diplomatic blowback, jeopardized the bottom lines of American industry,

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REPRESENTATIVES PERMANENT SELECT COMMITTEE ON INTELLIGENCE, http://intelligence.house.gov [http://perma.cc/A2SN-WAPA].

[11] For example, in 1989 Congress created an Office of Inspector General in the CIA. Intelligence Authorization Act, Fiscal Year 1990, Pub. L. No. 101-193, tit. VII, 103 Stat. 1711 (1989) (codified as amended at 50 U.S.C. § 3517 (Supp. 1 2013)).

[12] President Ford created the Intelligence Oversight Board with Exec. Order No. 11,905, 3 C.F.R. 90 (1977). It was later superseded by President Carter's Exec. Order No. 12,036, 3 C.F.R. 112 (1979). President Clinton made the Intelligence Oversight Board a part of what was then called the President's Foreign Intelligence Advisory Board (PFIAB) with Exec. Order No. 12,863, 3 C.F.R. 632 (1994).

[13] *See* HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

[14] *See* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, xiii (2012).

[15] There are some exceptions. In a short essay in the *Harvard Journal on Legislation*, James Baker (who has served as a senior intelligence lawyer in government and is currently General Counsel of the Federal Bureau of Investigation (FBI)) expressed the view that "it is first and foremost the President's responsibility to conduct oversight of intelligence activities." James A. Baker, *Intelligence Oversight*, 45 HARV. J. ON LEGIS. 199, 203 (2008).

[16] *See* K.G. Robertson, *The Politics of Secret Intelligence — British and American Attitudes*, *in* BRITISH AND AMERICAN APPROACHES TO INTELLIGENCE 244, 249 (K.G. Robertson ed., 1987) (noting that, compared with overseas counterparts, American spy agencies enjoy "greater independence . . . from direct political control").

[17] *See generally* Michael J. Glennon, *National Security and Double Government*, 5 HARV. NAT'L SECURITY J. 1 (2014).

and pushed the envelope (at the very least) on questions of privacy and civil liberties.[18]

What I refer to as presidential intelligence — the White House's sustained, routinized, and process-driven governance of American spying — takes as its starting point these misalignments between the political executive and the intelligence community. Presidential intelligence seeks to address such misalignments by harnessing the White House's unique capacity to shape the metes and bounds of intelligence collection in a systematic, ongoing way. Presidential intelligence is not merely a good idea; it is an emerging reality on the ground. In this Article, I set out to describe and defend its recent arrival on the scene, and to encourage its future growth through sound institutional design.

I make four main scholarly contributions. First, I show that, as a descriptive matter, the norms of presidential control that have characterized the majority of the regulatory state for decades have recently begun to take hold in the domain of intelligence collection.[19] Transposing the concepts and architectures of presidential administration to national security, and in particular to the world of intelligence, may seem odd, but is essentially plausible.[20] In fact, although they clearly rest on different constitutional foundations, there is a lot to recommend the analogy between the intelligence apparatus and the adminis-

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[18] *See* Loch K. Johnson, *The CIA and the Question of Accountability*, *in* ETERNAL VIGILANCE?: 50 YEARS OF THE CIA 178, 180 (Rhodri Jeffreys-Jones & Christopher Andrew eds., 1997) ("Nor did the Executive Office of the Presidency (EOP) offer reliable accountability over the intelligence establishment that sprawled beneath the White House in the organizational charts of the federal government."). For a diagnosis of the power wielded by the national security bureaucracy, see generally Glennon, *supra* note 17.

[19] My claims are not limited to any particular intelligence agency or collection platform. Whereas many of the post-Snowden developments that I document are particularly focused on electronic surveillance, the conceptual issues they implicate generalize to other intelligence disciplines, such as human intelligence. Furthermore, though critical attention regarding electronic surveillance has centered on the role of the National Security Agency (NSA), other organizations like the FBI have been deeply involved. *See, e.g.*, Charlie Savage, *F.B.I. Is Broadening Surveillance Role, Report Shows*, N.Y. TIMES (Jan. 11, 2015), http://www.nytimes.com/2015/01/12/us/politics/beyond-nsa-fbi-is-assuming-a-larger-surveillance-role-report-shows.html (referring to a recently declassified — though still redacted — 2008 report by the Department of Justice Inspector General assessing the role of the FBI in surveillance under the FISA Amendments Act). In particular, the FBI has been involved in the administration of the telephony metadata program under section 215 of the Patriot Act. *See* Michael Isikoff, *FBI Sharply Increases Use of Patriot Act Provision to Collect US Citizens' Records*, NBC NEWS (June 11, 2013, 11:42 AM), http://investigations.nbcnews.com/_news/2013/06/11/18887491-fbi-sharply-increases-use-of-patriot-act-provision-to-collect-us-citizens-records [http://perma.cc/L6N6-UHA7].

[20] In thinking about the ways that intelligence has previously defied the norms of the administrative state, and in contemplating the path by which that exceptionality is now under pressure, I am indebted to the scholarship of Professor Rachel Barkow, who has questioned the nonapplicability of administrative law norms to the world of criminal law. *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

trative state, beginning with a shared pedigree: Both are mid-twentieth-century transplants to Washington and are uneasy fits with the preexisting traditions and institutional life of American constitutionalism. Both initially grounded their legitimacy in claims of politically neutral technocracy before later broadening their foundations to rely heavily on legal institutions and processes. But over the last generation, their trajectories have diverged considerably. The intelligence apparatus has in large measure retained its strong ideals of bureaucratic independence from politics, even as the balance of the regulatory state has been transformed by ever-increasing presidentialization.[21] The reabsorption of the intelligence state into the mainstream of administrative law and regulation through its own belated presidentialization is powerful proof not of the exceptionality of national security but rather of its banality.[22]

My second main contribution, also descriptive, is to offer an account of how and why the current moment has proved especially propitious for the ascendancy of presidential intelligence. In particular, I call attention to the role that technology and telecommunications firms on the one hand, and allied governments on the other — all themselves intelligence collectors and connoisseurs — have played in catalyzing and shaping the emerging dynamics in this area. Such actors have made common cause with more traditional civil liberties groups in pushing back against a range of intelligence-collection practices. The emergence of separation of powers–type checks furnished by businesses and foreign governments is itself underwritten by heightened levels of transparency and what one scholar has dubbed "the declining half-

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[21] The emergence of presidential intelligence may be better thought of as a reemergence in that previous administrations attempted, but ultimately failed, to get the project off the ground. It is suggestive that Executive Order 12,333, 3 C.F.R. 200 (1982) (governing the intelligence community), never served as a font of centralized control on par with Executive Order 12,291, 3 C.F.R. 127 (1982) (requiring agencies to employ cost-benefit analysis), perhaps because the Iran-Contra scandal impaired the Reagan White House's ability to centralize control of intelligence. *See* GRIFFIN B. BELL WITH RONALD J. OSTROW, TAKING CARE OF THE LAW 139–41 (1982) (noting that in "the first months of the Reagan Administration . . . [t]he Heritage Foundation . . . proposed undoing virtually all intelligence reform measures," including "doing away with the" FISC, *id.* at 139, but concluding that the Reagan Administration was ultimately unable to realize these ambitions).

[22] *Cf.* ROY GODSON, DIRTY TRICKS OR TRUMP CARDS: U.S. COVERT ACTION AND COUNTERINTELLIGENCE 246 (1995) ("In terms of separation of powers, the world of U.S. intelligence has been 'normalized.'"); Gregory F. Treverton, *Intelligence: Welcome to the American Government*, *in* INTELLIGENCE: THE SECRET WORLD OF SPIES, AN ANTHOLOGY 347 (Loch K. Johnson & James J. Wirtz eds., 3d ed. 2011) (noting that, as judged by the way in which congressional oversight of intelligence functions, the intelligence community belongs to the mainstream of American government).

life of secrets,"[23] a development that has altered the incentives that used to operate in this area.[24]

My third contribution is to offer a qualified normative defense of the turn to the institutional presidency,[25] especially key White House elements such as the National Security Council[26] (NSC) (but also less conventional actors in national security, like the National Economic Council[27] (NEC) and the Office of Science and Technology Policy[28] (OSTP)), as a source of political direction and accountability for the post-9/11 intelligence bureaucracy. The normative claim itself has three components.[29] First, I argue that presidential intelligence has the capacity to bolster the policy and economic grounds for intelligence decisions.[30] This "strategic turn" entails a reconceptualization of the purpose of intelligence oversight.[31] Ever since the 1970s-era reforms, the assumption — coded into the DNA of oversight bodies[32] — has

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[23] PETER SWIRE, NEW AM. CYBERSECURITY INITIATIVE, THE DECLINING HALF-LIFE OF SECRETS AND THE FUTURE OF SIGNALS INTELLIGENCE (2015).

[24] *See* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 318–19 (2010). As discussed below, the relationship between visibility and secrecy is complex. *See* Samuel J. Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U. L. REV. 830, 844–56 (2014).

[25] *See* RICHARD P. NATHAN, THE ADMINISTRATIVE PRESIDENCY (1983).

[26] *See infra* pp. 671–72.

[27] The National Economic Council (NEC) performs a centralizing function for economic policy in the White House. *See National Economic Council: Overview*, WHITE HOUSE, http://www.whitehouse.gov/administration/eop/nec [http://perma.cc/F8RE-SZVG]. The National Security Advisor serves on the NEC. *See* Exec. Order No. 12,835, 3 C.F.R. 586 (1994).

[28] The Office of Science and Technology Policy advises the President "on the effects of science and technology on domestic and international affairs." *See Office of Science and Technology Policy: About OSTP*, WHITE HOUSE, https://www.whitehouse.gov/administration/eop/ostp/about [https://perma.cc/H5JZ-3S89]. Notably, one of its divisions is focused on national security and international affairs. *See id.*

[29] *Cf.* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 520 (2015) (recognizing "the constitutional tradition of employing rivalrous institutional counterweights to promote good governance, political accountability, and compliance with the rule of law").

[30] *See, e.g.*, Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry*, 29 CARDOZO L. REV. 53, 55 (2007) ("[T]here may be much to be said for separating the processes of oversight and review . . . [for the] efficacy of national security activities and . . . [for their] propriety."); *cf.* Baker, *supra* note 15, at 200–01 ("When it comes to conducting oversight of the United States intelligence community . . . it seems that our goals should include ensuring that taxpayers' funds are spent appropriately and efficiently on programs and activities that produce useable intelligence information; that intelligence activities are effective in protecting the United States and its interests from foreign threats; and that intelligence activities are conducted in a lawful manner at all times.").

[31] It is worth heeding Professor Amy Zegart's caution that the very meaning of the word "oversight" is contested, with some arguing that it refers to a process of holding hearings and demanding accounts, others emphasizing substantive results in agency behavior and outputs, and still others reading into the term a normative requirement that the agency perform effectively in the national interest. *See* Amy B. Zegart, *Agency Design and Evolution*, *in* THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY 207 (Robert F. Durant ed., 2010).

[32] The literature here is extensive. Important recent contributions include: AMY B. ZEGART, EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY

been that the main task of intelligence oversight is to detect and deter illegality and abuse. Presidential intelligence takes that foundation as a given and seeks to add to it mechanisms designed to promote strategically sound intelligence collection. Second, presidential intelligence has the capacity to enhance the ways in which the intelligence apparatus is made democratically accountable, through a range of institutions and methods (each of them inevitably limited).[33] Third, under many (though not all) specifications, presidential intelligence may enhance certain rights protections — in some cases more effectively than other oversight tools.

My fourth scholarly contribution is to suggest sound institutional design to help realize the potential of presidential intelligence. I call for a mixture of centralized review based in the White House and greater numbers of political appointments (with and without Senate confirmation) in the intelligence agencies.

Presidential intelligence is intended as a complement to existing oversight mechanisms, not a substitute for them.[34] It is certainly not a panacea, any more than presidential administration has proved to be one.[35] I offer no predictions as to where intelligence policy will come to rest in the United States in the coming years, or as to how presidential intelligence will fare in practice if (as I expect) it develops into a defining feature of intelligence governance.[36] But designed smartly,

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(2011); William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209 (2007); and Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).

[33] *See* Daniel Byman & Benjamin Wittes, Essay, *Reforming the NSA: How to Spy After Snowden*, FOREIGN AFF., May–June 2014, at 127, 129 ("Snowden's revelations demonstrated how the implicit bargain that has governed the U.S. intelligence community since the 1970s has broken down.").

[34] Arguing for presidential intelligence does not entail dismissing or downplaying the ongoing significance of traditional oversight institutions or arguing for their demise. Judicial review, congressional oversight, and internal–executive branch checks (emanating from offices of general counsel, compliance chiefs, and various civil liberties–focused bodies) all have important, ongoing roles to play in the complex undertaking of intelligence oversight. Inasmuch as presidential intelligence tends to "crowd out" other overseers — a claim that I tackle head on — that ought to count against the advisability of the project. But this dynamic is certainly not inevitable. In fact, properly conceived and designed, presidential intelligence ought to contribute to the effectiveness of controls exercised by other overseers.

[35] *See* Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 35–36 (2007) (criticizing the tendency of the presidential administration literature to mythologize the capacity of the White House, noting that its "accountability and effectiveness claims present a picture of the President as a white knight uniquely able to vindicate the public interest").

[36] *Cf.* GOLDSMITH, *supra* note 14, at 210 ("To say that the presidential [accountability system] helped generate a consensus about the counterterrorism policies the President can legitimately use does not, unfortunately, mean that it generated the right policies — the ones best designed to prevent terrorist attacks while . . . preserving other values as much as possible."). It has been repeatedly observed that pendulum swings in intelligence matters are pronounced. To take a striking

presidential intelligence represents a meaningful opportunity to enhance the effectiveness, accountability, and attentiveness to civil liberties of a crucially important and inevitably delicate instrument of American power.

The structure of the Article is as follows. In Part I, I aim to contextualize the recent ascendancy of presidential intelligence within the broad range of presidential involvement in intelligence matters. While my approach is necessarily schematic, I aim to show that White House involvement has been systematic and sustained in certain areas but not others. The historical baseline includes significant presidential involvement in some aspects of the intelligence process (consuming the products of intelligence analysts and governing covert action[37]), moderate involvement in others (strategic agenda setting and budgeting), and only modest involvement (until very recently, as I show) in the oversight of what amounts to the core business of the intelligence community: intelligence gathering. Concerning this latter function, conditions unique to the intelligence enterprise — and the distinctive political incentives that sustained them — have, until recently, cut against presidential involvement. Intelligence collection's defiance of the centripetal forces that dominate American public life across so many domains largely persisted even after 9/11. The so-called President's Surveillance Program (PSP) was assuredly an assertion of White House control over certain collection programs, but, insofar as it amounted to an end run around institutions, process, and law, it lacked the core attributes of presidential intelligence. The Office of the Director of National Intelligence (ODNI), a manifestation of centralization within the intelligence bureaucracy, meanwhile, has suffered from an opposite flaw: lacking in White House backing, its considerable institutional potential has not been realized. All along, while White House involvement has been muted, oversight of collection has been dominated by the "legalist" architecture and ethos that grew up (outside and inside the executive branch[38]) over the last generation, which has tended to be both insufficient to the realization of rights-protective in-

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example, on 9/11, former Secretary of State James Baker gave a television interview blaming the intelligence failure on the Church Committee, a vast overstatement that nevertheless conveyed a deep truth about perceptions in national security politics. *ABC Sept. 11, 2001 2:46pm–3:28pm*, at 32:00, 32:50–33:19, INTERNET ARCHIVE (ABC television broadcast Sept. 11, 2001), https://archive.org/details/abc20010911144 6-1528.

[37] I take up the matter of oversight of covert action later in the Article in order to draw a sustained analogy between that process and the oversight of intelligence gathering that figures prominently in this Article. *See infra* section IV.A, pp. 706–12.

[38] *See generally* Neal Kumar Katyal, Essay, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423 (2009).

telligence and ill-equipped as a mechanism for generating sound intelligence policy.

What 9/11 did not achieve in terms of fundamentally reshaping the presidential outlook on intelligence gathering, the Snowden leaks and their aftermath seem poised to accomplish. In Part II, I focus on the changes that are afoot, turning to a detailed description of why and how a President who committed, after his election, to "[g]etting [p]olitics out of [i]ntelligence"[39] has, in fact, taken powerful steps in the other direction. The President has been thrust into the role of overseer concerning a range of intelligence activities carried out by multiple agencies. The emergence of presidential intelligence has been catalyzed — and entrenched — by a new political economy in which telecommunications and technology firms that were explicitly revealed by Snowden to be National Security Agency (NSA) partners,[40] as well as overseas allies that were shown to be NSA targets,[41] have joined privacy advocates in putting pressure on the White House to cut back on certain intelligence-gathering practices. As the President acknowledged in a major policy address that debuted the makings of a new White House–based oversight regime, "I've listened to foreign partners, privacy advocates, and industry leaders."[42] While the evidence of the emergence of presidential intelligence is not yet overwhelming, I document the significant steps taken in Presidential Policy Directive 28[43] (PPD-28), the January 2014 order issued by the White House (accompanied by the aforementioned address), as well as certain even more recent developments that point in the same direction. It is perhaps telling that Professor Cass Sunstein, one of the leading scholars of the regulatory state and a former Administrator of OIRA (an office

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[39] *The Obama-Biden Plan*, CHANGE.GOV, http://change.gov/agenda/foreign_policy_agenda [http://perma.cc/8RPP-TFXD].

[40] Indeed, the very first published leak was of a FISC order compelling Verizon to turn over extensive metadata to the government. *See Verizon Forced to Hand Over Telephone Data — Full Court Ruling*, THE GUARDIAN (June 5, 2013, 7:04 PM), http://www.theguardian.com/world/interactive/2013/jun/06/verizon-telephone-data-court-order [http://perma.cc/QV5Z-8ANC].

[41] *See* David E. Sanger, *New N.S.A. Chief Calls Damage from Snowden Leaks Manageable*, N.Y. TIMES (June 29, 2014), http://www.nytimes.com/2014/06/30/us/sky-isnt-falling-after-snowden-nsa-chief-says.html (discussing NSA Director Admiral Michael Rogers's acknowledgement of the permanently changed dynamics between American intelligence and technology and telecommunications firms as well as foreign allies all stemming from the Snowden revelations).

[42] Press Release, Office of the Press Sec'y, Remarks by the President on Review of Signals Intelligence (Jan. 17, 2014) [hereinafter Presidential Remarks on Signals Intelligence], http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence [http://perma.cc/2QJE-9SJ5].

[43] Press Release, Office of the Press Sec'y, Presidential Policy Directive — Signals Intelligence Activities (Jan. 17, 2014) [hereinafter PPD-28], http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities [http://perma.cc/P97T-DNQ6].

which he has dubbed "the cockpit of the regulatory state"[44]), served on a key presidential committee[45] that issued recommendations about how to move forward after the Snowden leaks. Thus far, the changes have largely conformed to political scientist Professor Terry Moe's category[46] of *centralization* (presidential control based at the White House) rather than his concept of *politicization* (presidential control made effective through appointments in the agencies themselves).[47]

Drawing on the literature of presidential administration — in particular, the scholarship on the White House's direct involvement in regulation,[48] as well as the academic commentary on the role of OIRA — Part III offers a (necessarily preliminary) assessment of the prospects, pro and con, of presidential intelligence. On the positive side of the ledger, the academic literature on OIRA points to two significant upsides of presidential intelligence: an intelligence apparatus in which the competing interests of multiple agencies are harmonized, and one in which some kind of cost-benefit analysis (nontechnical and nonmonetized) of proposed intelligence gathering is carried out. A third key aspect of OIRA practice — quantifying the costs and benefits of a proposed major rule in dollar figures — is less readily translatable to the intelligence arena. Meanwhile, although democratic accountability of the intelligence state will always run up against the limitations imposed by secrecy, more visibility and revelation of the sort that presidential intelligence entails represents a welcome improvement on this front. Here, too, the presidential administration literature establishes a conceptual framework and a standard that presi-

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[44] Cass R. Sunstein, Comment, *Regulatory Moneyball: What Washington Can Learn from Sports Geeks*, FOREIGN AFF., May–June 2013, at 9, 9.

[45] That committee was the President's Review Group on Intelligence and Communications Technologies. *See About the Review Group on Intelligence and Communications Technologies*, OFFICE DIRECTOR NAT'L INTELLIGENCE, http://www.dni.gov/index.php/intelligence-community/review-group [http://perma.cc/L3K3-DX9U].

[46] *See* Terry M. Moe, *The Politicized Presidency*, *in* THE MANAGERIAL PRESIDENCY 144, 157 (James P. Pfiffner ed., 2d ed. 1999).

[47] The line between the two phenomena is not always sharply drawn. Consider the recent career of John Brennan, for example. He served as President Obama's counterterrorism advisor, deepening a close personal bond with the President that he first forged as a campaign advisor. More recently, as CIA Director, Brennan has maintained those close ties. *See* Peter Baker & Mark Mazzetti, *Brennan Draws on Bond with Obama in Backing C.I.A.*, N.Y. TIMES (Dec. 14, 2014), http://www.nytimes.com/2014/12/15/us/politics/cia-chief-and-president-walk-fine-line-.html ("[I]n the 67 years since the C.I.A. was founded, few presidents have had as close a bond with their intelligence chiefs as Mr. Obama has forged with Mr. Brennan.").

[48] The analogy does not work on every level. For example, the sense in which presidential administration represents, in part, an effort to energize agencies suffering from regulatory lethargy has no obvious corollary in the intelligence domain. For this reason, presidential intelligence may (more so than presidential administration) tend to skew "antiregulatory," which is to say, anti-surveillance. That said, once the presidential intelligence "game" is played repeatedly over the coming years, agencies may become more timid, creating a new equilibrium and necessitating a more catalytic approach from the White House.

dential intelligence ought to be able to strive for, if not fully achieve. Finally, presidential intelligence might well promote intelligence that is more attentive to basic rights. Here I return to the role of technology firms as a de facto pressure group for privacy protections. While these firms are principally motivated by the market, not morals,[49] their commitment to privacy is now sufficiently baked into the global business strategies they pursue (and even the devices they bring to the market) that it is likely to prove durable. And even if their antisurveillance sensibilities eventually give out under a new set of economic pressures, presidential intelligence (and the deliberative process on which it depends) will have already taken on an institutional life of its own.

Presidential intelligence also carries certain risks. I shed light on three potential downsides in particular. The first is that presidential control will "politicize"[50] intelligence in the sense of distorting analytic findings in order to placate policymakers with parochial agendas. This potential weakness — discussion of which is a staple of intelligence studies — can profitably be thought of as a species of concern that overhangs all administrative law: how to strike the right balance between technocratic detachment and expertise on the one hand, and political control on the other.[51] While concerns about distorting expert judgment are well taken, they should not doom the enterprise of presidential intelligence any more than they undermine the rationale for presidential administration. Second, I contend with the prospect that presidential intelligence might give impetus to unhealthy institutional dynamics between the White House and Capitol Hill, exacerbated by (and potentially also fueling) the contemporary phenomenon of hyperpartisanship. Here, too, the presidential administration literature offers useful context and, if not cause for optimism, then at least some reason to think that presidential intelligence will not fare any worse on this dimension than presidential administration. Third, I take up a potential vulnerability unique to the intelligence environment — namely that under certain specifications, fusing presidential power with intelligence capabilities might tend to recreate the conditions for abusive practices of the sort that prompted the significant intelligence reforms of the 1970s or that doomed the PSP a decade ago. This last

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[49] *See* Tom Gjelten, *Profit, Not Just Principle, Has Tech Firms Concerned with NSA*, NPR: ALL TECH CONSIDERED (Nov. 20, 2013, 3:19 AM), http://www.npr.org/sections/alltechconsidered/2013/12/12/246232540/profit-not-just-principle-has-tech-firms-concerned-with-nsa.

[50] Politicization in the pejorative sense that intelligence officials use the term, *see infra* section III.B.1, pp. 692–97, bears no resemblance to the way in which Moe deploys the term to refer to a process of presidential control that plays out within the agencies themselves, rather than within the White House. *See infra* notes 93–97 and accompanying text.

[51] *See generally* WILHELM AGRELL & GREGORY F. TREVERTON, NATIONAL INTELLIGENCE AND SCIENCE: BEYOND THE GREAT DIVIDE IN ANALYSIS AND POLICY (2015).

worry has no obvious equivalent in the presidential administration repertoire. It can be ameliorated, if not ultimately resolved, through a renewed commitment to external checks — prominently including judicial review of intelligence matters.

The prospects of presidential intelligence depend not only on macro-level trends, but also on carefully crafted institutional design. In Part IV, I consider two specific approaches that have the potential to stimulate growth in the right direction. First, I take up a presidential "finding" requirement for certain key collection programs or practices, on par with the requirement that the President sign off before covert action is undertaken. Second, I offer support for a more thoroughly politicized (in Moe's sense) intelligence bureaucracy, with greater numbers of presidentially nominated (and potentially also Senate-confirmed) senior officials. Among other things, ramping up political leadership within the intelligence agencies can help counteract the tendency — much commented on of late — of the White House to cross the line from centralized control to micromanagement of the bureaucracy, including (or especially) in matters of national security.[52] Some of these changes are achievable without new legislation, most likely through amending Executive Order 12,333,[53] which governs the intelligence community.

I conclude by contemplating what an intelligence community that has been absorbed into the heartland of the regulatory state — rather than treated as legally and intellectually quarantined from the balance of public law and policy — will look like. Having demonstrated throughout the Article how the scholarly literature on, and the practical experience of, the administrative state can and should inform our understanding of national security law and policy, I suggest some ways in which the gains of trade might flow both ways, pointing out how concepts well known within the precincts of intelligence practice and scholarship might illuminate problems in "ordinary" administrative law.

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[52] *See* Michael Crowley, *Dysfunction Washington Can Agree On*, POLITICO (Nov. 25, 2014, 8:51 PM), http://www.politico.com/story/2014/11/barack-obama-foreign-policy-team-113185.html [http://perma.cc/BK8J-G5V9] (quoting former Defense Secretary Robert Gates to the effect that "[i]t was micromanagement that drove me crazy"); James Pfiffner, *Cabinet Secretaries Versus the White House Staff*, BROOKINGS (Mar. 24, 2015, 11:00 AM), http://www.brookings.edu/blogs/fixgov/posts/2015/03/24-cabinet-secretaries-white-house-staff-pfiffner [http://perma.cc/M4ZC-EGW6].

[53] Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *amended by* Exec. Order No. 13,470, 3 C.F.R. 218 (2009), *reprinted as amended in* 50 U.S.C. § 3001 app. at 418–27 (Supp. I 2013).

I. THE PRESIDENT AND THE INTELLIGENCE COMMUNITY: A BASELINE

As I discuss below, the relationship between the President and intelligence collection has largely defied the logic of presidential control. In order to contextualize the recent changes in this area, it is important to establish a rough baseline of where presidential intelligence stood prior to the developments that I analyze, and how the President has historically related (or failed to relate) to the intelligence state across a wide range of intelligence practices. What emerges is that the scope of presidential involvement in different aspects of intelligence has varied extensively. Certain areas — consumption of intelligence analysis and management of covert action — are highly presidentialized (albeit for quite different reasons). Bureaucratic management of the intelligence agencies — including agenda setting and fiscal oversight — has been somewhat presidentialized. Meanwhile, until the recent developments I document later in this Article, the White House has been largely absent from the systematic oversight of how intelligence is collected — the bread and butter of what spy agencies do.[54]

A. Analysis and Covert Action: Highly Presidentialized

The President has always been the consumer-in-chief of intelligence, and the intelligence community has always stood prepared to advise him (and his senior staff) on issues of concern. Each day, the intelligence community prepares an intelligence digest for the President that is then briefed to him, in person, by the Director of National Intelligence (DNI) (or his designate).[55] The President is able to probe, demand follow-up on issues, and shape the way in which intelligence is presented.[56] The President's incentive to pay attention to his intelligence briefing is essentially strategic: he ignores it and its implications for American security and foreign policy (and, ultimately, his own political standing) at his own peril. This is not to suggest that the President is able to dictate substantive conclusions. Within the analytic arms of the intelligence bureaucracy, including in offices like the Na-

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[54] In practice, many of these intelligence functions are inevitably, and perhaps also increasingly, comingled. *See infra* p. 695. But standard intelligence texts continue to maintain these distinctions, and the intelligence profession continues to adhere to them.

[55] For details on the President's daily brief, see *The Evolution of the President's Daily Brief*, CIA (July 10, 2014, 12:28 PM), http://www.cia.gov/news-information/featured-story-archive/2014-featured-story-archive/the-evolution-of-the-presidents-daily-brief.html [http://perma.cc/3K4M-4UEW].

[56] *See* MICHAEL J. MORRELL, THE TURN TO WAR: 11 SEPTEMBER 2001: WITH THE PRESIDENT (C) (approved for release 2014), http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB493/docs/intell_ebb_022.PDF [http://perma.cc/YY8C-S5A5] (describing the dynamics of the President's daily briefings).

tional Intelligence Council, there is a powerful cultural sensibility that militates in favor of neutrality and a "speak-truth-to-power" ethic. But the President has extensive contact with intelligence analysts and analysis through the daily briefing he and other senior policymakers receive, and he is able to exert influence over the substantive agenda of the intelligence community (including, at least indirectly, over collection) by pointing it toward — or away from — specific areas.[57]

Another critical node of intense presidential involvement in intelligence involves covert action.[58] In the first decades of post–World War II intelligence, Presidents were leery of proximity between the White House and CIA operations,[59] and intelligence officials were, for their part, happy to respect presidential preferences for plausible deniability. This bargain came undone in response to the long shadow of Watergate, as well as the significant findings of malfeasance painstakingly documented by the Church Committee.[60] Intelligence reformers in 1974 imposed the requirement that "no appropriated funds could be expended by the CIA for covert actions unless and until the President found that each such operation was important to national security, and provided the appropriate committees of Congress with a description and scope of each operation in a timely fashion."[61] In other words, the oversight solution for the problem of covert action has been to restrict the availability to the White House of plausible deniability and to compel the President to determine whether a course of action is, on balance, worth the risk. As discussed below, academics debate how robust the presidential finding process is in application.[62] Meanwhile,

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[57] During the 1990s, in the aftermath of the fall of the Berlin Wall and before 9/11, the relationship between the White House and the CIA became more tenuous. When a Cessna 150 landed on the White House lawn during the Clinton administration, a popular inside-the-Beltway joke suggested that it was piloted by CIA Director R. James Woolsey employing a desperate measure to get on the President's schedule. *See* AMY B. ZEGART, SPYING BLIND 71 (2007). This more remote relationship was profoundly altered by the events of 9/11.

[58] *See infra* section IV.A, pp. 706–12. As a former CIA deputy director put it "Covert action is owned by the NSC and implemented by the CIA. Covert action is a tool of the President." GENEVIEVE LESTER, WHEN SHOULD STATE SECRETS STAY SECRET 112 (2015) (quoting Stephen R. Kappes).

[59] *See* Roderick M. Kramer & Dana A. Gavrieli, *Power, Uncertainty, and the Amplification of Doubt: An Archival Study of Suspicion Inside the Oval Office*, *in* TRUST AND DISTRUST IN ORGANIZATIONS 342, 343–45 (Roderick M. Kramer & Karen S. Cook eds., 2004).

[60] I document the historic boom-and-bust cycles of intelligence governance in Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575 (2010).

[61] *See* MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., RL33715, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 1 (2013). For a discussion of subsequent legislative developments, see *infra* pp. 707–08.

[62] *See, e.g.*, W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION (1992); Loch K. Johnson, *The Enduring Myths of Covert Action*, VA. POL'Y REV., Winter 2014, at 52; Jennifer D. Kibbe, *Covert Action and the Pentagon*, *in* 3 STRATEGIC INTELLIGENCE 131 (Loch K. Johnson ed., 2007).

public debate about recent covert-action programs paints a complex picture, with the Senate Select Committee on Intelligence report suggesting that the CIA misled the White House on aspects of its detention and interrogation program,[63] even as President Obama has been characterized as being intimately involved in the drone program.[64] In general terms, though, the statutory demand for White House involvement has been a vector for reshaping the President's incentives on covert action.

B. Organization and Budget: Somewhat Presidentialized

The President enjoys considerable authority to shape the intelligence community from the standpoint of its structure, budget, and organizational priorities. As set out in Executive Order 12,333, the charter order that has governed the intelligence state for over thirty years,[65] the President is empowered to specify the roles and responsibilities of various components of the intelligence community.[66] This executive order looms especially large because statutes governing the allocation of power to intelligence agencies are notoriously vague,[67] or

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[63] *See* S. SELECT COMM. ON INTELLIGENCE, 113TH CONG., COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM 2–8 (Comm. Print 2014) [hereinafter DETENTION AND INTERROGATION REPORT].

[64] Jo Becker & Scott Shane, *Secret "Kill List" Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html ("Mr. Obama has placed himself at the helm of a top secret 'nominations' process to designate terrorists for kill or capture . . . .").

[65] Executive Order 12,333, which itself represented a reform of Executive Order 11,905, 3 C.F.R. 90 (1977), is perhaps best known for its prohibition of assassination. *See* Exec. Order No. 12,333, 3 C.F.R. 200, § 2.11 (1982), *amended by* Exec. Order No. 13,470, 3 C.F.R. 218 (2009), *reprinted as amended in* 50 U.S.C. § 3001 app. at 418–27 (Supp. 1 2013). But it also serves as something like a basic charter for the intelligence community and as the "principal governing authority for United States intelligence activities [overseas]." RICHARD A. CLARKE ET AL., PRESIDENT'S REVIEW GRP. ON INTELLIGENCE AND COMMC'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD 70 (2013) [hereinafter PRG], https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf [https://perma.cc/C6VB-HXNH]. Reform of the order in 2008, designed in large measure to bring it into conformity with the Intelligence Reform and Terrorism Prevention Act of 2004, *see* STEPHEN B. SLICK, THE 2008 AMENDMENTS TO EXECUTIVE ORDER 12333, UNITED STATES INTELLIGENCE ACTIVITIES (2014), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol-58-no-2/pdfs/Slick-Modernizing%20the%20IC%20Charter-June2014.pdf [https://perma.cc/K3GJ-R52Q], generated bipartisan pushback on Capitol Hill, *see* Eli Lake, *Bush's Order on Intelligence Sparks a Furor in Congress*, N.Y. SUN (Aug. 1, 2008), http://www.nysun.com/national/bushs-order-on-intelligence-sparks-a-furor/83046.

[66] *See* Exec. Order No. 12,333, 3 C.F.R. 200.

[67] *Cf.* Robert Chesney, *Further Thoughts on Congressional Oversight, the UBL Operation, and the Title 10/Title 50 Issue*, LAWFARE (May 3, 2011, 5:51 PM), http://www.lawfareblog.com/2011/05/further-thoughts-on-congressional-oversight-the-ubl-operation-and-the-title-10title-50-issue [http://perma.cc/2PCQ-HTTR] (describing the authority the CIA possesses under the National Security Act, including the ambiguous "such other functions and duties related to intelligence af-

in some cases nonexistent.[68] Within the White House, presidential management of the intelligence bureaucracy is pegged to the key — if often unsung — leadership role assigned to the Assistant to the President for National Security (known popularly as the National Security Advisor) by Executive Order 12,333.[69] The National Security Advisor maintains a small, dedicated intelligence staff on the NSC, typically headed by a senior intelligence official.[70]

The White House also has access to the President's Intelligence Advisory Board (a subset of which also functions as the Intelligence Oversight Board), originally conceived by President Eisenhower as a means of furnishing "advice to the President concerning the quality and adequacy of intelligence collection, of analysis and estimates, of counterintelligence, and of other intelligence activities,"[71] though scholars debate its overall utility.[72] In addition, the President has the power to convene ad hoc commissions and task forces. In the aftermath of the Snowden leaks, President Obama actually convened three — one, known as the President's Review Group, was made up of five members with legal and intelligence backgrounds.[73] Another was

fecting the national security," *id.* (quoting 50 U.S.C. § 403-4a(d)(4) (2012)), often referred to as the "Fifth Function," which "has long been construed to encompass covert action," *id.*).

[68] The FBI lacks an organic statute and until the 1970s lacked internal guidelines. Some federal criminal statutes authorize the FBI to investigate particular crimes, *see A Brief History of the FBI*, FBI, http://www.fbi.gov/about-us/history/brief-history [http://perma.cc/GA89-Q2TA], but its authority is defined principally by the Attorney General guidelines and Executive Order 12,333 (and implicitly FISA), *see supra* note 21. Similarly, the NSA has never had an organic statute. President Truman established the NSA with a secret memo. Conor Friedersdorf, *The Secret Story of How the NSA Began*, THE ATLANTIC (Nov. 27, 2013), http://www.theatlantic.com/politics/archive/2013/11/the-secret-story-of-how-the-nsa-began/281862 [http://perma.cc/32MR-KEGY]. At present the NSA is governed by Executive Order 12,333 (and, in practice, FISA). *See supra* note 65.

[69] *See The Role of the National Security Advisor*, BROOKINGS, http://www.brookings.edu/about/projects/archive/nsc/19991025 [http://perma.cc/W95J-BJQJ]. Other NSC posts, like the Assistant to the President for Homeland Security and Counterterrorism, also have extensive points of tangency with intelligence.

[70] Historian of the NSC David Rothkopf has argued that the National Security Advisor position might have been even more influential in intelligence matters than it has proved to be, which would have obviated the need for a Director of National Intelligence. *See* DAVID J. ROTHKOPF, RUNNING THE WORLD: THE INSIDE STORY OF THE NATIONAL SECURITY COUNCIL AND THE ARCHITECTS OF AMERICAN POWER 435–36 (2005) (arguing that the National Security Act of 1947 empowers the NSC to preside over intelligence matters).

[71] *ODNI FAQ*, OFF. DIRECTOR OF NAT'L INTELLIGENCE, http://www.dni.gov/index.php/about/faq?start=1 [http://perma.cc/5QP7-NAXY].

[72] *See generally* KENNETH MICHAEL ABSHER ET AL., PRIVILEGED AND CONFIDENTIAL: THE SECRET HISTORY OF THE PRESIDENT'S INTELLIGENCE ADVISORY BOARD (2012).

[73] *See About the Review Group on Intelligence and Communications Technologies, supra* note 45.

staffed within the NSC itself.[74] And a third was focused on the relationship between "big data" and privacy.[75]

The White House's capacity to shape the agenda of the intelligence bureaucracy in terms of what "requirements" they collect against is also considerable. For example, President Clinton issued Presidential Decision Directive 35 to establish intelligence priorities in a post–Cold War landscape.[76] And in National Security Presidential Directive 26, the George W. Bush Administration provided guidance to the intelligence community by creating "a dynamic process for articulating and reviewing intelligence priorities."[77] The National Intelligence Priorities Framework (NIPF) was established to implement this directive and translate White House priorities into concrete deliverables.[78] The NIPF process offers intelligence "customers" across the national security state an opportunity to rank their various priorities for the intelligence agencies, and then affords the National Security Advisor (working through the interagency process at the NSC) the ability to come up with an overall recommendation to the President.[79] Intelligence professionals complain that the process suffers from a one-way ratchet problem — intelligence requirements never come off the list or get explicitly downgraded in priority.[80] They are merely eclipsed by new priorities.[81] But whatever its limitations, the NIPF provides the White House a significant say in shaping strategic priorities for intelligence.

While the intelligence budgeting process remains opaque and involves bureaucratic sleights-of-hand like "reprogramming," it is clear that the White House, with the assistance of a small, dedicated intelli-

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[74] *See* Lisa Monaco, *Obama Administration: Surveillance Policies Under Review*, USA TODAY (Oct. 24, 2013, 8:43 PM), http://www.usatoday.com/story/opinion/2013/10/24/nsa-foreign-leaders-president-obama-lisa-monaco-editorials-debates/3183331 [http://perma.cc/L4UD-P867].

[75] *See* JOHN PODESTA ET AL., EXECUTIVE OFFICE OF THE PRESIDENT, BIG DATA: SEIZING OPPORTUNITIES, PRESERVING VALUES (2014), https://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf [https://perma.cc/XCY3-59WH].

[76] Press Briefing, Mike McCurry, Office of the Press Sec'y (Mar. 10, 1995), http://fas.org/irp/offdocs/pdd35.htm [http://perma.cc/7P9C-XXDR].

[77] Steven C. Boraz, *Executive Privilege: Intelligence Oversight in the United States*, *in* REFORMING INTELLIGENCE 27, 32 (Thomas C. Bruneau & Steven C. Boraz eds., 2007).

[78] *Id.* It is embodied in a piece of regulation internal to the intelligence community. *See* OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NO. 204, NATIONAL INTELLIGENCE PRIORITIES FRAMEWORK (2015), http://www.dni.gov/files/documents/ICD/ICD%20204%20National%20Intelligence%20Priorities%20Framework.pdf [http://perma.cc/7VTU-CDFP].

[79] Boraz, *supra* note 77, at 32.

[80] The President's Review Group couches one of its recommendations in terms of engaging senior policymaker input on issues that go beyond the first two tiers of NIPF priority. PRG, *supra* note 65, at 168 ("We recommend that: . . . senior policymakers should review not only the requirements in Tier One and Tier Two of the National Intelligence Priorities Framework, but also any other requirements that they define as sensitive . . . .").

[81] And as the old adage has it, if everything is a priority, then nothing is.

gence staff at OMB, plays a key role here. The President's power stems, in part, from the way that the intelligence budget is divided into two components: a National Intelligence Program (NIP), which is managed by the Director of National Intelligence, and a Military Intelligence Program (MIP), which is overseen by the Secretary of Defense.[82] For Fiscal Year 2015, the aggregate amount of appropriations requested for the NIP was approximately $50.4 billion[83] while the request for the MIP budget was approximately $16.6 billion.[84] Concerning both, notional budgets are prepared by the various component agencies, and are then rationalized and coordinated by the DNI and the Secretary of Defense. But it is only at the White House that the two budgets are harmonized before being sent to the relevant committees on Capitol Hill.[85]

C. Intelligence Collection: Weakly Presidentialized

All of the aforementioned points of contact between the White House and the intelligence agencies are, of course, hugely important. But at the heart of my argument is the fact that when it comes to the sustained oversight of how intelligence is collected — what has rightly been called "the bedrock of intelligence"[86] — the President's role has been limited. Certain highly sensitive collection programs do garner White House attention.[87] But it remains the case that the core "business" of spy agencies (running the gamut from the FBI to the CIA to

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[82] MARSHALL C. ERWIN & AMY BELASCO, CONG. RESEARCH SERV., R42061, INTELLIGENCE SPENDING AND APPROPRIATIONS: ISSUES FOR CONGRESS 1 (2013).

[83] Press Release, Office of the Dir. of Nat'l Intelligence, DNI Releases Updated Budget Figure for FY 2015 Appropriations Requested for the National Intelligence Program (Nov. 21, 2014), http://www.dni.gov/index.php/newsroom/press-releases/198-press-releases-2014/1141-dni-releases-updated-budget-figure-for-fy-2015-appropriations-requested-for-the-national-intelligence-program-14 [http://perma.cc/X5T8-NMLW].

[84] Press Release, Dep't of Defense, DoD Releases Revised Military Intelligence Program Request for Fiscal Year 2015 (Nov. 21, 2014), http://www.fas.org/irp/news/2014/11/mip-2015.html [http://perma.cc/LMD5-HFBN].

[85] ERWIN & BELASCO, *supra* note 82, at 10–11.

[86] *See* MARK M. LOWENTHAL, INTELLIGENCE: FROM SECRETS TO POLICY 87 (6th ed. 2015).

[87] The President and his senior staff are involved in signing off on highly sensitive technical collection decisions. *See, e.g.*, BOB WOODWARD, VEIL: THE SECRET WARS OF THE CIA, 1981–1987, at 30 (2005) (tapping undersea cables required presidential sign off); *see also* Ryan Lizza, *State of Deception: Why Won't the President Rein in the Intelligence Community?*, NEW YORKER (Dec. 16, 2013), http://www.newyorker.com/magazine/2013/12/16/state-of-deception [http://perma.cc/2YKP-EL6K] (describing a briefing President Obama received in early February 2009 setting out substantial NSA compliance issues with FISC orders governing its metadata program, and the President's decision to proceed with the program when Judge Walton on the FISC was threatening to shut it down); Presidential Remarks on Signals Intelligence, *supra* note 42 ("I maintained a healthy skepticism toward our surveillance programs after I became President. I ordered that our programs be reviewed by my national security team and our lawyers, and in some cases I ordered changes in how we did business.").

the NSA, and so on) is largely ungoverned by the White House. Intelligence scholars have long called for tighter political control of intelligence collection, such as when Professor Harry Howe Ransom recommended that "[n]o foreign secret action should be undertaken until after the most careful weighing of risks against possible gains, and particularly a careful and realistic analysis of the prospects for secrecy and the consequences of public exposure."[88] But unlike the case of covert-action regulation, there has been (at least until Snowden) no watershed culminating in a formal demand that Presidents pay systematic attention to intelligence gathering. To understand why, it is useful to step back and consider the sorts of centripetal forces that operate across the broad sweep of American public life, and to analyze why they have tended not to apply in this area.

Although the "institutional presidency" is an artifact of the New Deal,[89] and the Executive Office of the President came about in 1939,[90] positive political science theories until recently tended to focus on the workings of Congress at the expense of the presidency.[91] But Moe and Scott Wilson accurately perceived that the conditions of modern political life favored an ever-growing role for Presidents because presidential incentives to intervene in any given issue were driven by the politics of accountability.[92] As Moe had previously argued, "the expectations surrounding presidential performance far outstrip the institutional capacity of presidents to perform. This gives presidents a strong incentive to enhance their capacity by initiating reforms and making adjustments in the administrative apparatus surrounding them . . . ."[93] When it comes to the assertion of control over the bureaucracy, two strategies are available to Presidents. First, through a process of "centralization," "presidents can move toward coherent central control by setting up their own policymaking structures inside the

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[88] HARRY HOWE RANSOM, THE INTELLIGENCE ESTABLISHMENT 247 (1970); *see also* Kenneth deGraffenreid, *Intelligence and the Oval Office*, *in* 7 INTELLIGENCE REQUIREMENTS FOR THE 1980'S: INTELLIGENCE AND POLICY 9, 16 (Roy Godson ed., 1986) ("If a president is interested in having a closer look at one issue than at another, he ought to, even if it means a reordering or restructuring of the intelligence community's collection and analytic efforts.").

[89] *See generally* JOHN P. BURKE, THE INSTITUTIONAL PRESIDENCY (2d ed. 2000).

[90] *See* FRANKLIN DELANO ROOSEVELT, *The President Presents Plan No. I to Carry Out the Provisions of the Reorganization Act* (Apr. 25, 1939), *in* 1939 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 245, 249 (Samuel I. Rosenman ed., 1941).

[91] *See* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 1–2.

[92] *Id.* at 19 ("The continuing problem for presidents, though, is that they have too little control, not too much, and they need to build an institution that helps them do a better job of overcoming the tremendous obstacles to leadership the system places in their way. This is what the presidential team, the various presidential organizations, and the strategies of politicization and centralization are all about, and it is what the institutional presidency as a whole is all about. This is how presidents fight back: with structures that enhance their power.").

[93] Moe, *supra* note 46, at 157.

White House, incorporating people of their own choosing from the departments, the agencies, and the Executive Office, and pulling salient issues of public policy into the presidency for debate and resolution."[94] The creation of regulatory review within OMB under President Reagan was an important manifestation of this sort of centralizing impulse.[95] So was President Clinton's more personal — and more selective — involvement in certain signature policy arenas documented by then-Professor Elena Kagan in her landmark article that conveyed Moe's insights into the heartland of administrative law.[96] The second strategy for the President to assert control over the bureaucracy is "politicization," which entails the assertion of presidential control through the appointment of officials in the agencies in order "to ensure that important bureaucratic decisions are made, or at least overseen and monitored, by presidential agents."[97] As then-Professor David Barron has put it, "for the last three decades, Presidents have been doing much more than looking for ways to wrest discretionary decision-making power *from* agencies. Over that same period of time, Presidents also have been making novel and aggressive use of their powers of appointment to remake agencies in their own image."[98]

Returning to the intelligence orbit, and the absence of sustained, routinized presidential involvement in intelligence collection, it is necessary to consider the preexisting constellation of incentives and institutional dynamics. First, up until recently, there was no obvious incentive for the President to superintend intelligence collection methods akin to the President's incentives to pay close attention in his daily consumption of intelligence analysis. Quite the opposite, the President has, over the years, come to embrace his marginal status as overseer of intelligence-gathering methods. Intelligence oversight, historically a secret means for governing secret programs and processes, offered few reliable political benefits. As intelligence scholar Professor Amy Zegart has observed:

> Intelligence is in many respects the worst of all oversight worlds: It concerns complicated policy issues that require considerable attention to mas-

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[94] *See* Moe & Wilson, *supra* note 91, at 18–19.

[95] Former OIRA Administrator Sally Katzen has remarked on how important it is to OIRA that it sits within the institutional presidency at OMB. *See* Sally Katzen, Correspondence, *A Reality Check on an Empirical Study: Comments on "Inside the Administrative State*," 105 MICH. L. REV. 1497, 1498 (2007) ("[T]he centralized review of rule-makings is only one piece of presidential control. [OMB] presides over the whole mosaic, where review of rule-making occurs along side review of legislative proposals, review of Executive Orders, and, very importantly, review of resource (budget) decisions.").

[96] *See* Kagan, *supra* note 1, at 2310 ("More than any other player in the political system, the President is in practice, even if not in constitutional theory, responsible for governance.").

[97] *See* Moe & Wilson, *supra* note 91, at 18.

[98] David J. Barron, Foreword, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008).

> ter, deals with highly charged and controversial policies that are fraught with political risk, requires toiling away in secret without the promise of public prestige, and provides almost no benefit where it counts the most, at the polls.[99]

Concerning secret intelligence collection, the public would not blame the President because there would be no visible problem for which blame needed to be assigned. At the same time, for a President to become enmeshed with the management of intelligence collection carried potential downsides, including the always salient opportunity costs measured in efforts not expended on issues offering political rewards, as well as potential proximity to a set of activities that, by design, push the outer limits of legality. If the President could not benefit politically from investment in oversight of collection, and if he stood to lose a great deal, it would obviously be advisable to cede ground on oversight issues to the coordinate branches of government. Certainly the intelligence agencies themselves (which acted as an unopposed interest group of sorts in this domain[100]) never sought out greater supervision from their reluctant political principal.[101] Reinforcing the incentives of presidential noninvolvement was a lack of institutional mechanisms and legal prompts for focusing White House attention. As noted above, two of the most important mechanisms for engaging the President on intelligence matters — the President's daily brief and the covert-action finding — did not speak directly to the oversight of collection.

The post-9/11 counterterrorism imperative,[102] for all the profound changes in national security policy, law, and institutional design that it ushered in, did not fundamentally recast the President's relationship to intelligence collection. The well-known story of the President's Surveillance Program (PSP), codenamed "STELLAR WIND," confirms

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[99] ZEGART, *supra* note 32, at 115–16. Zegart's focus is on congressional oversight, but her observation generalizes beyond Capitol Hill.

[100] *Cf.* Johnson, *supra* note 18, at 194 (discussing the lobbying efforts undertaken by the CIA on its own behalf).

[101] Not that there are no bureaucratic incentives pointing in this direction. For example, former CIA acting General Counsel John Rizzo has written that he should have sought greater congressional oversight of the legal foundations of the CIA's interrogation program in order to more effectively distribute political risk. *See* JOHN RIZZO, COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA 200–01 (2014).

[102] It is useful to bear in mind that American counterterrorism did not begin in September 2001. In 2000, President Clinton and his advisors undertook secret efforts directly with the Northern Alliance in Afghanistan to acquire intelligence to attack Osama bin Laden. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, EXECUTIVE SUMMARY (2004), http://www.9-11commission.gov/report/911Report_Exec.htm [http://perma.cc/ZS2B-56GQ].

this point.[103] Although the President and some of his senior advisors were directly involved in authorizing the PSP, that involvement did not amount to a manifestation of presidential intelligence in the sense that this Article employs the concept.[104] First, and most fundamentally, presidential intelligence as I conceive it depends on the existence of sustained, routinized governance by the White House and its components, especially the NSC. In this respect, the PSP was the antithesis of presidential intelligence. It was the product of an intensely secretive effort that was unable to withstand legal scrutiny from within the executive branch and effectively collapsed under its own weight when aspects of the program came to light. Furthermore, the secrecy with which the PSP was carried out, including within the government itself, is not reflective of the baseline assumptions that have lately catalyzed and shaped presidential intelligence. Nor did the PSP feature the sorts of internal processes that are central to the enterprise of presidential intelligence. It was certainly not marked by thorough assessments of risk that took into account far-reaching factors such as economic and diplomatic fallout. It was only when the Bush Administration made its case for aspects of the program to the entire Congress in 2007 and 2008 that the sorts of tradeoffs inherent in electronic surveillance at scale, such as its potential impacts on telecommunications firms (which sought and obtained immunity from Congress), were considered.[105]

Nor did the creation of the ODNI, the result of a recommendation of the 9/11 Commission,[106] signify presidential control. A superagency meant to sit atop the entirety of the intelligence bureaucracy, the ODNI only fortified the independence of the intelligence community by interposing another layer of bureaucracy between the President and the spy agencies.[107] This was partly by design; President Bush fateful-

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[103] The program was first revealed by the *New York Times* in 2005. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES (Dec. 16, 2005), http://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html.

[104] Michael Hayden, as NSA Director, embraced the PSP. He was subsequently tapped by President Bush to serve as Deputy Director of National Intelligence and then Director of the CIA. *See* Dan Eggen & Walter Pincus, *Campaign to Justify Spying Intensifies*, WASH. POST (Jan. 24, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/01/23/AR2006012300754_pf.html [http://perma.cc/NBM6-UKV6]. Then-DNI John Negroponte did not offer a public defense of the program, leaving Hayden in charge. *See* RICHARD A. POSNER, COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS 71–72 (2007).

[105] The FISA Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 18 and 50 U.S.C.), represented a concession by the White House of the PSP's unviability as a manifestation of presidential power.

[106] For a thoughtful insider's view of this process, see MICHAEL ALLEN, BLINKING RED: CRISIS AND COMPROMISE IN AMERICAN INTELLIGENCE AFTER 9/11 (2013).

[107] *See* RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at 140–42 (2005). This squares with Barron's assessment of OIRA. *See* Barron, *supra* note 98, at 1112 ("Far from imposing a presidential/political view of the world on top of an administrative/expert one, OIRA review is better conceptualized as instituting

ly rejected a proposal that would have lodged the DNI within the White House.[108] The statute also reflected a bitter compromise between intelligence reformers and backers of the Pentagon, such that the DNI's authority was sharply curtailed from the start.[109] It hasn't helped that in its first decade there has been high turnover in the top job, or that DNIs have been repeatedly outmaneuvered by bureaucratic rivals — most notably when then–CIA Director Leon Panetta managed to scuttle DNI Admiral Dennis Blair's effort to dislodge the CIA from its historic role as the lead intelligence presence in American embassies throughout the world.[110] The fight was ultimately adjudicated by the Vice President in favor of the CIA.[111] Although the DNI is himself picked by the President and confirmed by the Senate,[112] the organization as a whole seems to have foundered without significant White House ties and prestige. Intelligence scholar Professor Loch Johnson is too harsh in deeming the DNI a "cardboard cutout," but his criticism is not baseless.[113]

To say that centralized political control of intelligence collection has generally been weak is not to suggest that intelligence gathering has been altogether impervious to oversight. Legalist institutions and processes have played an important role, helping to determine "whether [the] Government's intelligence activities [are] governed and controlled consistently with the fundamental principles of American constitutional government" and to interpose "effective measures to prevent intelli-

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a new layer of technical (even neutral, bureaucratic) review, but one that is much more deregulatory in orientation because of the substantive inquiry that it requires OIRA analysts to undertake.").

108 ALLEN, *supra* note 106, at 65. As 9/11 Commission Executive Director Philip Zelikow testified, "We recommended [locating the ODNI within] the executive office of the president because of the need for proximity to the president and the National Security Council." *Id*. Ultimately the proposal was rejected out of concern that placement in the White House would politicize intelligence. *See id*.

109 So much so that an experienced Washington hand like Robert Gates writes that he declined President Bush's overture to become the first DNI when he read the statute and realized how weak the position was. In the intelligence lore of contemporary Washington, this moment sealed the fate of the ODNI. *See* Robert M. Gates, Opinion, *Racing to Ruin the CIA*, N.Y. TIMES (June 8, 2004), http://www.nytimes.com/2004/06/08/opinion/racing-to-ruin-the-cia.html (suggesting of the as-yet-to-be-created DNI that the "intelligence czar would, in fact, be an intelligence eunuch"); David Ignatius, Opinion, *Gates's Next Mission*, WASH. POST (Aug. 7, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/08/06/AR2008080602511.html [http://perma.cc/M63F-QK8T].

110 *See* Mark Mazzetti, *Turf Battles on Intelligence Pose Test for Spy Chiefs*, N.Y. TIMES (June 8, 2009), http://www.nytimes.com/2009/06/09/us/politics/09intel.html.

111 Bobby Ghosh, *Overseas Turf War Between the CIA and DNI Won't Die*, TIME (Nov. 6, 2009), http://content.time.com/time/nation/article/0,8599,1936129,00.html.

112 *See* H. COMM. ON OVERSIGHT AND GOV'T REFORM, 112TH CONG., POLICY AND SUPPORTING POSITIONS 177 (Comm. Print 2012) [hereinafter PLUM BOOK].

113 LOCH K. JOHNSON, NATIONAL SECURITY INTELLIGENCE 178 (2012).

gence excesses."[114] Institutionally, legalist oversight is typically associated with separation of powers checks like the FISC and congressional intelligence committees. But in practice, much of the checking for compliance with law takes place within the executive branch through a wide range of institutional actors. Offices of general counsel within the various intelligence agencies have swollen in size and institutional significance over the last generation.[115] The NSA now features an office of compliance, and a number of intelligence agencies have dedicated civil liberties officers.[116] Inspectors general wield substantial power across the intelligence state.[117] The Department of Justice also plays a pivotal role in providing legalist oversight, through everything from Office of Legal Counsel (OLC) memos, to the formulation of guidelines for FBI surveillance,[118] to the role of the Attorney General in authorizing certain types of electronic surveillance[119] as required by the Foreign Intelligence Surveillance Act[120] (FISA) and in approving each intelligence agency's internal regulations for collection pursuant to Executive Order 12,333.[121] Finally, quasi-independent entities have figured in legalist oversight. The (largely moribund) Intelligence Oversight Board nominally superintends compliance with a wide range of legal constraints,[122] while the bipartisan Privacy and Civil Liberties Oversight Board (PCLOB)[123] has recently assumed an important role

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114 S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK II: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-775, at v (1976). Professor Margo Schlanger argues that there is a causal relationship between the dearth of policy-based review and the availability of legalist oversight in that the "relentless focus on rights and compliance and law . . . has obscured the absence of what should be an additional focus on interests, or balancing, or policy." *See* Margo Schlanger, *Intelligence Legalism and the National Security Agency's Civil Liberties Gap*, 6 HARV. NAT'L SECURITY J. 112, 118 (2015).

115 *See* RIZZO, *supra* note 101, at 44 (recounting a three-decades-long career as a lawyer at the CIA).

116 *See* Schlanger, *supra* note 114, at 190–91.

117 *See* Sinnar, *supra* note 32, at 1032 ("I identify five dimensions of rights oversight consistent with IGs' statutory mandate and analyze how IG reviews both contributed to these objectives and sometimes failed to do so: increasing transparency, identifying rights violations and wrongful conduct, providing relief for victims, holding government officials accountable for abuses, and revising agency rules to prevent future abuse.").

118 *See, e.g.*, FBI, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE (2011).

119 *See* 50 U.S.C. § 1802 (2012).

120 *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 18 and 50 U.S.C.).

121 Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *amended by* Exec. Order No. 13,470, 3 C.F.R. 218 (2009), *reprinted as amended in* 50 U.S.C. § 3001 app. at 418–27 (Supp. I 2013).

122 *The President's Intelligence Advisory Board and Intelligence Oversight Board*, WHITE HOUSE, https://www.whitehouse.gov/administration/eop/piab [https://perma.cc/A82D-5TH4].

123 The PCLOB came to enjoy certain measures of independence after an early brouhaha that centered on top-down White House control. *See* Lanny Davis, *Why I Resigned from the President's Privacy and Civil Liberties Oversight Board — And Where We Go from Here*, THE HILL (May 18, 2007, 2:15 PM), http://thehill.com/blogs/pundits-blog/the-administration/34214-why-i

in legalist oversight of counterterrorism measures.[124]

And yet, as I elaborate below, legalist oversight of intelligence collection is no substitute for presidential control. This is partly because the ambition of legalist oversight is considerably narrower; it does not aspire (and in any event is not equipped) to engage with the strategic wisdom of intelligence gathering. But even when it comes to attending to privacy and civil liberties, existing legalist controls are wanting, as Professor Margo Schlanger has recently argued.[125] This is due to questionable legal interpretations,[126] flawed compliance practices, and imperfectly designed oversight bodies like the FISC, which has struggled with a lack of in-house technical expertise, the absence of an adversarial structure,[127] and insufficient "capacity to investigate issues of noncompliance."[128] Furthermore, when it comes to the large swaths of intelligence collection governed by Executive Order 12,333 — which dwarf the amount of collection under FISA — legal controls are generally less robust, predicated as they are on internal agency regulations promulgated under the order.[129] For this reason, to a growing number

-resigned-from-the-presidents-privacy-and-civil-liberties-oversight-board--and-where-we-go-from-here- [http://perma.cc/WPD2-ZW88]. It is still plagued by political problems. *See* Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 HARV. C.R.-C.L. L. REV. 289, 316 (2015) ("[T]he ideological divides that contributed to the Board's long dormancy have resurfaced to thwart consensus on liberty-security questions."). And its overall impact remains uncertain; Schlanger has recently referred to the board as "a blue-ribbon-commission type organization with no enforcement or other executive function." Schlanger, *supra* note 114, at 166.

124 *See, e.g.*, PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 104 (2014) ("Because the oversight mandate of the Board extends only to those measures taken to protect the nation from terrorism, our focus in this section is limited to the counterterrorism value of the Section 702 program, although the program serves a broader range of foreign intelligence purposes.").

125 *See* Schlanger, *supra* note 114, at 172–88.

126 *See, e.g.*, Laura K. Donohue, *Bulk Metadata Collection: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757 (2014); Laura K. Donohue, *Section 702 and the Collection of International Telephone and Internet Content*, 38 HARV. J.L. & PUB. POL'Y 117 (2015).

127 The USA Freedom Act of 2015 provides a mechanism for tapping amici curiae to represent nongovernmental perspectives before the FISC. Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015, Pub. L. No. 114-23, tit. IV, § 401, 129 Stat. 279 (to be codified at 50 U.S.C. § 1803(a)(i)).

128 Carol D. Leonnig, *Court: Ability to Police U.S. Spying Program Limited*, WASH. POST (Aug. 15, 2013) (quoting Judge Reggie B. Walton, U.S. District Judge for the District of Columbia), http://www.washingtonpost.com/politics/court-ability-to-police-us-spying-program-limited/2013/08/15/4a8c8c44-05cd-11e3-a07f-49ddc7417125_story.html [http://perma.cc/76L3-NS9X]. The full impact of this observation emerges in light of circumstances such as those described in a 2011 opinion of the FISC in which Chief Judge Bates expressed the view that the court's certification of surveillance under Section 702 had been predicated on a "misperception . . . buttressed by repeated inaccurate statements made in the government's submissions, and despite a government-devised and Court-mandated oversight regime." [Redacted], 2011 WL 10945618, at *5 n.14 (FISA Ct. Oct. 3, 2011).

129 Exec. Order No. 12,333, 3 C.F.R. 200 (1982), *amended by* Exec. Order No. 13,470, 3 C.F.R. 218 (2009), *reprinted as amended in* 50 U.S.C. § 3001 app. at 418–27 (Supp. I 2013).

of scholars and privacy activists, collection under 12,333 represents the next frontier of intelligence controversy.[130]

II. The Emergence of Presidential Intelligence

While the emergence of presidential intelligence does not lend itself to precise periodization, it is my contention that the revelation of surveillance practices by Edward Snowden can be thought of as the fulcrum of the transition. Goldsmith captures the moment and its upshot with precision:

> Pre-Snowden, the US government faced few constraints in its collection and analysis other than what the law imposed, what its technology could achieve, and what its large budget permitted. Within these constraints, it could focus solely on the national security benefit side of communications surveillance, for there were few costs, and practically no political costs, to it. In the post-Snowden world, NSA collection programs are very costly along many dimensions, and the US government faces many tradeoffs and conflicting interests.[131]

Under conditions of unprecedented visibility, political blame was assigned to the White House for perceived intelligence excesses and the President was compelled to assume greater control of the issues. The particular causal mechanisms that prompted presidential intelligence to take hold are inevitably numerous and overlapping.

The Snowden leaks themselves (which came on the heels of the Julian Assange revelations and have already been followed by others), as well as the White House attention these leaks generated, can be seen as a predictable response to the exponential growth that the intelligence bureaucracy has undergone since 9/11. Massive growth has increased the risk surface for leaks, both in the sense that it has become that much harder to ensure the impenetrability of a greatly enlarged and complex workforce[132] (Snowden was working as a contractor) and

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[130] Notably the PCLOB has committed to studying surveillance conducted pursuant to 12,333. *See* Press Release, Privacy & Civil Liberties Oversight Bd., PCLOB Announces Its Short-Term Agenda (Sept. 3, 2014), http://www.pclob.gov/newsroom/20140807.html [http://perma.cc/RP6Q-ZP9R]. Informing the debate is an OLC memo (revealed by Senator Sheldon Whitehouse) that expresses the view that Presidents are not bound by the terms of executive orders (including Executive Order 12,333) in that departures from orders are plausibly deemed modifications. *See* 153 CONG. REC. 33,492–94 (2007) (statement of Sen. Whitehouse).

[131] *See* Jack Goldsmith, *A Partial Defense of the Front-Page Rule*, HOOVER INSTITUTION: THE BRIEFING (Jan. 29, 2014), http://www.hoover.org/research/partial-defense-front-page-rule [http://perma.cc/4L2Y-MQQ8].

[132] *See, e.g.*, David Omand, *Ethical Guidelines in Using Secret Intelligence for Public Security*, 19 CAMBRIDGE REV. INT'L AFF. 613, 616 (2006) ("The British Security Service will, for example, by 2008 be double the size it was before 9/11."); *see also* Charles Stross, Argument, *Spy Kids*, FOREIGN POL'Y (Aug. 29, 2013), http://foreignpolicy.com/2013/08/29/spy-kids [http://perma.cc/2HBG-FKZN] (emphasizing the mobility of labor among the next generation of technology experts and its likely effects on the NSA workforce and its ethos).

because the expanded ambitions of post-9/11 intelligence have created more potential points of friction that could, in turn, galvanize insiders to expose what they perceive as official excess. Indeed, thinking even more macroscopically about the nature of technology itself, it has both significantly expanded the capacities of intelligence agencies to collect information and massively increased vulnerability, for example by empowering individuals within the intelligence apparatus to expose official practices on a heretofore unimaginable scale. Professor Peter Swire has convincingly argued that secrets have a "declining half-life" and that intelligence agencies fail to internalize this reality at their own peril.[133] Swire's view appears to have shaped one of the recommendations of the President's Review Group on which he served: "[W]e should not engage in any secret, covert, or clandestine activity if we could not persuade the American people of the necessity and wisdom of such activities were they to learn of them as the result of a leak or other disclosure."[134] While all of these structural accounts undoubtedly contain explanatory power, my account emphasizes the ways in which recent revelations (and the ongoing, realistic prospect of more) have unleashed new patterns of interest group involvement in this area. Regardless of the complex reasons for its emergence, presidential intelligence is not likely to fade from the scene when the Snowden moment has come and gone.[135]

A. The New Political Economy of Intelligence

Since 9/11, there has certainly been interest group contestation in national security, with civil liberties groups tending to oppose a range of government policies that they view as privileging security over core constitutional rights of expression, liberty, due process, and privacy.[136] But what is distinctive about the post-Snowden developments is that other, arguably more powerful, groups have united with privacy activ-

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133 *See* SWIRE, *supra* note 23.

134 *See* PRG, *supra* note 65, at 170; *see also* Goldsmith, *supra* note 131 ("Secret intelligence actions — especially the ones that would most likely engender outrage, surprise, debate, or legal controversy — are increasingly difficult to keep secret.").

135 The ACLU's Jameel Jaffer rightly observed "that Congress isn't the only forum in which surveillance reform can be achieved," emphasizing that "technology companies whose cooperation the government needs in order to conduct surveillance have already taken multiple steps to limit government surveillance." Jameel Jaffer, *There Will Be Surveillance Reform*, JUST SECURITY (Nov. 20, 2014, 11:15 AM), http://justsecurity.org/17622/surveillance-reform [http://perma.cc/8TTL-KNRF].

136 *See, e.g.*, *NSA Surveillance*, ACLU, http://www.aclu.org/issues/national-security/privacy-and-surveillance/nsa-surveillance [http://perma.cc/87MP-E3W9] (detailing the organization's challenges to intelligence programs and practices); *NSA Spying on Americans*, ELECTRONIC FRONTIER FOUND., http://www.eff.org/nsa-spying [http://perma.cc/8GSF-ZLXA] (same).

ists to challenge official surveillance policy.[137] This is not to devalue the work of privacy groups, which themselves have proved technologically capable[138] and politically nimble.[139] Still, the fact that civil liberties advocates have resisted intelligence practices of late is hardly news; they have done so with mixed success for well over a generation. The business firms and foreign governments who have now added their voices to the discussion bring considerable economic and diplomatic clout to the table, as well as sophistication about intelligence, being connoisseurs and practitioners themselves.[140] It had previously been written of intelligence that "[f]ew interest groups exist in this policy domain."[141] But the Snowden revelations helped to usher in a change on this front.[142] Under pressure from this new constellation of actors, the White House has been forced to recalibrate its own out-

[137] *See, e.g.*, Sam Gustin, *Apple, Google, Facebook Join Civil Liberties Groups for NSA Transparency Push*, TIME (July 18, 2013), http://business.time.com/2013/07/18/apple-google-facebook-join-civil-liberties-groups-for-nsa-transparency-push.

[138] *See, e.g.*, *Surveillance Self-Defense: Tips, Tools and How-Tos for Safer Online Communications*, ELECTRONIC FRONTIER FOUND., http://ssd.eff.org/ [http://perma.cc/ZVL9-MGSZ].

[139] *See* James Risen, *Bipartisan Backlash Grows Against Domestic Surveillance*, N.Y. TIMES (July 17, 2013), http://www.nytimes.com/2013/07/18/us/politics/bipartisan-backlash-grows-against-domestic-surveillance.html.

[140] My argument does not depend on the motivations driving firms and allies. It rests solely on their power and their ability to lean on the White House to achieve reforms. As a descriptive matter, the fact of interest group pressure on the President concerning intelligence practices bears out the accuracy of the observation that the White House is itself a site of interest group contestation. *See generally* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) ("As an initial matter, it would be naïve to assume that the President is immune to public choice pressures. He is not." *Id.* at 1305.).

[141] *See* Loch K. Johnson, *Congressional Supervision of America's Secret Agencies: The Experience and Legacy of the Church Committee*, *in* INTELLIGENCE: THE SECRET WORLD OF SPIES, AN ANTHOLOGY, *supra* note 22, at 393, 394. Of course, it is not correct that major technology and telecommunications firms have been strangers to national security policymaking or politics until very recently. To take a striking example, the telecommunications firms fought hard to get immunity from civil liability built into the structure of the FISA Amendments Act of 2008. *See* EDWARD C. LIU, CONG. RESEARCH SERV., RL34600, RETROACTIVE IMMUNITY PROVIDED BY THE FISA AMENDMENTS ACT OF 2008 (2008). And some aspects of the current political economy remind thoughtful observers of a prior generation's so-called crypto wars. *See* Joris V.J. van Hoboken & Ira S. Rubinstein, *Privacy and Security in the Cloud: Some Realism about Technical Solutions to Transnational Surveillance in the Post-Snowden Era*, 66 ME. L. REV. 487, 500–03 (2014) (describing a standoff between the technology industry and the national security state during the Clinton Administration over commercial uses of encryption technology).

[142] The story of the emergence of presidential intelligence could itself be recast as a successful capture story, with the technology firms and foreign allies doing the capturing. *See, e.g.*, Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1340 (2013) ("Capture describes situations where organized interest groups successfully act to vindicate their goals through government policy at the expense of the public interest."). That is certainly how many intelligence insiders who oppose the influence that technology firms currently wield see it.

moded assessment of the relative costs and benefits of disengagement from intelligence governance.[143]

1. Technology Firms and Economic Misalignment. — A critically important — and thus far, largely unheralded (at least by scholars) — feature of the new intelligence oversight ecosystem is the role of American technology and telecommunications firms. These firms combine deep understanding of the nature of signals intelligence — much of the work that the intelligence community performs is done collaboratively with private actors[144] — with sensitivity to the global marketplace and worries about reputational and economic harms that could result from being identified with the putative misdeeds of the NSA. As Julian Sanchez has put it, "perhaps the most significant change wrought by the Snowden disclosures to date has not been the policy proposals it has inspired — which, however vital, tend to focus on rules rather than architectures — but in the way it has transformed the incentives of the technology companies that maintain those architectures."[145]

The technology firms have certainly been outspoken on these matters. For example, following recent reports that the NSA was able to access information in the custody of U.S. technology companies outside the United States through means not supervised by the FISC,[146] Google's Chief Legal Officer, David Drummond, said that the company was "outraged" that the government would have intercepted data from Google's private networks, which he said "underscores the need

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143 Of course, interest groups have also undertaken concerted lobbying efforts on Capitol Hill, for example, championing reform of metadata collection. *See, e.g.*, Angela Swartz, *What Silicon Valley Tech Firms Think of the USA Freedom Act's Approval*, SILICON VALLEY BUS. J. (June 3, 2015, 11:45 AM), http://www.bizjournals.com/sanjose/news/2015/06/02/what-silicon-valley-tech-firms-think-of-the-usa.html. But what is perhaps more striking is the amount of direct pressure the groups have brought to the White House itself. *See, e.g.*, Steven Musil, *Obama to Meet with Tech Leaders Again over Surveillance*, CNET (Mar. 21, 2014, 12:21 AM) http://www.cnet.com/news/obama-to-meet-with-tech-leaders-again-over-surveillance [http://perma.cc/EP4N-L2VP].

144 For example, the structure of surveillance under Section 702 of FISA involves the issuance of directives by the government to private actors. 50 U.S.C. § 1881a(h) (2012) ("[T]he Attorney General and the Director of National Intelligence may direct, in writing, an electronic service provider . . . .").

145 Julian Sanchez, *Snowden Showed Us Just How Big the Panopticon Really Was. Now It's Up to Us*, THE GUARDIAN (June 5, 2014, 4:02 PM), http://www.theguardian.com/commentisfree/2014/jun/05/edward-snowden-one-year-surveillance-debate-begins-future-privacy [http://perma.cc/U8AG-VVW2].

146 *See, e.g.*, Barton Gellman, Ashkan Soltani & Andrea Peterson, *How We Know the NSA Had Access to Internal Google and Yahoo Cloud Data*, WASH. POST (Nov. 4, 2013), http://www.washingtonpost.com/blogs/the-switch/wp/2013/11/04/how-we-know-the-nsa-had-access-to-internal-google-and-yahoo-cloud-data [https://perma.cc/6VPY-U77U]; Barton Gellman & Ashkan Soltani, *NSA Infiltrates Links to Yahoo, Google Data Centers Worldwide, Snowden Documents Say*, WASH. POST (Oct. 30, 2013), http://www.washingtonpost.com/world/national-security/nsa-infiltrates-links-to-yahoo-google-data-centers-worldwide-snowden-documents-say/2013/10/30/e51d661e-4166-11e3-8b74-d89d714ca4dd_story.html [http://perma.cc/R4YY-S35Y].

for urgent reform."[147] The message has been received by leaders of the intelligence community. NSA Director Admiral Michael Rogers recently acknowledged that, in the words of his interviewer David Sanger, "the quiet working relationships between the security agency and the nation's telecommunications and high technology firms have been sharply changed by the Snowden disclosures — and might never return to what they once were in an era when the relationships were enveloped in secrecy."[148] And the firms have certainly registered their displeasure with the surveillance status quo by lobbying Congress to amend public laws.[149] But they have also lodged their protests directly with the White House. The President has heard repeatedly from angry technology and telecommunications CEOs who have pressed him for profound changes to surveillance practices.[150]

There are some suggestions that the economic fallout from the reputational harm of being closely identified with the intelligence apparatus has already been significant. A recent report cites estimates of the economic losses to American cloud-computing firms owing to global concerns about NSA spying ranging from $22 billion to $180 billion.[151] The Snowden revelations have recently caused the German government to transfer an important contract from Verizon to Deutsche Telekom.[152] The changed economic dynamics have also supplied the backdrop for legal showdowns,[153] such as the unfolding

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147 Charlie Savage, Claire Cain Miller & Nicole Perlroth, *N.S.A. Said to Tap Google and Yahoo Abroad*, N.Y. TIMES (Oct. 30, 2013), http://www.nytimes.com/2013/10/31/technology/nsa-is-mining-google-and-yahoo-abroad.html.

148 Sanger, *supra* note 41.

149 *See, e.g.*, Chris Strohm, *Facebook, Apple Make Year-End Lobbying Push to Curb NSA Spying*, BLOOMBERG (Nov. 14, 2014, 3:45 PM), http://www.bloomberg.com/politics/articles/2014-11-14/companies-call-on-senate-to-pass-bill-curbing-nsa-powers [http://perma.cc/MJ5Q-BRRS].

150 Musil, *supra* note 143.

151 DANIELLE KEHL ET AL., NEW AMERICA'S OPEN TECH. INST., SURVEILLANCE COSTS: THE NSA'S IMPACT ON THE ECONOMY, INTERNET FREEDOM & CYBERSECURITY 8–9 (2014), http://www.newamerica.org/downloads/Surveilance_Costs_Final.pdf [http://perma.cc/NV6F-V8GW]; *see also* Chris Strohm, *Tech Companies Reel as NSA Spying Mars Image for Clients*, BLOOMBERG (July 29, 2014, 11:46 AM), http://www.bloomberg.com/news/2014-07-29/tech-companies-reel-as-nsa-spying-mars-image-for-clients.html [http://perma.cc/3FSL-5KSQ].

152 *See* Brian Parkin et al., *Germany Favors Deutsche Telekom to Replace Ousted Verizon*, BLOOMBERG (June 27, 2014, 10:30 AM), http://www.bloomberg.com/news/2014-06-26/german-government-to-end-verizon-contract-citing-nsa-concern.html [http://perma.cc/5S97-5SN5]; *cf.* Lawrence Cappello, *Privacy and the Profit Motive*, THE NATION (May 4, 2015), http://www.thenation.com/article/privacy-and-profit-motive [http://perma.cc/B5KL-KQTL] ("The fallout from the Edward Snowden fiasco wasn't just political — it was largely economic. Soon after the extent of the NSA's data collection became public, overseas customers (including the Brazilian government) started abandoning US-based tech companies in droves over privacy concerns.").

153 *See, e.g.*, Harley Geiger, *Yahoo Court Documents Reveal Pitched Battle over Surveillance Power*, CTR. FOR DEMOCRACY & TECH. (Sept. 12, 2014), http://cdt.org/blog/yahoo-court-documents-reveal-pitched-battle-over-surveillance-power [http://perma.cc/3NBM-N94X].

contest in the Second Circuit about a warrant issued to Microsoft to turn over information that the company is storing in Ireland to American prosecutors.[154] The companies are also beginning to engage in forms of commercial "self-help," employing default encryption technologies on mobile devices and explicitly marketing them as being impervious to government snooping.[155] The message is clear: the global marketplace demands consumer technology (or cloud-based services) that defeats surveillance, and if the Apples of the world are not poised to provide it, some other corporation will. In yet another unmistakable nod to the imperatives of global competitiveness, Google's top lawyer has recently argued for the extension of American privacy protections to EU citizens.[156] In sum, a major American industry has now taken a stance against "overregulation" by the intelligence state — possibly the first time in the annals of post–World War II American national security that a set of powerful economic actors has been so misaligned with the security apparatus and so vocal about it.

Of late, some national security officials have begun to push back. FBI Director James Comey has publicly argued that the pendulum has now swung too far in the direction of privacy,[157] specifically decrying the recent push toward encryption and warning that "Apple and Google have the power to upend the rule of law."[158] If anything, the backlash in the United Kingdom has been even more pronounced.

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[154] *See* Microsoft Corp. v. United States, No. 14-2985 (2d Cir. filed Aug. 12, 2014).

[155] *See, e.g.*, *Government Information Requests*, APPLE, http://www.apple.com/privacy/government-information-requests [http://perma.cc/LZR8-H7BQ] ("For all devices running iOS 8 and later versions, Apple will not perform iOS data extractions in response to government search warrants because the files to be extracted are protected by an encryption key that is tied to the user's passcode, which Apple does not possess."); *Our Approach to Privacy*, APPLE, http://www.apple.com/privacy/approach-to-privacy [http://perma.cc/7C9Y-Q3QU] ("[W]e wouldn't be able to comply with a wiretap order even if we wanted to."); *see also* David E. Sanger & Brian X. Chen, *Signaling Post-Snowden Era, New iPhone Locks Out N.S.A.*, N.Y. TIMES (Sept. 26, 2014), http://www.nytimes.com/2014/09/27/technology/iphone-locks-out-the-nsa-signaling-a-post-snowden-era-.html.

[156] David Drummond, *It's Time to Extend the US Privacy Act to EU Citizens,* GOOGLE PUB. POL'Y BLOG (Nov. 12, 2014), http://googlepublicpolicy.blogspot.com/2014/11/its-time-to-extend-us-privacy-act-to-eu.html [http://perma.cc/GZF7-N8UR].

[157] *See* James B. Comey, Dir., FBI, Remarks at the Brookings Institution, Going Dark: Are Technology, Privacy, and Public Safety on a Collision Course? (Oct. 16, 2014), https://www.fbi.gov/news/speeches/going-dark-are-technology-privacy-and-public-safety-on-a-collision-course [https://perma.cc/6D89-J4W2].

[158] *60 Minutes: FBI Director on Privacy, Electronic Surveillance* (CBS television broadcast Oct. 12, 2014), http://www.cbsnews.com/news/fbi-director-james-comey-on-privacy-and-surveillance [http://perma.cc/3SGJ-TGCK]. In the aftermath of the recent terrorist attacks in Paris, CIA Director John Brennan criticized the ways in which "hand-wringing" about government surveillance has led to legal and policy changes that, in turn, have made global counterterrorism efforts "much more challenging." *CIA Director John Brennan Remarks on Global Security* (C-SPAN television broadcast Nov. 16, 2015), http://www.c-span.org/video/?400755-1/cia-director-john-brennan-remarks-global-security.

The recently tapped head of Government Communications Headquarters (GCHQ), the United Kingdom's electronic surveillance arm, publicly castigated American social media platforms for serving as "the command-and-control networks of choice for terrorists and criminals, who find their services as transformational as the rest of us."[159] But it remains unclear what effect, if any, these interventions from security officials may have. The firms have clearly indicated that they will maintain pressure on officials — up to and including the President — to rein in what they decry (at least for public consumption) as the excesses of the intelligence state. Comey's recent announcement that the Obama Administration would not seek to legislate "backdoors" to defeat encryption[160] suggests that the technology firms have, at least for now, gained the upper hand.

2. Allies and Strategic Misalignment. — The President has also had to absorb pushback from allies.[161] U.S. envoys were summoned by the French,[162] German,[163] and Brazilian[164] authorities, among others, to explain U.S. surveillance practices, including surveillance of heads of state. No case was more inflammatory than the revelation that the United States had carried out surveillance of German Chan-

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159 Robert Hannigan, *The Web is a Terrorist's Command-and-Control-Network of Choice*, FIN. TIMES (Nov. 3, 2014, 6:03 PM), http://www.ft.com/intl/cms/s/2/c89b6c58-6342-11e4-8a63-00144feabdc0.html. Hannigan went on to call for "a new deal between democratic governments and the technology companies in the area of protecting our citizens." *Id.*

160 David Kravets, *Obama Administration Won't Seek Encryption-Backdoor Legislation*, ARS TECHNICA (Oct. 9, 2015, 4:00 PM), http://arstechnica.com/tech-policy/2015/10/obama-administration-wont-seek-encryption-backdoor-legislation [http://perma.cc/6783-D8GX].

161 Sometimes pressure from allies has merged with pressure from technology firms, as when Google Chairman Eric Schmidt spoke about his meeting with Chancellor Angela Merkel and her sense of outrage at surveillance practices that evoked her childhood experience in an East German surveillance state. *See* Nancy Scola, *Google's Schmidt: Surveillance Fears Are "Going to End Up Breaking the Internet,"* WASH. POST (Oct. 8, 2014), http://www.washingtonpost.com/blogs/the-switch/wp/2014/10/08/googles-schmidt-surveillance-fears-are-going-to-end-up-breaking-the-internet [http://perma.cc/GRH3-WU3A].

162 *See, e.g.*, Laura Smith-Spark & Jethro Mullen, *France Summons U.S. Ambassador After Reports U.S. Spied on Presidents*, CNN (June 24, 2015, 11:17 AM), http://www.cnn.com/2015/06/24/europe/france-wikileaks-nsa-spying-claims [http://perma.cc/N7Q5-52K8].

163 *German Foreign Minister Summons US Ambassador over Merkel Spying Allegations*, DEUTSCHE WELLE (Oct. 24, 2013), http://www.dw.de/german-foreign-minister-summons-us-ambassador-over-merkel-spying-allegations/a-17180294 [http://perma.cc/M7CK-5MP8]. Merkel commented on the allegations by saying that "trust needs to be re-established" with Washington. *Id.* German Defense Minister Thomas de Maiziere said it would be "really bad" if the allegations turned out to be true: "We can't simply return to business as usual . . . [but] the relations between our countries are stable and important for our future; they will remain that way." *Id.*

164 Simon Romero & Randal C. Archibold, *Brazil Angered over Report N.S.A. Spied on President*, N.Y. TIMES (Sept. 2, 2013), http://www.nytimes.com/2013/09/03/world/americas/brazil-angered-over-report-nsa-spied-on-president.html. Brazil's Justice Minister commented that "[t]his would be an unacceptable violation to our sovereignty, involving our head of state." *Id.*

cellor Angela Merkel's cellphone.[165] As Henry Farrell and Abraham Newman have argued, Chancellor Merkel was already downplaying the impact of broad counterterrorism-motivated NSA surveillance when further Snowden revelations exposed widespread spying on European leaders.[166] It was at that point that she told the President that "she unmistakably disapproves of and views as completely unacceptable such practices" and that "[s]uch practices have to be halted immediately."[167] The German Attorney General opened an investigation into the tapping of Chancellor Merkel's phone.[168]

But much more is potentially at stake than catching an earful from a foreign leader.[169] The revelations had the effect of recalibrating the relative power of privacy-minded European politicians, who had been successfully sidelined by more security-minded officials for a decade.[170] Questions have been raised about the ongoing vitality of the Terrorist Finance Tracking Program (TFTP)[171] and Passenger Name Records agreement, two central pillars of U.S.-European cooperation in counterterrorism.[172] And the European Court of Justice recently struck

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165 *See* Melissa Eddy, *File Is Said to Confirm N.S.A. Spied on Merkel*, N.Y. TIMES (July 1, 2015), http://www.nytimes.com/2015/07/02/world/europe/file-is-said-to-confirm-nsa-spied-on-merkel.html.

166 *See* Henry Farrell & Abraham Newman, *Senseless Spying: The National Security Agency's Self-Defeating Espionage Against the EU*, FOREIGN AFF. (July 9, 2013), http://www.foreignaffairs.com/articles/139567/henry-farrell-and-abraham-newman/senseless-spying [http://perma.cc/PJH4-RS4V].

167 Ian Traynor, Philip Oltermann & Paul Lewis, *Angela Merkel's Call to Obama: Are You Bugging My Mobile Phone?*, THE GUARDIAN (Oct. 24, 2013, 3:10 AM), http://www.theguardian.com/world/2013/oct/23/us-monitored-angela-merkel-german [http://perma.cc/9FAT-NXDW].

168 Stephen Brown, *German Prosecutor to Probe U.S. Spies for Bugging Merkel's Phone*, REUTERS (June 4, 2014, 11:31 AM), http://www.reuters.com/article/2014/06/04/us-germany-merkel-bugging-idUSKBN0EF11420140604 [http://perma.cc/5H72-QCGA]. The inquiry was subsequently dropped. Melissa Eddy, *Germany Drops Inquiry into Claims U.S. Tapped Angela Merkel's Phone*, N.Y. TIMES (June 12, 2015), http://www.nytimes.com/2015/06/13/world/europe/germany-drops-inquiry-us-tapped-angela-merkel-phone.html.

169 Protests of NSA activity by foreign governments may be matters of politics, not principles. Recent reporting suggests that "the Merkel government knew of cooperation between the German foreign intelligence agency, the Bundesnachrichtendienst, and the American spy services, but withheld that information from a parliamentary committee assigned to investigate the affair." Melissa Eddy, *Germany Is Accused of Helping N.S.A. Spy on European Allies*, N.Y. TIMES (Apr. 30, 2015), www.nytimes.com/2015/05/01/world/europe/germany-is-accused-of-helping-nsa-spy-on-european-allies.html.

170 *See* Farrell & Newman, *supra* note 166.

171 TFTP is a government program that provides access to the Society for Worldwide Interbank Financial Telecommunication (SWIFT) database. *See Terrorist Finance Tracking Program*, U.S. DEP'T TREASURY, http://www.treasury.gov/resource-center/terrorist-illicit-finance/Terrorist-Finance-Tracking/Pages/tftp.aspx (last updated May 7, 2014, 10:24 AM) [http://perma.cc/DL55-B7SL].

172 *EU Threatens End to US Data Deals over Snowden Revelations*, DEUTSCHE WELLE (July 4, 2013), http://www.dw.de/eu-threatens-end-to-us-data-deals-over-snowden-revelations/a-16930528 [http://perma.cc/37TQ-YSER].

down the U.S.–EU Safe Harbor agreement,[173] which, for the past fifteen years, enabled American firms to self-certify that they take certain precautions with respect to personal data.[174] In the aftermath of the Snowden revelations, European officials argued that a national security and criminal justice carve-out had been interpreted too liberally by American officials.[175] The European Court of Justice concluded that national-level officials within the European Union should oversee data privacy, upending the compact, which governs more than 4000 companies.[176] Paul Nemitz, a director in the European Commission's justice department who is overseeing a new data privacy regime for Europe, recently expressed the view that the legal authority that "empowers the NSA to basically grab everything which comes from outside the United States, is a real trade barrier to a European digital company to provide services to Americans inside America."[177]

Certain countries, like Germany, have pursued — apparently without success — "no spy" agreements with the United States,[178] expressing the desire to be treated on par with the so-called "Five Eyes," an intelligence alliance that unites the United States, United Kingdom, Australia, New Zealand, and Canada.[179] More dramatically, a number of countries have already taken steps in the direction of imposing data localization requirements.[180] Google Chairman Eric Schmidt recently characterized this development as carrying the potential to "break[] the

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[173] *See* Case C-362/14, Schrems v. Data Prot. Comm'r (Oct. 16, 2015), http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5bbf805dca432456ea788e756c7ad7a25.e34KaxiLc3eQc40LaxqMbN4Oc30Seo?text=&docid=169195&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=94600 [http://perma.cc/88AD-WWJB].

[174] *Safe Harbor*, EXPORT.GOV (Oct. 9, 2015, 5:33 PM), http://www.export.gov/safeharbor/index.asp [http://perma.cc/AA86-PSUM].

[175] *See* Natasha Lomas, *Post-Snowden, European Commission Sets out Actions Needed to Restore Trust in E.U.-U.S. Data Flows*, TECHCRUNCH (Nov. 27, 2013), http://techcrunch.com/2013/11/27/not-so-safe [http://perma.cc/QT4W-9SN9].

[176] Mark Scott, *Data Transfer Pact Between U.S. and Europe Is Ruled Invalid*, N.Y. TIMES (Oct. 6, 2016) http://www.nytimes.com/2015/10/07/technology/european-union-us-data-collection.html.

[177] *See* Julia Fioretti, *NSA's Surveillance a "Trade Barrier" for EU Companies: EU Official*, REUTERS (Dec. 8, 2014, 10:05 AM) (quoting European Commission justice department official Paul Nemitz), http://www.reuters.com/article/2014/12/08/us-eu-privacy-nsa-idUSKBN0JM1M220141208 [http://perma.cc/H5WW-WUX9].

[178] David E. Sanger, *U.S. and Germany Fail to Reach a Deal on Spying*, N.Y. TIMES (May 1, 2014), http://www.nytimes.com/2014/05/02/world/europe/us-and-germany-fail-to-reach-a-deal-on-spying.html.

[179] Margaret Warner, *An Exclusive Club: The Five Countries that Don't Spy on Each Other*, PBS (Oct. 25, 2013, 5:45 PM), http://www.pbs.org/newshour/rundown/an-exclusive-club-the-five-countries-that-dont-spy-on-each-other [http://perma.cc/MN3V-6CKN].

[180] *See* Jonah Force Hill, *The Growth of Data Localization Post-Snowden: Analysis and Recommendations for U.S. Policymakers and Industry Leaders*, LAWFARE RES. PAPER SERIES (July 21, 2014), http://lawfare.s3-us-west-2.amazonaws.com/staging/Lawfare-Research-Paper-Series-Vol2No3.pdf [http://perma.cc/4NNS-MHMX].

Internet" because foreign governments are "eventually going to say, we want our own Internet in our country because we want it to work our way, and we don't want the NSA and these other people in it."[181] Blowback by allies against American intelligence practices has largely focused on electronic surveillance practices. But it has also extended to human intelligence collection. After the arrest of a German intelligence officer alleged to be spying for the United States, Germany decided, for the first time since 1945, to engage in counterespionage against the United States and the United Kingdom.[182] In the meantime, American officials have reportedly engaged in an unprecedented cessation of espionage against European governments.[183]

In sum, the Snowden leaks have galvanized technology firms and allies to join longstanding skeptics of the surveillance state, like privacy groups, in putting pressure on the White House to resist the agenda of the intelligence bureaucracy. To be certain, the market- and strategy-based incentives that motivate these actors are morally shallower, and for that reason more malleable, than the stances taken by the nongovernmental organization critics of surveillance. Zooming out from the issues at hand, it is possible to view the likes of Google and Facebook, with their own insatiable appetites for data, as exhibiting some of the same features — and implicating the same sorts of concerns — as the intelligence agencies against which they rail.[184] And certainly the allied governments that have lodged complaints with the United States, in addition to lacking clean hands themselves, are somewhat parochial in their outlooks. Their central (stated) preoccupation is with the privacy of their own officials and citizens, not those of the United States. But notwithstanding these complications and limitations, with powerful actors engaged in pushing back against American intelligence collection, it is clear that the President, perhaps

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[181] *See* Scola, *supra* note 161.

[182] Justin Huggler, *Germany to "Spy on US and UK Intelligence Gathering" for the First Time in 45 Years*, THE TELEGRAPH (July 24, 2014, 4:57 PM), http://www.telegraph.co.uk/news/worldnews/europe/germany/10988939/Germany-to-spy-on-US-and-UK-intelligence-gathering-for-the-first-time-in-45-years.html. Interestingly, the implication of this newspaper article is that alleged U.S. spies in Germany were arrested without a concerted counterespionage program focused on American intelligence. *See id.*

[183] Ken Dilanian, *AP Exclusive: CIA Halts Spying in Europe*, HUFFINGTON POST (Sept. 20, 2014, 12:09 AM), http://www.huffingtonpost.com/huff-wires/20140920/us--cia-europe-spying-pause [http://perma.cc/8QLF-NPQZ] ("Under the stand-down order, case officers in Europe largely have been forbidden from undertaking 'unilateral operations' such as meeting with sources they have recruited within allied governments. Such clandestine meetings are the bedrock of spying.").

[184] *See, e.g.*, Conor Dougherty, *Jay Edelson, the Class-Action Lawyer Who May Be Tech's Least Friended Man*, N.Y. TIMES (Apr. 4, 2015), http://www.nytimes.com/2015/04/05/technology/unpopular-in-silicon-valley.html (noting how the Snowden leaks have improved the prospects of lawsuits seeking to hold technology firms accountable for privacy violations).

for the first time, has something to gain — and a lot to lose — in the oversight of intelligence collection.[185]

B. The Shape of Presidential Intelligence

In response to the Snowden leaks — and their catalytic effect on powerful interest groups — the President has looked to curtail the political damage and to respond to interest group pressures by intervening in the area of surveillance policy. The tools that he has employed can be thought of as largely obeying the logic of "centralization" in Moe's sense of White House–based leadership. The turn to presidential control can be seen across a number of distinct domains. First, there is the straightforward but noticeable phenomenon of the President becoming seized of the issue. As noted above,[186] in the aftermath of the Snowden leaks, President Obama convened various ad hoc groups staffed by a combination of senior officials and outside experts. With their input, and with the benefit of numerous direct meetings with the leadership of privacy groups,[187] technology firms,[188] and allied governments,[189] the President considered, in a newly systematic fashion, the yawning gaps that had emerged in intelligence governance.

The next — and arguably most significant — aspect of the assertion of President Obama's control in this area was the issuance of a presidential directive,[190] one of the typical vehicles of presidential administration.[191] On January 17, 2014, President Obama issued Presidential Policy Directive 28 (PPD-28), articulating "principles to guide why, whether, when, and how the United States conducts signals intelligence activities for authorized foreign intelligence and counterintelli-

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185 *See* Moe, *supra* note 46, at 144.

186 *See supra* pp. 649–50.

187 *See* Spencer Ackerman, *White House Meets with Privacy Advocates to Discuss NSA Surveillance*, THE GUARDIAN (Jan. 9, 2014, 10:15 AM), http://www.theguardian.com/world/2014/jan/09/white-house-meets-privacy-advocates-nsa-phone-data [http://perma.cc/KV5F-JE9A].

188 *See* Tony Romm, *Zuckerberg, Tech Execs Meet Obama*, POLITICO (Mar. 21, 2014, 4:55 PM), http://www.politico.com/story/2014/03/mark-zuckerberg-barack-obama-tech-ceos-nsa-104907.html [http://perma.cc/S3JL-DG5J] ("The meeting marked the second time in about four months that the White House has invited major technology CEOs to Washington to talk about the issue.").

189 *See* Julia Edwards, *Obama Acknowledges Damage from NSA Eavesdropping on Angela Merkel*, HUFFINGTON POST (Feb. 9, 2015, 2:20 PM), http://www.huffingtonpost.com/2015/02/09/obama-angela-merkel-nsa_n_6647058.html [http://perma.cc/A5Y7-HVZF].

190 PPD-28, *supra* note 43. Commentators have reserved judgment about the ultimate impact of the PPD. One especially keen observer has written that it "represents an unprecedented change in U.S. intelligence policy, at least at the rhetorical level" even as "[t]he degree of substantive change that will follow from PPD-28 is less certain." David S. Kris, *On the Bulk Collection of Tangible Things*, 7 J. NAT'L SECURITY L. & POL'Y 209, 289 (2014).

191 *See* Kagan, *supra* note 1, at 2290–99.

gence purposes."[192] PPD-28 is divided into four sections[193]: (1) principles governing signals intelligence (SIGINT) collection; (2) limitations on bulk SIGINT collection; (3) alterations to the process for SIGINT collection; and (4) requirements and techniques for safeguarding personal information in the SIGINT collection process and reporting requirements[194] for the intelligence community.[195] It is the directive's third section that speaks most straightforwardly to the formation of a new, White House–driven approach to intelligence oversight. Characterizing that change in his address, the President called for "strengthen[ing] executive branch oversight of our intelligence activities" by ensuring that the White House "will review decisions about intelligence priorities and sensitive targets on an annual basis so that our actions are regularly scrutinized by [the President's] senior national security team."[196]

The key move here is to define the potential risks associated with intelligence practices (and their possible revelation) broadly. As the

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[192] PPD-28, *supra* note 43; *see also* Press Release, Office of the Press Sec'y, FACT SHEET: The Administration's Proposal for Ending the Section 215 Bulk Telephony Metadata Program (Mar. 27, 2014), http://www.whitehouse.gov/the-press-office/2014/03/27/fact-sheet-administration-s-proposal-ending-section-215-bulk-telephony-m [http://perma.cc/45CL-FNST] (detailing the President's proposed changes and the future steps to be taken by Congress in order to enact them).

[193] PPD-28, *supra* note 43. Among the significant policy changes ushered in by the directive and the accompanying speech, Presidential Remarks on Signals Intelligence, *supra* note 42, are (1) imposing a two-hop (rather than three-hop) standard on querying metadata; (2) recommending that the FISC, rather than the NSA, make findings about reasonable, articulable suspicion (it is unclear what authority the President employed to make this change, but the FISC seems to have assumed the responsibility notwithstanding the public letter by Chief Judge Bates suggesting the court was overburdened, Letter from Chief Judge John D. Bates, Director, Admin. Office of the U.S. Courts, to Patrick J. Leahy, Chairman, Comm. on the Judiciary (Aug. 5, 2014), http://online.wsj.com/public/resources/documents/Leahyletter.pdf [http://perma.cc/4FAE-YYAJ]); and (3) extending certain heightened privacy protections to foreign nationals. This last point makes sense as a direct response to the global pressures that have been brought to bear on the White House, both by allied governments and by technology firms with global customers. *See supra* section II.A, pp. 660–69.

[194] PPD-28 mandated several reports, by the PCLOB, the PIAB, as well as the DNI. PPD-28, *supra* note 43. The DNI report, issued in July 2014 but not released publicly until October 17, 2014, describes how the intelligence community has begun to implement the requirements of PPD-28 and plans to "afford protections that go beyond those explicitly outlined in PPD-28." Robert Litt & Alexander W. Joel, Office of the Dir. of Nat'l Intelligence, *Interim Progress Report on Implementing PPD-28* (Oct. 17, 2014), http://www.dni.gov/index.php/newsroom/reports-and-publications/204-reports-publications-2014/1126-interim-progress-report-on-implementing-ppd-28 [http://perma.cc/RYK2-CAM9].

[195] PPD-28, *supra* note 43; *see* Laura K. Donohue, *FISA Reform*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 599, 612–13 (2014) ("PPD-28 . . . lay[s] out the current principles guiding SIGINT, such as the integration of privacy and civil liberties considerations in the collection of intelligence, limits on the collection of commercial information and trade secrets, and the tailoring of SIGINT to areas where the information is not otherwise available. The document restricts the use of bulk SIGINT data. It draws attention to . . . minimization [procedures,] . . . data security and access, data quality, and oversight." (footnotes omitted)).

[196] Presidential Remarks on Signals Intelligence, *supra* note 42.

President went on to explain, the oversight will take into "account our security requirements, but also our alliances; our trade and investment relationships, including the concerns of American companies; and our commitment to privacy and basic liberties."[197] This echoes a recognition in PPD-28 that intelligence practices — especially insofar as they become public — potentially entail risk to:

> our relationships with other nations, including the cooperation we receive from other nations on law enforcement, counterterrorism, and other issues; our commercial, economic, and financial interests, including a potential loss of international trust in U.S. firms and the decreased willingness of other nations to participate in international data sharing, privacy, and regulatory regimes . . . .[198]

Institutionally, the NSC — "the major centralizing institution" in foreign affairs[199] — is the place within the White House where many of these competing equities are put on the table and discussed in comprehensive fashion. As Zegart has persuasively argued, the NSC, which began as a site of coordination for the leading cabinet agencies on matters of national security, has evolved into a highly centralized mechanism for consolidating policymaking within the White House at the expense of those cabinet offices.[200] With a National Security Advisor empowered by Executive Order 12,333 on matters of intelligence, and with a large and influential staff,[201] the NSC is the natural venue for effectively leveraging a variety of expertise from across the national security community (writ large) in shaping intelligence policy.[202] Issues can be considered at the staff level, and elevated from there to ever more senior policymakers (through Deputies and Principals meetings), ultimately arriving at the President's desk.[203] Moreover, the NSC

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197 *Id.*

198 PPD-28, *supra* note 43. Furthermore, PPD-28 calls for the creation of a post in the State Department to manage the diplomatic aspects of surveillance. *Id.*

199 Moe & Wilson, *supra* note 91, at 19 ("The president clearly has strong reasons for not wanting the State Department, the Defense Department, and other agencies to make their own foreign policy decisions.").

200 *See* AMY B. ZEGART, FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC 85–88 (1999).

201 Previously, President Obama had changed the name of the staff from the "National Security Council Staff" to the "National Security Staff," or NSS. The purpose of the name change to NSS was to accommodate the merger of the Homeland Security Council and National Security Council staffs. *See* Michael D. Shear, *Security Staff Getting Its Old Name Back*, N.Y. TIMES (Feb. 10, 2014), http://www.nytimes.com/2014/02/11/us/politics/security-staff-getting-its-old-name-back.html.

202 This was not always so. *See* Johnson, *supra* note 18, at 181 (describing how, prior to the era of inquests into intelligence practices and greater accountability, "[m]any of the CIA's activities . . . never received a thorough examination — or, in some cases, even approval — by the NSC").

203 OIRA operates similarly. *See* Ryan Bubb, Comment, *The OIRA Model for Institutionalizing CBA of Financial Regulation*, 78 LAW & CONTEMP. PROBS., no. 3, 2015, at 47, 53 ("If the

framework allows for participation by a wide range of institutional actors with diverse perspectives, including the Treasury and Commerce Departments and the U.S. Trade Representative.[204] As PPD-28 puts it, "[i]t is . . . essential that national security policymakers consider carefully the value of signals intelligence activities in light of the risks entailed in conducting these activities."[205] Rather than allow the intelligence agencies themselves to shape intelligence policy, a review process headquartered at the NSC increases the likelihood that surveillance practices will be (or become) "truly presidential by hearing [the] views [of senior national security staff], enlisting their expertise, coordinating their contributions, and directing policy toward presidential ends."[206]

In overseeing intelligence collection, the President is also able to draw on the distinctive outlooks and expertise of a range of other White House entities, like the NEC and OSTP,[207] as well as of senior advisors not devoted solely to national security matters, such as the White House Counsel[208] and the Chief of Staff. On a number of occasions, President Obama has tapped his Chief of Staff,[209] Denis McDonough (who previously served as Deputy National Security Ad-

agency staff and [the OIRA staff] could not resolve an issue, it was elevated to the administrator of OIRA and the relevant senior political appointee at the promulgating agency to resolve. Failing their agreement, it went up the chain in the White House, and ultimately the president was indeed 'the decider.'").

204 *Cf.* PRG, *supra* note 65, at 169 (recommending the creation of an office lodged in the ODNI that reviews sensitive collection and that includes elements from nontraditional national security organizations "such as the National Economic Council, Treasury, Commerce, and the Trade Representative"); *id.* at 168 (recommending that senior policymakers from the federal agencies with responsibility for U.S. economic interests should participate in the review process because disclosures of classified information can have detrimental effects on those interests).

205 PPD-28, *supra* note 43.

206 *See* Moe & Wilson, *supra* note 91, at 19.

207 NEC Director Jeffrey Zients and OSTP Director John Holdren were coauthors of the White House's May 2014 report on big data. *See* PODESTA ET AL., *supra* note 75. Furthermore, the President, in his speech accompanying the issuance of PPD-28, noted his intention to appoint a "senior official at the White House to implement the new privacy safeguards that I have announced today." Presidential Remarks on Signals Intelligence, *supra* note 42.

208 *See, e.g.*, Justin Sink, *Obama to Meet with Intel Officials, Lawmakers Ahead of NSA Report*, THE HILL (Jan. 7, 2014, 3:23 PM), http://thehill.com/homenews/administration/194663-obama-to-meet-with-intel-officials-lawmakers-ahead-of-nsa-report [http://perma.cc/Y7YT-X8SW] ("White House counsel Kathryn Ruemmler is expected to meet with civil society groups at the White House on Thursday afternoon in a chat about technology, privacy protections and civil liberties . . . .").

209 The pattern of striking a balance between employing the chief of staff and the national security advisor on matters that involve not only national security equities but also broader policy and political interests is longstanding. For example, Ken Duberstein, who served as Reagan's chief of staff toward the end of his presidency, had a fully worked-out modus operandi with then–National Security Advisor Colin Powell. The two of them would coordinate each morning as to which of the two might raise an issue with the President when it straddled the line between national security and larger policy and political concerns. *See* ROTHKOPF, *supra* note 70, at 256.

visor), to carry out sensitive, intelligence-related missions. For example, after talking directly to Chancellor Merkel about the most recent allegations of American eavesdropping in Germany, the President — in a highly unusual move — dispatched his senior counterterrorism advisor and McDonough to Berlin to engage in bilateral discussions with their counterparts.[210] The meeting's significance was further displayed when the White House published a "readout" of the meeting on its website, noting that "Mr. McDonough and Mr. Altmaier [Merkel's chief of staff] agreed to set up a Structured Dialogue to address concerns of both sides and establish guiding principles as the basis for continued and future cooperation. The Structured Dialogue will be overseen by the Chiefs of Staff."[211] More recently, the President sent McDonough on another unconventional mission to Senator Dianne Feinstein's San Francisco home, where his job was to negotiate redactions to the Senate Intelligence Committee report on CIA interrogation practices.[212]

The theme of White House–based policy review of intelligence collection was amplified a few months after the issuance of PPD-28 by the President's top counterterrorism advisor Lisa Monaco, who acknowledged that before Snowden, because the government did not conceive that collection programs and operations would be made public, it did not undertake "cost-benefit analysis" of the foreign policy and economic impacts of American surveillance.[213] She conceded that in the post-Snowden era such assessments are necessary, and that they require the involvement of "senior-level policymakers" as well as a "procedure" for effectuating the assessment of potential tradeoffs.[214] Indeed, by the time she addressed the matter publicly, Monaco had already "overseen weekly interagency task force meetings since August that ha[d] included representatives from the Office of the Director of National Intelligence, the Pentagon, and the State Department; cybersecurity experts; economic analysts; and lawyers from the White House Counsel's Office."[215] The White House also announced a simi-

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[210] *Obama Sends Top Aides to Germany amid Spying Flap*, YAHOO! NEWS (July 22, 2014, 1:07 PM), http://news.yahoo.com/obama-sends-top-aides-germany-amid-spying-flap-165804407--politics.html [http://perma.cc/VNH6-CBQ4].

[211] Press Release, Office of the Press Sec'y, Readout of the Chief of Staff's Meetings in Berlin, Germany (July 22, 2014), http://www.whitehouse.gov/the-press-office/2014/07/22/readout-chief-staff-s-meetings-berlin-germany [http://perma.cc/9J2V-MXE9].

[212] *See* Mark Landler, *Obama Could Replace Aides Bruised by a Cascade of Crises*, N.Y. TIMES (Oct. 29, 2014), http://www.nytimes.com/2014/10/30/world/middleeast/mounting-crises-raise-questions-on-capacity-of-obamas-team.html.

[213] *The View from the West Wing*, ASPEN INST. (July 26, 2014), http://www.aspeninstitute.org/video/view-west-wing.

[214] *Id.*

[215] David Nakamura, *Behind-the-Scenes, White House Preoccupied by NSA Surveillance Controversy*, WASH. POST (Jan. 9, 2014), http://www.washingtonpost.com/politics/behind-the-scenes

lar process for decisionmaking on the related issue of "Zero-Day" vulnerabilities, accepting the essence of the recommendation of the President's Review Group that vulnerabilities ought to be presumptively patched, and that "[b]efore approving use of the Zero Day rather than patching a vulnerability, there should be a senior-level, interagency approval process that employs a risk management approach."[216]

III. ASSESSING PRESIDENTIAL INTELLIGENCE

Assessing presidential intelligence requires coming to terms with a number of complex tradeoffs. Presidential intelligence has the capacity to promote more effective, accountable, and rights-regarding intelligence practices. But it also entails a number of potentially significant downsides, including diminished intelligence expertise and enervated congressional oversight. Under certain specifications, it might even foster the conditions for abusive practices. Presidential administration is experienced with these sorts of tradeoffs and has generated a robust scholarly literature that can help illuminate how these issues might play out in the intelligence setting. In this Part, I draw on that literature to highlight, first, some potential upsides, and then some potential downsides, of presidential intelligence, all the while acknowledging the ways in which the intelligence bureaucracy conforms to its own logic and institutional pressures.

A. The Benefits of Presidential Intelligence

The most significant potential benefits of presidential intelligence are its capacity to promote more effective, more accountable, and more rights-regarding intelligence. The first two of these strengths run parallel to claims that have been advanced on behalf of presidential administration. The third claim sets presidential intelligence apart.

1. Strategically Sound Intelligence. — Presidential intelligence entails a centralized mechanism for reviewing intelligence practices in light of their overall consequences, a job that requires the inputs of policymakers, and so cannot be performed within the intelligence bureaucracy itself. The motivating ideas here are as simple as they are attractive. Intelligence collection practices ought to be assessed for their efficacy and employed only to the extent that their overall benefits exceed their costs. Determining the appropriate scope of intelligence gathering entails calling forth a wide range of perspectives and

-white-house-preoccupied-by-nsa-surveillance-controversy/2014/01/09/2d6ee2ba-789b-11e3-8963-b4b654bcc9b2_story.html [http://perma.cc/FDQ2-TDCF]. Furthermore, White House official "Miriam Perlberg, a cybersecurity expert, was asked to take the additional role of 'director of disclosures' to monitor the Snowden leaks." *Id.*

216 PRG, *supra* note 65, at 220.

expertise, a task to which the White House is well suited. The idea that the NSC is able to convene an interagency process through which to arrive at better-calibrated intelligence collection resonates powerfully with a body of academic literature that assesses the role of OIRA in performing centralized review of regulatory decisionmaking. Inaugurated by an executive order issued by President Reagan,[217] but famously retained by all subsequent Presidents, OIRA review institutionalized the White House's role as a clearinghouse for important rulemaking across the government. While OIRA unquestionably arose out of the Reagan Administration's deregulatory agenda,[218] it is a subject of ongoing debate whether that antiregulatory posture is built into the nature of OIRA's work. Some academics maintain that such a bias continues to characterize the office's outlook,[219] while others — especially veterans of the office — resist that account, maintaining that OIRA is not "necessarily blindly hostile to agencies or to regulation"[220] and that its largely apolitical staff are more "ideologues for efficiency" than antiregulatory in outlook.[221] Another debate revolves around the degree of secrecy that attends OIRA decisionmaking, with critics raising questions about the transparency of its website, its lack of written or public communication, and its opaque review process.[222]

OIRA performs three key functions. The best known is the office's employment of technical cost-benefit analysis (CBA) to review the economic soundness of proposed regulations. But the other two (considerably less heralded) roles that OIRA discharges are, if anything, more directly relevant to the prospects of presidential intelligence. First, scholars[223] and former practitioners have taken stock of OIRA's criti-

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217 Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

218 *See* Barron, *supra* note 98, at 1111.

219 *See, e.g.*, REVESZ & LIVERMORE, *supra* note 2.

220 *See* Stuart Shapiro, *OIRA Inside and Out*, ADMIN. L. REV., Special Edition 2011, at 135, 145 (noting that former OIRA Administrators "[S. Jay] Plager and [Sally] Katzen both cited the need for a cooperative relationship between agencies and OIRA, with Plager saying, 'Agencies are not bad people'").

221 *Id.* ("This repeated interaction is much less effective if the relationship between the desk officer and the agency is uniformly hostile.").

222 Sidney A. Shapiro, *Does OIRA Improve the Rulemaking Process? Cass Sunstein's Incomplete Defense*, ADMIN. & REG. L. NEWS, Fall 2013, at 6, 6; *see also* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 342 (2014) ("From my perspective, it was often hard to tell who exactly was in charge of making the ultimate decision on an important regulatory matter.").

223 *See, e.g.*, Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1135 (2010) ("Presidential supervision clearly can make pragmatic contributions to agency decision making. A President can ensure that decision making among multiple federal agencies is coordinated. A President can provide direction and energy to agency officials. And centralized presidential supervision can counteract the tendency of an agency to take a 'tunnel vision' approach by bringing a broad perspective to agency prioritization and decision

cal function as an "information aggregator."[224] OIRA asks multiple departments and agencies for their views in order to corral information and expertise and help harmonize regulation across agencies.[225] As former OIRA Administrator Cass Sunstein put it, a defining feature of the office is "the idea of interagency coordination and consultation, so that when a rule [comes] from the U.S. Department of Agriculture, the people at the Department of Justice and the Environmental Protection Agency and Council on Economic Advisers [are] aware. That's really valuable."[226]

Second, OIRA performs nontechnical, nonmonetized CBA of proposed rules, tallying and comparing their upsides and downsides in conceptual terms. As Professor Amy Sinden has recently argued, the very project of CBA can and should be thought of as containing two key elements that are analytically and practically severable. One is the technical comparison of monetized costs and benefits of proposed government action. Another is the more conceptual tradeoff analysis in which costs and benefits are compared without attempts at rigorous quantification.[227]

In recommending an OIRA-like function for intelligence, I emphasize the desirability of these two defining features — harmonization across various agencies and the application of nontechnical cost-

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making." (footnotes omitted)). Some scholars have questioned the capacity of OIRA to deliver on the goal of harmonization. *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 75 (2006) ("As critics warn, OIRA review may not advance intra-agency coherence and inter-agency coordination at all or well enough.").

[224] Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1840–41 (2013).

[225] *Id.* at 1855 ("A central goal of the OIRA process is to ensure that rulemaking agencies have access to the wide variety of perspectives that can be found throughout the executive branch."). This is consistent with a scholarly emphasis on collaborative (as between agencies) regulation. *See, e.g.*, William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

[226] Brad Plumer, *Cass Sunstein on How Government Regulations Could Be a Lot Simpler*, WASH. POST: WONKBLOG (June 12, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/12/cass-sunstein-on-how-government-regulations-could-be-a-lot-simpler [http://perma.cc/CLY6-MUS7]. *But see* Bressman & Vandenbergh, *supra* note 223, at 50 ("OIRA review appears to advance inter-agency coordination somewhat, minimizing overlaps and conflicts between or among the regulations of different federal agencies. But OIRA review does not achieve what might be called 'intra-agency coherence,' which includes reducing redundancies, avoiding inconsistencies, and eliminating unintended consequences between or among the regulations of a particular agency. Thus, OIRA review fails to discharge one of the central purposes for which President Reagan created it and all subsequent presidents have maintained it." (footnote omitted)).

[227] *See* Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93, 98–99. Some of the normative criticisms that have been lodged against CBA take aim at its more technical aspects. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004).

benefit logic — which are ripe for export. Harmonization in the intelligence context entails a mechanism for gathering inputs from all the spy agencies (which differ from one another mainly in terms of the surveillance technology they employ) and analyzing those inputs in light of the more comprehensive strategic outlook that the NSC uniquely possesses. Even Judge Posner, who (in his scholarly work) generally opposes centralization of intelligence functions, has argued that more coordination on intelligence collection modalities is important.[228] Among other things, it will heighten efficiency by nipping in the bud a trend toward unnecessary duplication of effort in collection — for example, the periodic flare-ups between the NSA and CIA in allocating surveillance authorities.[229]

Presidential intelligence can also benefit from nontechnical CBA when considering various potential courses of intelligence collection. This sort of decisionmaking also belongs in the White House as part of an expanded NSC process. As noted above, in a post-Snowden era, the potential strategic and economic costs (and benefits) of intelligence collection are critical inputs for assessing the overall advisability of proposed intelligence collection.[230] As Goldsmith has put it, government "must balance the security benefits of NSA activities against vociferous privacy and legitimacy concerns at home and against significant potential economic fallout for US firms' global business."[231] This sort of balancing should not be limited to the consideration of the downstream consequences of electronic surveillance, but should also be applied to other intelligence collection methodologies, including human intelligence. For example, in a recently published monograph, intelligence scholar and current Chairman of the National Intelligence Council Greg Treverton argues that a thorough review of the intelli-

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[228] *See* POSNER, *supra* note 107, at 149 (advocating strong coordination of the intelligence agencies in respect to their collection function).

[229] *See, e.g.*, Greg Miller, *CIA Looks to Expand Its Cyber Espionage Capabilities*, WASH. POST (Feb. 23, 2015), http://www.washingtonpost.com/world/national-security/cia-looks-to-expand-its-cyber-espionage-capabilities/2015/02/23/a028e80c-b94d-11e4-9423-f3d0a1ec335c_story.html [http://perma.cc/69U9-PMRL] (noting that the CIA's maintaining a standalone cybersecurity capability could create tension with the NSA); Ellen Nakashima, *Dismantling of Saudi-CIA Web Site Illustrates Need for Clearer Cyberwar Policies*, WASH. POST (Mar. 19, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/18/AR2010031805464.html [http://perma.cc/CGR7-ZJU4] (describing tensions between the CIA and the Department of Defense).

[230] Presidential intelligence will naturally emphasize the costs and benefits to the United States and its citizens. But more cosmopolitan perspectives may also be required, for example, when the risks to allies are taken into account. *Cf.* Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1572 (2008) ("We do not question the proposition that an international agreement to control greenhouse gases, with American participation, is justified, and all things considered, the United States should probably participate even if the domestic cost-benefit analysis does not clearly justify such participation." (footnote omitted)).

[231] Goldsmith, *supra* note 131.

gence value of American human intelligence is warranted, writing that "[f]rom what is publicly known, the record is not impressive."[232]

In many cases, the costs that must be weighed will show up only in the event the public finds out, in which case the likelihood (or perhaps more realistically, the timing) of revelation must itself be factored into the analysis. This is a straightforward application of what is often referred to as the "Front Page Rule," in the sense that officials ought to make only those decisions that would withstand scrutiny on the front page of a newspaper. The President's Review Group included the Front Page Rule in its list of recommendations for surveillance reform,[233] and Goldsmith recently charged intelligence lawyers to take the rule seriously.[234] That said, the track record of intelligence agencies in this area is, at best, lackluster. As Bruce Schneier has written:

> While the NSA excels at performing . . . cost-benefit analysis at the tactical level, it's far less competent at doing the same thing at the policy level. The organization seems to be good enough at assessing the risk of discovery — for example, if the target of an intelligence-gathering effort discovers that effort — but to have completely ignored the risks of those efforts becoming front-page news.[235]

Even a cursory comparison with existing intelligence oversight institutions reveals the relative advantages of the White House — and in particular, the NSC — in assessing these sorts of risks. It goes without saying that neither the FISC nor courts of general jurisdiction have anything like the requisite capacity to harmonize disparate voices from across the intelligence community or to promote a set of intelligence policies that balance competing strategic imperatives. Congressional committees are more capable on this dimension than courts, for their remit includes "ensuring that taxpayers' funds are spent appropriately and efficiently on programs and activities that produce useable intelligence information [and] that intelligence activities are effective in protecting the United States and its interests from foreign threats."[236]

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[232] *See* AGRELL & TREVERTON, *supra* note 51, at 49.

[233] *See* PRG, *supra* note 65, at 170 ("[W]e should not engage in any secret, covert, or clandestine activity if we could not persuade the American people of the necessity and wisdom of such activities were they to learn of them as the result of a leak or other disclosure. The corollary of that rule is that if a foreign government's likely negative reaction to a revealed collection effort would outweigh the value of the information likely to be obtained, then do not do it.").

[234] *See* Jack Goldsmith, *My Speech at ODNI Legal Conference: "Toward Greater Transparency of National Security Legal Work,"* LAWFARE (May 12, 2015, 8:30 AM), http://www.lawfareblog.com/my-speech-odni-legal-conference-toward-greater-transparency-national-security-legal-work [http://perma.cc/8AXJ-YSHF].

[235] Bruce Schneier, *How the NSA Thinks About Secrecy and Risk*, THE ATLANTIC (Oct. 4, 2013), http://www.theatlantic.com/technology/archive/2013/10/how-the-nsa-thinks-about-secrecy-and-risk/280258 [http://perma.cc/56U8-MF3S].

[236] Baker, *supra* note 15, at 201; *cf.* Jennifer Kibbe, *Congressional Oversight of Intelligence: Is the Solution Part of the Problem?*, 25 INTELLIGENCE & NAT'L SECURITY 24, 25 (2010)

Nevertheless, congressional overseers lack real-time access to the full range of inputs necessary for integrating intelligence collection practices into a national strategy. Furthermore, the fragmentary nature of congressional oversight committee jurisdiction impedes the development of a comprehensive outlook.[237] Meanwhile, legalist checks within the executive branch, ranging from inspectors general to offices of general counsel, are not designed or staffed, except obliquely, to analyze questions of intelligence efficacy. Consider in this regard the decision (exposed in one of Edward Snowden's leaked documents[238]) to tap German Chancellor Angela Merkel's personal cellphone as far back as 2002 (when she served as leader of the opposition in the Bundestag), a decision seemingly made by the NSA without the President's knowledge.[239] Whatever legal barriers that may have applied to this collection[240] were dwarfed by strategic and economic concerns of the

("[D]one well, [congressional intelligence oversight] helps to improve the intelligence product . . . .").

[237] For example, the then-Chairman of the Senate Foreign Relations Committee expressed frustration with Secretary of State John Kerry, who was testifying before the committee about the projected scale of military operations in Iraq and Syria but was not forthcoming about intelligence operations in the same area. As Senator Robert Menendez said to Secretary Kerry: "It is unfathomable to me to understand how this committee is going to get to those conclusions without understanding all of the elements of military engagement, both overtly and covertly." Niels Lesniewski & Humberto Sanchez, *Before Approving ISIS War, Menendez Wants Intelligence Briefing*, ROLL CALL (Sept. 22, 2014, 3:50 PM), http://blogs.rollcall.com/wgdb/before-approving-isis-war-menendez-wants-intelligence-briefing [http://perma.cc/Z84M-KDYT].

[238] James Ball, *NSA Monitored Phone Calls of 35 World Leaders After US Official Handed Over Contacts*, THE GUARDIAN (Oct. 25, 2013, 2:50 AM), http://www.theguardian.com/world/2013/oct/24/nsa-surveillance-world-leaders-calls [http://perma.cc/ZPU6-KXUJ].

[239] Some question whether President Obama was ignorant of the tapping. *See, e.g.*, *Embassy Espionage: The NSA's Secret Spy Hub in Berlin*, DER SPIEGEL (Oct. 27, 2013, 7:02 PM), http://www.spiegel.de/international/germany/cover-story-how-nsa-spied-on-merkel-cell-phone-from-berlin-embassy-a-930205-2.html [http://perma.cc/FY4H-C24S] ("Among the politically decisive questions is whether the spying was authorized from the top: from the US president."). However, President Obama, backed by the NSA, has claimed that he would have halted the collection had he known about it. *NSA Says Obama Didn't Know Merkel's Phone Was Being Bugged*, AL JAZEERA AM. (Oct. 27, 2013, 10:52 PM), http://america.aljazeera.com/articles/2013/10/26/us-may-have-buggedangelamerkelsphonesince2002report.html [http://perma.cc/S2FT-VMZ2].

[240] The question of international law's application to intelligence is complex and evolving. For a thoughtful framing of some of the issues surrounding disparate treatments of citizens and foreigners for purposes of bulk collection, see Ryan Goodman, *Should Foreign Nationals Get the Same Privacy Protections Under NSA Surveillance — or Less (or More)?,* JUST SECURITY (Oct. 29, 2014, 10:33 AM), http://justsecurity.org/16797/foreign-nationals-privacy-protections-nsa-surveillance-or-or-more [http://perma.cc/JF72-NVWE]. Professor Ashley Deeks has advanced the idea that some (limited, at least at first) international compact ought to govern this space. *See* Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291 (2015); *see also* Kenneth Roth, *Obama & Counterterror: The Ignored Record*, N.Y. REV. BOOKS (Feb. 5, 2015), http://www.nybooks.com/articles/archives/2015/feb/05/obama-counterterror-ignored-record ("Brazil and Germany have led an initiative at the UN General Assembly to articulate global concern about the harm of mass surveillance for our right to privacy and other basic freedoms. In addition, there will be an effort at the UN Human Rights Council in March 2015 to create a spe-

sort that legalist oversight bodies are not called upon to address. It is precisely in considering these downstream policy-based consequences that presidential intelligence would have proved useful. Nested at the hub of the national security state (understood in the broadest sense to contemplate instruments of military, diplomatic, and economic power), White House review would have brought a holistic approach to calibrating the proper metes and bounds of this and other collection efforts, recognizing that how intelligence is gathered must be integrated into any national strategy.[241]

As noted above, the OIRA analogy should not be stretched too far. It is difficult to see how technical CBA could be performed in this area. As Professor John Coates recently cautioned with respect to the extension of technical CBA to financial regulation,[242] any attempt to perform such an analysis of intelligence collection is likely to supply an occasion for camouflaging qualitative judgments, rather than getting hard-edged analytic traction on the issues. But to conclude that intelligence oversight "does not take place in a political vacuum in which legislators conduct a Spock-like assessment of options, costs, and benefits"[243] is not to diminish the possibility and desirability of a more conceptual review for tradeoffs carried out by the White House. And the absence of mathematical rigor does not absolve overseers of responsibility for generating a meaningful methodology to assess the efficacy of intelligence. As noted above, the absence of clearly defined metrics has been a major shortcoming of intelligence oversight (and the oversight of national security policies more generally), playing into the hands of a more ideologically inflected and less pragmatic discourse about intelligence. As one PCLOB member has thoughtfully observed, "the natural tendency of the government, the media, and the public is to ask whether a particular program has allowed officials to thwart terrorist attacks or save identifiable lives."[244] But "plots averted" is hardly the

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cial rapporteur on privacy who could elaborate global standards for communications regardless of where people are located.").

241 As Zegart has argued, the CIA was founded with this sort of strategic outlook in mind. Over the years, it has drifted away from this core mission. *See generally* ZEGART, *supra* note 200.

242 *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015). *But see* Bubb, *supra* note 203, at 49 (arguing that cost-benefit analysis of financial regulation is "no more difficult — indeed, it might be less difficult — than it is in many other domains in which it plays a central role"); Eric A. Posner & E. Glen Weyl, *Benefit-Cost Paradigms in Financial Regulation*, 43 J. LEGAL STUD. S1, S30 (2014) (recommending that "the president . . . create a department within OIRA and give it the specific mission of coordinating [cost-benefit analysis] among the financial agencies").

243 Amy B. Zegart, *The Domestic Politics of Irrational Intelligence Oversight*, 126 POL. SCI. Q. 1, 4 (2011). Zegart's focus is on congressional oversight, but some of her observations generalize more broadly across various oversight institutions.

244 PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON

right barometer of intelligence success in counterterrorism, putting aside the obvious problem that this metric does not translate to non-terrorism-related intelligence work.[245] In discussing the 215 metadata program, former NSA Deputy Director John C. "Chris" Inglis, acknowledged that the program was "not a silver bullet in and of itself," but maintained that its true value inhered in plugging a potential intelligence gap "that we don't know any other way to cover."[246] It may be that reaching meaningful conclusions about the value of intelligence collection efforts necessitates a more conceptually rich vocabulary for capturing and measuring intelligence efficacy than we currently have.[247] But from a practical point of view, it is certainly not impossible to assess the utility of information learned from a particular program, source, or collection method.

The desire to push the PCLOB toward considering the policy implications of surveillance practices is commendable. Although its mandate did not make it inevitable that the Board would define its role in largely legalist terms, the fact that the PCLOB is staffed exclusively by lawyers[248] may have pointed it in that direction.[249] The Board's emphasis on determining, in a court-like fashion, the legality of various programs has arguably detracted from its ability to pronounce more holistically on the programs' costs and benefits.[250] That said, proposing "that the NSA and other members of the Intelligence

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THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 217 (2014) [hereinafter 215 PCLOB REPORT], http://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf [http://perma.cc/LSG6-5PP7] (separate statement of Board Member Elisebeth Collins Cook).

245 *See* Matthew Waxman, *How to Measure the Value of NSA Programs?*, LAWFARE (Aug. 12, 2013, 11:07 AM), http://www.lawfareblog.com/2013/08/how-to-measure-the-value-of-nsa-programs [http://perma.cc/CM2U-RWCL] (criticizing the emphasis in official justifications of surveillance programs on the number of plots averted).

246 *Transcript: NSA Deputy Director John Inglis*, NAT'L PUB. RADIO (Jan. 10, 2014, 6:19 AM), http://www.npr.org/2014/01/10/261282601/transcript-nsa-deputy-director-john-inglis.

247 *See, e.g.*, COMM. ON RESPONDING TO SECTION 5(D) OF PRESIDENTIAL POLICY DIRECTIVE 28, NAT'L RESEARCH COUNCIL, REPORT ON BULK COLLECTION OF SIGNALS INTELLIGENCE: TECHNICAL OPTIONS (2015) (employing various "use cases" to assess the viability of software substitutes for bulk collection).

248 *See Board Member Biographies*, PRIVACY & C.L. OVERSIGHT BOARD, http://www.pclob.gov/about-us/board.html [http://perma.cc/FJ2G-3HTS] .

249 For a timely exchange on the relative clout of lawyers and intelligence experts in contemporary oversight, see Charles J. Dunlap, Jr., *Does the Intelligence Community Fear Lawyers . . . or Legal Scrutiny?*, JUST SECURITY (July 2, 2014, 8:05 AM), http://justsecurity.org/12472/guest-post-intelligence-community-fear-lawyersor-legal-scrutiny [http://perma.cc/2PUR-A588]; and Marshall Erwin, *A Response to General Dunlap*, JUST SECURITY (July 2, 2014, 1:25 PM), https://www.justsecurity.org/12509/guest-post-response-dunlap [https://perma.cc/E8PG-KXCQ].

250 *See* Schlanger, *supra* note 114, at 113. One of the Board's members filed a dissent in which she expressed the view that the Board ought to adopt a more policy-oriented, and less law-focused, outlook on metadata collection. *See* 215 PCLOB REPORT, *supra* note 244, at 210 (separate statement of Board Member Rachel Brand).

Community develop metrics for assessing the efficacy and value of intelligence programs, particularly in relation to other tools and programs,"[251] misunderstands the nature of the measurement that needs to take place. Members of the policy community, as consumers of intelligence (informed, to be sure, by the insights of intelligence officials), will need to assess the efficacy of intelligence. Intelligence officials suffer from tunnel vision and lack the strategic horizons (and perhaps also the neutrality) to evaluate their own work.[252]

None of this is to say that the intelligence community can be expected to cede turf willingly to the White House. To the contrary, the capacity of intelligence agencies to engage in what Professor Jennifer Nou, in the context of agency stonewalling of OIRA, has labeled "self-insulating" behavior,[253] is formidable.[254] One way to resist greater oversight is for agency officials to highlight the scope of current (legalist) mechanisms.[255] This sort of approach is audible in the way that intelligence officials talk about legalist oversight. When former CIA General Counsel Stephen Preston speaks of intelligence as a regulated industry[256] and when former NSA General Counsel Rajesh De refers to the section 215 metadata program run by the NSA and FBI as "one of the most highly regulated programs in the federal government

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[251] 215 PCLOB REPORT, *supra* note 244, at 217 (separate statement of Board Member Elisebeth Collins Cook).

[252] Joseph Fitsanakis, *Secret Report Warns US Spy Mission Distorted by "War on Terror*," INTELNEWS.ORG (Mar. 22, 2013), http://intelnews.org/2013/03/22/01-1222 (reporting that a classified report compiled by President Obama's Intelligence Advisory Board cautioned the President that the CIA and NSA had "been disabled by tunnel vision and operational fatigue in the pursuit" of al Qaeda and the focus on Islamic militancy).

[253] *See generally* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013).

[254] In recent wrangling over proposed intelligence reform legislation, Professor Bruce Ackerman sees evidence that "the intelligence establishment launched a political counteroffensive" against the proposal, "[w]ith Obama remaining on the sidelines." Bruce Ackerman, Opinion, *CIA vs. the Senate: The Constitution Demands Action*, L.A. TIMES (Aug. 6, 2014, 5:17 PM), http://www.latimes.com/opinion/op-ed/la-oe-ackerman-cia-spies-on-senate-20140807-story.html [http://perma.cc/D9M7-74W3].

[255] This trend is noteworthy given that the intelligence establishment initially resisted the pivot to legalist oversight. *See* Margo Schlanger, *A Cult of Rules: The Origins of Legalism in the Surveillance State*, JUST SECURITY, (Nov. 5, 2014, 11:13 AM), http://justsecurity.org/17117/cult-rules-origins-intelligence-legalism [http://perma.cc/38KW-2GVU] (citing a drafter of Executive Order 12,333 for the proposition that there was "enormous pent-up hostility in the intelligence community toward lawyers and legalistic restrictions" and that the "attitude was not an invention of the Republican political appointees — who at that time were not yet that numerous — but permeated the career service").

[256] *See* Stephen W. Preston, Gen. Counsel, CIA, Remarks at Harvard Law School (Apr. 10, 2012), https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/cia-general-counsel-harvard.html [https://perma.cc/9AQD-J2QV].

today,"[257] they are reading from a common legalist script.[258] Strictly speaking, these officials are not wrong; there is significant legal regulation of at least certain aspects of American intelligence collection. But the presence of this kind of oversight — and the willingness of officials to tout it — does not speak to the enormous policy discretion that spy agencies otherwise enjoy with respect to intelligence gathering.

In their efforts at self-insulation, intelligence officials are enabled by a climate of secrecy, which limits scrutiny from outside, or even from within, the national security state. Indeed, leaders of the spy agencies themselves struggle to account for all that the organizations they run do. Referring to ultraclassified Special Access Programs (SAPs), then-Undersecretary of Defense for Intelligence (and current DNI) James R. Clapper observed: "There's only one entity in the entire universe that has visibility on all SAPs — that's God."[259] The ability of intelligence agencies to dampen White House control is also underwritten by their recognition that the President is ultimately dependent on the work they do, and will, accordingly, only bear down on them so much. As Professor David Cole recently observed, reflecting on CIA Director John Brennan's nuanced response to the recently issued Senate Intelligence Committee's study of the CIA's detention and interrogation program[260]: "The quandary that Brennan faces is similar to the quandary that Obama faces . . . . Both are personally opposed to what went on and deeply troubled by what went on and agree that it should never happen again. And both are ultimately dependent on the C.I.A. for important national security services."[261]

But in the end the right question is not whether the White House will struggle to extract information from the intelligence agencies, but instead whether the White House can be expected to perform more effectively in this regard than other oversight institutions. Whether the

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[257] *See* Consideration of Recommendations for Change: The Surveillance Programs Operated Pursuant to Section 215 of the USA PATRIOT Act and Section 702 of the Foreign Intelligence Surveillance Act Before the Privacy and Civil Liberties Oversight Board at 26 (Nov. 4, 2013), http://fas.org/irp/news/2013/11/110413-pclob.pdf [http://perma.cc/YG7A-NVRH] (statement of Rajesh De, NSA Gen. Counsel).

[258] In a related vein, the ACLU's Jameel Jaffer has criticized officials for touting (pre-Snowden, anyhow) the fact that the government's surveillance programs had been countenanced by all three branches of government. As Jaffer argued, "what it presented as a defense of the surveillance program was actually an indictment of our oversight system." *See* Jameel Jaffer, *Obama Is Cancelling the NSA Dragnet. So Why Did All Three Branches Sign Off?*, THE GUARDIAN (Mar. 25, 2014, 10:09 AM), http://www.theguardian.com/commentisfree/2014/mar/25/obama-nsa-dragnet-phone-proposal-sign-off [http://perma.cc/YQF3-XCAH].

[259] Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010, 4:50 PM), http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/print [http://perma.cc/8X9F-ZF5Z].

[260] *See* DETENTION AND INTERROGATION REPORT, *supra* note 63.

[261] Baker & Mazzetti, *supra* note 47 (quoting Professor David Cole).

comparison is to congressional committees, the FISC, or the PCLOB, the answer is yes. As noted above, the President and his staff have daily contact with senior leaders of the intelligence apparatus and have at their disposal mechanisms to extract information, up to and including the ability to replace agency heads. Furthermore, and more subtly, the President is positioned to exploit rivalries across the intelligence and national security bureaucracy to defeat the self-insulating strategies that individual agencies might pursue.[262]

2. Accountable Intelligence. — Under many (though, as discussed below, not all) specifications, presidential intelligence carries the potential for heightened democratic accountability. In one sense, the logic here verges on the tautological. Substituting presidential intelligence for a system that historically empowered the permanent intelligence bureaucracy to self-regulate promotes responsiveness to the people's elected representative.[263] As one intelligence scholar has explained, "what some may perceive as a president's 'preconceptions' and 'biases,' may well be the entirely proper policy orientation that a president was elected to pursue."[264] But upon closer inspection, more nuanced judgments can be teased out, and two distinct concepts of accountability come into view. First, there is the way in which presidential intelligence underwrites (and is underwritten by) what might be thought of as a pluralist account of accountability. As noted above, the President has repeatedly interacted with emergent interest groups in the intelligence domain, especially foreign heads of state and diplomats on the one hand, and technology and telecommunications executives on the other. Precisely because these conversations are relatively intimate and entail discussions with knowledgeable intelligence insiders (and efforts by officials to mollify actors they need to keep on board), they are likely to involve candid talk about intelligence practices. In turn, these candid exchanges can be said to supply a measure of accountability with the interest groups standing in for (at least some portion of) the general public.

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[262] *See* Kasie Hunt, *Intel Agencies' Internal Turf Wars*, POLITICO (Jan. 20, 2010, 5:00 AM), http://www.politico.com/news/stories/0110/31686.html [http://perma.cc/NCB8-VVSR] (quoting lawmakers describing a "three-way turf war" between DNI Dennis Blair, CIA Director Leon Panetta, and National Counterterrorism Center Director Michael Leiter that resulted in the agencies being unable to bring together pieces of intelligence to detect the would-be Christmas Day airplane bomber).

[263] *See* Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY 115, 121 (Michael W. Dowdle ed., 2006) (setting out various types of public accountability and describing political accountability as a system in which "[t]op-level bureaucrats . . . are responsible or accountable to an elected official . . . for carrying out their discretionary functions in accordance with their political superiors' policies or ideological commitments").

[264] deGraffenreid, *supra* note 88, at 16.

Second, presidential intelligence has inched toward a more straightforwardly democratic vision of accountability, a turn which is itself dependent on the heightened visibility of the intelligence apparatus. The allied presidential administration literature regards the President's ability to "go public" as a defining feature of that project.[265] The President and his senior advisors have spoken publicly and extensively about the changes at hand. For example, in a major speech that he delivered to accompany the issuance of PPD-28, President Obama sought to reassure a skittish public that the United States grapples meaningfully with the political, ethical, and legal dilemmas posed by contemporary surveillance.[266] As the President put it, "we will reform programs and procedures in place to provide greater transparency to our surveillance activities."[267] Other top officials have made extensive public appearances, perhaps none more so than the incumbent ODNI General Counsel, who has spoken repeatedly to specialist and nonspecialist audiences.[268] This turn to greater openness is consistent with Professor John Ferejohn's insight that heightened visibility is causally linked to greater official power.[269] To take an example from the intelligence domain, the PSP, attended as it was by intense secrecy, ultimately could not bear its own political weight; when Congress openly legislated intelligence gathering comparable in scale to the PSP but more visible to the public, the program could pass muster.[270]

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[265] *See* Kagan, *supra* note 1, at 2301 ("Some of this activity no doubt related more to strategies of public relations than of administrative governance. All methods of 'going public,' in the sense that political scientists use the term, aim to cultivate public support, and Clinton focused on this goal with equal or greater intensity than any of his predecessors. If, as I have indicated, his 'going public' strategy had a peculiarly administrative cast, a prime cause lay in his understanding that announcing new actions captured more and bigger headlines than did simple opining on policy issues. And this recognition sometimes led him to commandeer, wholly after the fact, regulatory decisions made in the bureaucratic trenches, with little prior or subsequent White House interest or involvement." (footnotes omitted)).

[266] *See* Presidential Remarks on Signals Intelligence, *supra* note 42. Speeches by the President and his senior staff have become an especially important means of shaping national security law and policy in the Obama Administration. *See* KENNETH ANDERSON & BENJAMIN WITTES, SPEAKING THE LAW: THE OBAMA ADMINISTRATION'S ADDRESSES ON NATIONAL SECURITY LAW 6–8 (2015); *cf.* RICHARD E. NEUSTADT, PRESIDENTIAL POWER 10 (1960) ("Presidential *power* is the power to persuade.").

[267] Presidential Remarks on Signals Intelligence, *supra* note 42.

[268] *See, e.g.*, Robert S. Litt, Gen. Counsel, ODNI, Address at the Brookings Institution: NSA Data Collection and Surveillance Oversight (July 19, 2013), http://www.c-span.org/video/?314083-1/general-counsel-dni-speaks-intelligence-law; Robert S. Litt, Gen. Counsel, ODNI, Keynote Remarks at the American University Washington College of Law Freedom of Information Day Celebration (Mar. 18, 2014), http://www.dni.gov/files/documents/Robert%20Litt%20FOIA%20Day%20Celebration.pdf [http://perma.cc/SJ6K-ADB8].

[269] *See* John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, *in* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 149 (Adam Przeworski et al. eds., 1999).

[270] *See supra* notes 102–105 and accompanying text.

The presidential turn to greater publicity is itself made possible by his ability to reach out to a national (and perhaps just as importantly, global) audience.[271] A key component of that power is the President's unilateral capacity to declassify information and to reveal aspects of intelligence programs.[272] By contrast, neither the FISC nor congressional intelligence committees may declassify information on their own authority,[273] which severely constrains the ability of those institutions to engage the public directly on intelligence matters. This power has been powerfully on display in the post-Snowden environment. Working with the DNI,[274] the White House has acted to make public many previously classified documents, including the intelligence community's annual priorities, countless surveillance-related documents, and a series of important opinions of the FISC.[275] That is not to suggest that the White House possesses a monopoly on official discussion of intelligence matters. Some scholars have drawn attention to the capacity of the congressional oversight committees to "explain[] and represent[] the intelligence community to the public,"[276] and certain legislators have, in fact, taken to the airwaves to comment (critically[277] and approvingly[278]) on pressing intelligence controversies. The recently issued Senate

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[271] *See generally* DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION, *supra* note 269.

[272] *Cf.* Baker, *supra* note 15, at 202–03 (noting that the President's oversight responsibilities are tied to the fact that "[a]s a practical matter, he . . . controls access to classified information").

[273] *See* Note, *Keeping Secrets: Congress, the Courts, and National Security Information*, 103 HARV. L. REV. 906, 906 (1990) ("Historically, the executive branch alone has decided how to balance the need for secrecy against the need for openness in foreign affairs.").

[274] The DNI has lately embraced the virtues of transparency. While recognizing that transparency entails some amount of risk, the current director recently signed only one version — unclassified — of the 2014 National Intelligence Strategy. James R. Clapper, Dir. of Nat'l Intelligence, Remarks at the AFCEA/INSA National Security and Intelligence Summit (Sept. 18, 2014), http://www.dni.gov/index.php/newsroom/speeches-and-interviews/202-speeches-interviews-2014/1115-remarks-as-delivered-by-the-honorable-james-r-clapper-director-of-national-intelligence-afcea-insa-national-security-and-intelligence-summit?tmpl=component&format=pdf [http://perma.cc/TVV3-9VP5] ("I only signed an unclassified NIS. One of my big takeaways from the past 16 months is that we need to be more transparent.").

[275] *See* Press Release, Office of the Press Sec'y, FACT SHEET: Review of U.S. Signals Intelligence (Jan. 17, 2014), https://www.whitehouse.gov/the-press-office/2014/01/17/fact-sheet-review-us-signals-intelligence [https://perma.cc/2RHG-QFLM]; *see also Declassified FISA Court Documents on Intelligence Collection*, WASH. POST, http://apps.washingtonpost.com/g/page/world/declassified-fisa-court-documents-on-intelligence-collection/447 [http://perma.cc/6G4K-UPET]. *See generally* OFF. OF THE DIRECTOR OF NAT'L INTELLIGENCE, http://www.dni.gov/index.php (last visited Nov. 22, 2015) (search "declassified").

[276] *See* Kibbe, *supra* note 236, at 25.

[277] *See* Carl Hulse, *On Torture Report, Colorado's Udall Leaves Subtlety at Door on the Way Out*, N.Y. TIMES (Dec. 13, 2014), http://www.nytimes.com/2014/12/14/world/americas/on-torture-report-colorados-udall-leaves-subtlety-at-door-on-the-way-out.html.

[278] *See* Ginger Gibson, *Mike Rogers Defends NSA Data Collection*, POLITICO: POLITICO NOW BLOG (Dec. 22, 2013, 10:23 AM), http://www.politico.com/blogs/politico-live/2013/12/mike-rogers-defends-nsa-data-collection-180105.html [http://perma.cc/YL24-9VKS].

Intelligence Committee report on CIA detention and interrogation[279] attests to the ongoing power of Congress to speak directly to the American public. But the White House will always have an edge in terms of its access to the most timely information and the relevant strategic context.

I hasten to add that gains here are to be understood in comparison with the prior state of affairs. For a host of reasons, democratic accountability cannot be fully realized in the intelligence area (if it can be anywhere). First, notwithstanding the discussion above regarding the tight connection between presidential intelligence and heightened publicity, the default setting for intelligence programs and oversight remains secrecy. All presidential revelation in this area, however well motivated and ostensibly thorough, is necessarily incomplete. Furthermore, greater visibility is not the same as transparency. That is because the power to disclose selectively is parasitic on, and marbled into, the power to conceal. Paraphrasing Senator Daniel Moynihan's classic work, one might say that selective disclosure, like secrecy, is itself a "form of regulation."[280] In the fullest sense the President cannot be said to be securing the assent of the people for policies that are known to the people only through selective disclosures made by the White House. As noted above, the pluralist accountability sustained by presidential interaction with informed interest groups may be more promising on this dimension. Second, as Professor Jide Nzelibe has argued, the very idea of a nationally elected President capable of conferring democratic legitimacy on White House decisions rests, at least in part, on myth.[281] By and large, national elections do not pivot on the politics of this or that issue[282] — certainly not surveillance.

But these qualifiers themselves need qualifying. Allowing that public knowledge of, and participation in, intelligence governance is constrained by secrecy, there is nevertheless a great deal more information available in the public domain than there ever has been. As compared to the administrative state, where centralized oversight bodies like OIRA are typically more, not less, secretive (and less accounta-

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[279] DETENTION AND INTERROGATION REPORT, *supra* note 63.

[280] *See* DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE 59 (1998).

[281] Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1217 (2006); *see also* Jane Mansbridge, *Representation Revisited: Introduction to the Case Against Electoral Accountability*, DEMOCRACY & SOC'Y, Fall 2004, at 1, 12–13.

[282] *See* Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 143 (2006) ("Presidential supervision without effective congressional oversight is more of a threat to democratic values than congressional oversight because it can occur privately, and the President may have been elected for reasons completely unrelated to the particular regulatory issues involved.").

ble) than the agencies they superintend,[283] the opposite is true in the intelligence arena. And while it is unlikely to top the list of politically salient issues in the current presidential-election cycle, intelligence oversight can be expected to influence campaign fundraising in certain key sectors of the economy and slices of the voting public.

3. Rights-Regarding Intelligence. — Presidential intelligence may well mean more privacy-oriented intelligence, as compared with the baseline. This is true at the conceptual level. Intelligence collection that is better aligned with strategic judgment is more likely to pass muster under the Fourth Amendment, according to which reasonableness is a touchstone for establishing legality.[284] But it is also true in a more operational sense.[285] Greater political control from a White House under economic and strategic pressure from technology firms and allies may also yield more privacy-oriented intelligence. For example, as noted above, PPD-28 embodies a commitment to extend certain privacy protections to non-U.S. persons. This ratcheting up of privacy protections beyond the dictates of any statute or the Fourth Amendment — "a major change in U.S. policy"[286] — dovetails with the interests of allies and global firms seeking to reassure skittish citizens and customers.[287] In the PPD's demands that signals intelligence "be as tailored as feasible"[288] and that bulk data not be used for af-

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[283] *See* Bagley & Revesz, *supra* note 140, at 1309 (noting OIRA's "long and well-documented history of secrecy").

[284] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); MacWade v. Kelly, 460 F.3d 260, 269 (2d Cir. 2006) (holding that the reasonableness of a search in the "special needs" context turns on the "efficacy of the search in advancing the government interest," among other factors); Brief for Plaintiffs-Appellants at 2, 28, ACLU v. Clapper, 785 F.3d 787 (2d Cir. 2015) (No. 14-42) (resting their claim that the bulk collection of telephone records, under Section 215 of the Patriot Act, violates the Fourth Amendment partially upon the fact that the PRG and the PCLOB have questioned the effectiveness of the program).

[285] Another approach to thinking about presidential intelligence as a vector for rights protection emphasizes the tendency on the part of centralized reviewers to be less zealous in their regulatory outlook than officials serving in agencies. If we imagine that the average intelligence officer pays less heed to the costs of his zealousness, including costs measured in harm to privacy, than a White House overseer, then a system of presidential intelligence ought to yield greater rights protection as compared with the prior baseline of greater agency autonomy. *See generally* Ryan Bubb & Patrick L. Warren, *Optimal Agency Bias and Regulatory Review*, 43 J. LEGAL STUD. 95 (2014).

[286] *See* Kris, *supra* note 190, at 292.

[287] Ashley Deeks has written of the capacity of "foreign leaders, citizens, corporations, and peer intelligence services" to serve as checks on American intelligence, both directly and indirectly (by stimulating American actors to play a checking role). *See* Ashley Deeks, *Checks and Balances from Abroad*, U. CHI. L. REV. (forthcoming 2016) (manuscript at 1) (on file with the Harvard Law School Library).

[288] PPD-28, *supra* note 43.

firmative foreign intelligence gathering,[289] the pressure from technology firms and allies is also detectable.

ACLU lawyer Ben Wizner's observation that "one of the great contributions that Snowden has made is to make some very powerful tech companies adverse to governments"[290] captures something true about the emerging dynamic. Technology firms, channeling global consumer demand, are currently serving as a catalyst for more constrained surveillance practices. It is precisely the conditions of privatization and mutual dependency between the technology firms (and allies) and the government that have underwritten the power of these actors to push back.[291] The Madisonian insight that individual rights are most effectively protected when "[a]mbition . . . [is] made to counteract ambition"[292] — a claim that is usually realized through inter- and intragovernmental checks at the federal and state levels — is here operationalized when technology firms and allies, looking to secure their own interests, pressure the White House to push back against the intelligence community.[293]

Presidential administrations may, of course, be more or less receptive to what the technology firms are saying, but given these firms' ever-growing clout within the American economy, it is hard to imagine a President ignoring their demands altogether. Obviously a shift in the threat environment could have a powerful impact.[294] But the claim that presidential intelligence is uniquely vulnerable to dynamic assessments of risk misses the mark, because all intelligence oversight institutions (courts, congressional committees) have tended to buckle under the pressure of a current or very recent national security emer-

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[289] *Id.*

[290] Henry Peck, *Pull Back to Reveal: Henry Peck Interviews Ben Wizner*, GUERNICA (Oct. 1, 2014), https://www.guernicamag.com/interviews/pull-back-to-reveal [https://perma.cc/UB6V-2VUZ]. As Wizner went on to say, "these tech companies, which are amassing some of the biggest fortunes in the history of the world, are among the few entities that have the power and the clout and the standing to really take on the security state." *Id.*

[291] *See, e.g.*, Drummond, *supra* note 156. This dynamic supplies a good illustration of Professor Jon Michaels's emphasis on translating the core insights of separation of powers to changed political and economic dynamics. *See* Michaels, *supra* note 29, at 520–21.

[292] *See* THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

[293] Lobbying the White House (and Congress) is not the technology firms' sole avenue for promoting privacy. They have also gravitated toward more robust European-style privacy protections in their own services. Indeed, thanks to pressure on the companies from overseas regulators and users, these standards "have become the default privacy settings for the world." *See* Mark Scott, *Where Tech Giants Protect Privacy*, N.Y. TIMES (Dec. 13, 2014), http://www.nytimes.com/2014/12/14/sunday-review/where-tech-giants-protect-privacy.html (quoting a former Irish data-protection official).

[294] *See, e.g.*, Sam Schechner & Jenny Gross, *France Pushes for Tighter Online Surveillance*, WALL ST. J. (Jan. 13, 2015, 5:05 PM), http://www.wsj.com/articles/france-pushes-for-tighter-online-surveillance-1421186711 (discussing the French government's attempt to gain technology firms' assistance with surveillance efforts in the wake of terror attacks).

gency. That said, one potential worry about the capacity of presidential intelligence to supply rights protections stands out: the mounting threat of cyberattacks. Because of the technological interdependence of surveillance and cybersecurity, certain privacy protections that have largely been obtained in the context of pushing back against counterterrorism surveillance programs may come under increasing pressure from the mounting concern over cybersecurity.[295]

Championing the capacity of political control to underwrite rights-protection is not to gainsay the value of other mechanisms for promoting rights-regarding intelligence. All three branches of government have important roles to play. Indeed, as I discuss below, presidential intelligence might itself enhance the capacity of other overseers to protect privacy. For example, presidential control might induce more sensitivity to law and legal controls within intelligence agencies by shining a light (if only because more officials, including in the White House, will be scrutinizing the work of intelligence) on potentially shaky legal theories. For that matter, the prospect that the White House might be paying attention could induce intelligence lawyers to be more scrupulous in making representations to the FISC and in adhering to that court's mandates. But the central point remains that presidential control, predicated, at least initially, on interest group participation, is likely to be a potent vector for meaningful (and enforceable) rights-regarding reforms.

Here, too, the benefit of presidential intelligence needs to be understood in relation to the preexisting baseline. Although the Snowden leaks showcase an intelligence bureaucracy that has largely internalized its responsibility to make a good faith effort to obey the law, and reveal effectively no officially sanctioned abuse,[296] the leaks also show how existing institutions have fallen short in ensuring the legality of intelligence collection. Here the well-known story of domestic metadata

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[295] *See* Jack Goldsmith, *The Sony Hack: Attribution Problems, and the Connection to Domestic Surveillance*, LAWFARE (Dec. 19, 2014, 5:19 PM), http://www.lawfareblog.com/2014/12/the-sony-hack-attribution-problems-and-the-connection-to-domestic-surveillance [http://perma.cc/N4XV-S3SU] ("How should the U.S. government do a better job of taking intelligence about known prior attacks and using that intelligence proactively to stop future ones? And that in turn will require a conversation about whether, how, and how deeply the NSA and related government agencies should be in the domestic network — not for purposes of catching Islamist terrorists, but rather for purposes of protecting our networks from other adversaries.").

[296] Presidential Remarks on Signals Intelligence, *supra* note 42 ("[N]othing in that initial review, and nothing that I have learned since, indicated that our intelligence community has sought to violate the law or is cavalier about the civil liberties of their fellow citizens."). Even the ACLU's Jaffer has conceded in respect to contemporary American electronic surveillance that "[t]he scandal is what Congress has made legal." Glenn Greenwald & Murtaza Hussain, *Meet the Muslim-American Leaders the FBI and NSA Have Been Spying On*, THE INTERCEPT (July 9, 2014, 12:01 AM), https://firstlook.org/theintercept/2014/07/09/under-surveillance.

collection on the (claimed) authority of section 215 of the Patriot Act[297] is instructive.[298] The government program rested on a legal interpretation that made it through a gauntlet of institutions designed to check for legally questionable intelligence gathering, even though doubts surfaced about the program's legality (and efficacy[299]) at a number of points along the way. It was briefed to members of Congress,[300] countenanced by the OLC,[301] and passed on by the FISC,[302] which, after some back and forth, permitted the government to extend out from the initial target "three hops" — meaning that the government could look into a pool of metadata massively larger than that belonging to the individuals being investigated.[303] Until Congress passed the USA Freedom Act of 2015,[304] prohibiting the bulk collection of all records under section 215 and mandating that the government base applications for

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[297] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of the U.S. Code).

[298] For a background on metadata collection and its claimed legal justification, see Recent Administration White Paper, 127 HARV. L. REV. 1871 (2014).

[299] The PCLOB, for example, concluded that "[b]ased on the information provided to the Board, including classified briefings and documentation, we have not identified a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation." 215 PCLOB REPORT, *supra* note 244, at 11.

[300] *See* Peter Wallsten, *Lawmakers Say Obstacles Limited Oversight of NSA's Telephone Surveillance Program*, WASH. POST (Aug. 10, 2013), http://www.washingtonpost.com/politics/2013/08/10/bee87394-004d-11e3-9a3e-916de805f65d_story.html [http://perma.cc/M6MX-BJE5] ("The administration argued Friday that lawmakers were fully informed of the surveillance program and voted to keep it in place as recently as 2011."). We also know that certain legislators began registering their concerns about the statutory foundations on which the program rested as early as 2011. *See* Eyder Peralta, *In Letter to Senators, DoJ Explains How Secret Court Works*, NPR: THE TWO-WAY (June 6, 2013, 12:23 PM), http://www.npr.org/blogs/thetwo-way/2013/06/06/189196780/in-letter-to-senators-justice-explains-how-secret-court-works (noting that "then-Assistant Attorney General Ronald Weich wrote a letter to Sens. Ron Wyden (D-Ore.) and Mark Udall (D-Colo.) concerning section 215" in October 2011).

[301] The legal analysis the lawyers there (apparently) advanced has been roundly criticized. *See, e.g.*, Orin Kerr, *The Problem with the Administration "White Paper" on the Telephony Metadata Program*, VOLOKH CONSPIRACY (Aug. 12, 2013, 2:34 PM), http://www.volokh.com/2013/08/12/problem-withthe-administration-white-paper-on-the-telephony-metadata-program [http://perma.cc/N69W-PQRZ].

[302] *See* Andrea Peterson, *The Switchboard: The FISA Court Just Approved Bulk Collection of Phone Records, Again*, WASH. POST: THE SWITCH (Oct. 14, 2013), http://www.washingtonpost.com/blogs/the-switch/wp/2013/10/14/the-switchboard-the-fisa-court-just-approved-bulk-collection-of-phone-records-again [http://perma.cc/4W4J-V3VE].

[303] We also know that there was a period of time when the FISC expressed its concerns about the NSA's implementation of the program, during which the court assumed the responsibility, in effect, for checking the NSA's compliance work. *See* Jennifer Granick, *New FISC Pen Register Opinion: It's Just a Matter of Time Before Somebody Gets Hurt*, JUST SECURITY (Nov. 21, 2013, 7:06 PM), http://justsecurity.org/3576/fisc-pen-register-opinion-its-matter-time-hurt [http://perma.cc/U9KW-V4CE].

[304] Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (to be codified in scattered sections of the U.S. Code).

this kind of data on a "specific selection term,"[305] it was the President's engagement with the issue, inspired by the feedback he received from American technology and telecommunications firms, that had produced the most movement to cut back on this authority and to interpose a measure of accountability.

The exception of the recent legislation proves a larger rule. Congress, under conditions of seemingly unprecedented partisan rancor, is unlikely to reset the basic terms of the bargain between the American people and the intelligence apparatus. Meanwhile, neither beefed-up civil liberties offices within the various agencies nor investigatory bodies without remedial authority like the PCLOB possess the institutional heft on their own to enact or enforce serious reforms. And although, as noted below,[306] courts are increasingly involved in shaping intelligence policy, presidential intelligence is more nimble and in some sense more ambitious in what it can achieve (at least in the short run), for example when it comes to extending privacy protections beyond America's borders.[307]

B. Three Potential Downsides

Although it is potentially conducive to more effective, accountable, and rights-protective intelligence, presidential control entails certain risks. I discuss three in particular: interfering with expertise, fanning the flames of partisanship, and threatening abuse. I regard the first two concerns as essentially surmountable, or at least no more damaging to the case for presidential intelligence than comparable worries that surface in connection with presidential administration. The third concern is unique to the intelligence environment and necessitates thinking that is attuned to the dispiriting history at hand and alert to potential ways to prevent it from being repeated.

1. Politicization. — Striking the balance between political control and agency expertise is a core tension that runs throughout the administrative state.[308] Agencies in a sense owe their existence to a claim of

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[305] *Id.* tit. I, § 101. The legislation was prompted by the sunsetting of a number of Patriot Act authorities on May 31, 2015. Among other things, the new law includes the designation by the FISC of a panel of amici curiae to serve in cases raising novel or significant legal issues. *Id.* tit. IV, § 401.

[306] *See infra* pp. 704–06.

[307] *See* PPD-28, *supra* note 43 (extending certain privacy protections to non-U.S. persons). Given this attention, it is somewhat exaggerated for Kenneth Roth to argue that "Obama has not addressed another troubling aspect of US electronic surveillance — the view that foreign citizens outside the United States have no right to privacy even in the content of their communications." *See* Roth, *supra* note 240.

[308] *See, e.g.*, Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 87 ("This approach hearkens back to an older, pre-*Chevron* vision of administrative law in which independence and expertise are seen as opposed to, rather than defined by, political accountability, and in which political influence over agencies by the White

technical know-how that they are able to deploy in the service of sound policymaking. But that commitment to expertise trades off against competing aspirations to democratic accountability rooted in the close ties between the agencies and their political overseers. The presidential administration literature is attuned to this dilemma. In her 2001 article, then-Professor Kagan acknowledged that "an important place for substantive expertise remains in generating sound regulatory decisions" and that "[t]o the extent that presidential administration displaces this feature of agency decisionmaking in areas where it legitimately should operate, this substitution effect must weigh against the practice."[309] But cordoning off science from politics is famously knotty even in the abstract.[310] And the problems do not get easier when political actors and institutions are engaged. A recent example of the politicization of agency expertise came from President George W. Bush's EPA and its skepticism of climate science.[311] The episode culminated in a rebuke from the Supreme Court motivated, in Professors Jody Freeman and Adrian Vermeule's telling, by "the Court majority's increasing worries about the politicization of administrative expertise."[312]

House is seen as a problem rather than a solution."); *The Supreme Court, 2006 Term — Leading Cases*, 121 HARV. L. REV. 185, 420 (2007).

309 Kagan, *supra* note 1, at 2353–54; *see also* Peter L. Strauss, Foreword, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 752 (2007) ("While *Chevron* sensibly accepts the President's political role as mediating the difficulties of focused bureaucratic expertise, it does not purport to displace reliance on the latter. Indeed, the structure of judicial review of administrative action depends, top to bottom, on the presumption that the matter being reviewed is in some respects the product of an expert, not merely a political judgment.").

310 *See, e.g.*, Barron, *supra* note 98, at 1150 ("There is a great deal of science on the issue of global warming, obviously. But the fact that there is a scientific consensus on the role that human activity plays in causing climate change hardly answers the policy question of what should be done in response. Thus, an embrace of scientific expertise alone cannot resolve the hardest policy questions in this area any more than is usually the case." (footnote omitted)).

311 The issue was politically salient during the Bush Administration, with concerns that the White House "embraced bad politics over science in certain areas . . . and ignored science for bad political reasons in other areas." RENA STEINZOR & SIDNEY SHAPIRO, THE PEOPLE'S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC 132 (2010). President Obama's White House has not been immune to this tendency. *See* Mendelson, *supra* note 223, at 1143 (discussing the Obama Administration's failure to acknowledge the political considerations that informed its decision to prohibit women under 18 from buying so-called Plan B contraceptives over the counter).

312 Freeman & Vermeule, *supra* note 308, at 52. Their reading of the case is not naïve, in that it recognizes that "[a]ll administrations exert political pressure on their executive agencies," and that "it is inevitable that political considerations will come into play in executive agencies headed by political appointees who are accountable to the President." *Id.* at 108–09. For the sake of precision it is important to note that the main argument in the case was that greenhouse gases are not "air pollutants" for the purposes of the Clean Air Act. *See* Massachusetts v. EPA, 549 U.S. 497, 528 (2007). A clearer climate-denying claim would have been that they don't "endanger public health," a statutory claim that was not before the Court.

In the intelligence setting, a similar set of issues has played out for generations, concerning the well-known phenomenon of politicization of intelligence.[313] Indeed, the very worry about politicization is "a US invention, one stemming from the specific structure and role of the US intelligence community in the recurring struggles over strategic issues in defense and foreign policy during the Cold War."[314] The debate pits two schools of thought against each other. On the one hand, there is the view, associated with intelligence scholar Sherman Kent, that intelligence and policy must remain separate.[315] On the other hand, there is a view that is associated with former–CIA head Robert Gates,[316] which insists that too much separation impedes the purpose behind intelligence: to generate useful and relevant insights for policymakers.[317] The balance within the intelligence state has historically tipped toward the Kent view. For example, Paul Pillar, with the Iraq weapons of mass destruction (WMD) fiasco in mind, offers a powerful defense of the value of resisting political pressure in shaping intelligence estimates.[318] Scholars like Jennifer Sims, however, have pushed back:

> U.S. intelligence officers often do not seem to believe they are working *on behalf of* policy makers or as part of their team. They tend to see themselves as a check on an administration's power and the repository of truth in a system riddled with biases. . . . Although policy makers do want intelligence to provide facts or "ground-truth," other branches of government have the job of checking the power of those in office, not intelligence.[319]

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[313] Scholars have, of late, attempted to flesh out what has been a theoretically impoverished conversation on the meaning of politicization. *See, e.g.*, JOSHUA ROVNER, FIXING THE FACTS: NATIONAL SECURITY AND THE POLITICS OF INTELLIGENCE 36–48 (2011). Professor Richard Betts has questioned the reflexively critical posture that commentators bring to discussions of politicization. *See* RICHARD K. BETTS, ENEMIES OF INTELLIGENCE: KNOWLEDGE AND POWER IN AMERICAN NATIONAL SECURITY 74 (2007).

[314] AGRELL & TREVERTON, *supra* note 51, at 162.

[315] SHERMAN KENT, STRATEGIC INTELLIGENCE FOR AMERICAN WORLD POLICY 200 (1949).

[316] *See* BETTS, *supra* note 313, at 76.

[317] *See* Richard L. Russell, *Achieving All-Source Fusion in the Intelligence Community*, *in* HANDBOOK OF INTELLIGENCE STUDIES 189, 195 (Loch K. Johnson ed., 2009).

[318] *See* Paul R. Pillar, *Intelligence, Policy, and the War in Iraq*, FOREIGN AFF., Mar.–Apr. 2006, https://foreignaffairs.com/articles/iraq/2006-03-01/intelligence-policyand-war-iraq ("That the administration arrived at so different a policy solution indicates that its decision to topple Saddam was driven by other factors — namely, the desire to shake up the sclerotic power structures of the Middle East and hasten the spread of more liberal politics and economics in the region.").

[319] Jennifer E. Sims, *A Theory of Intelligence and International Politics*, *in* NATIONAL INTELLIGENCE SYSTEMS: CURRENT RESEARCH AND FUTURE PROSPECTS 58, 90 (Gregory F. Treverton & Wilhelm Agrell eds., 2009); *cf.* Richard K. Betts, *Politicization of Intelligence: Costs and Benefits*, *in* PARADOXES OF STRATEGIC INTELLIGENCE 59, 60 (Richard K. Betts & Thomas G. Mahnken eds., 2003) ("[I]n one sense, intelligence cannot live with politicization, but policy cannot live without it.").

Corresponding to this view, and tending to reinforce it, is a nascent trend to comingle intelligence collection and intelligence analysis. This is another formerly ironclad barrier that has begun to give out under mounting evidence that producing the most valuable intelligence requires persistent interaction between operators and analysts.[320] This new idea is based on an old one, part of a road not taken when a central intelligence agency was chosen over an alternative institutional design that would have co-located all intelligence analysis with various government departments responsible for policymaking.[321] Here, too, critics invoke "politicization" as a would-be knock-down argument in favor of maintaining, or even fortifying, the traditional divide.[322]

Regardless of how the balance is struck in terms of the roles of policy and politics in shaping substantive intelligence judgments,[323] the issue of politicization takes on a somewhat different cast when it comes to heightened presidential oversight of intelligence collection modalities. It makes sense to quarantine from politics the factual inquiry into whether Saddam Hussein possessed WMD, or how far along the Iranian government is in acquiring weapons-grade nuclear material.[324] But it is not comparably intuitive — and in fact, makes little sense — to bar the White House from expressing a view on the desirability of spying on an ally, or weighing in on whether to forego controversial programs like metadata collection because their costs may outweigh their benefits. The intelligence agencies have no claim to comparative advantage here. Indeed, concerning the overall assessment of the value of intelligence programs in relation to overarching goals of strategic and economic statecraft, the spy agencies are likely to be less informed (even cumulatively) than the White House, which, as discussed above,[325] can summon the perspectives of multiple "customer" agencies to develop a comprehensive picture. Furthermore, because these sorts of judgments inevitably traverse the fact-value di-

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320 *See* PHILIP BOBBITT, TERROR AND CONSENT 314–15 (2008).

321 *See* AGRELL & TREVERTON, *supra* note 51, at 51. Some intelligence analysis, notably the State Department's Bureau of Intelligence and Research (INR), continues to be organized this way. *See Bureau of Intelligence and Research*, U.S. DEP'T OF STATE, http://www.state.gov/s/inr [http://perma.cc/3EC8-QZTF].

322 *See, e.g.*, Melvin A. Goodman, Opinion, *Separate the C.I.A.'s Intelligence and Operations*, N.Y. TIMES (Dec. 21, 2014), http://www.nytimes.com/roomfordebate/2014/12/21/do-we-need-the-cia/separate-the-cias-intelligence-and-operations (maintaining that CIA centers that fuse operational and analytic functions "undermine[] the ability of analysts to provide objective analysis").

323 As Michael Hayden once put it, "[i]f it were a fact, it wouldn't be intelligence." BOB WOODWARD, PLAN OF ATTACK 219 (2004).

324 *See* Gregory F. Treverton, *Estimating Beyond the Cold War*, DEF. INTELLIGENCE J., Fall 1994, at 5, 8; Greg Bruno & Sharon Otterman, *National Intelligence Estimates*, COUNCIL ON FOREIGN REL. (May 14, 2008), http://www.cfr.org/iraq/national-intelligence-estimates/p7758 [http://perma.cc/5D7H-3QAF].

325 *See supra* notes 76–81 and accompanying text.

vide, they are appropriate for White House decisionmaking. As Kagan puts it, "[a]gencies . . . often must confront the question, which science alone cannot answer, of how to make determinate judgments regarding the protection of health and safety in the face both of scientific uncertainty and competing public interests. With respect to these matters, a strong presidential role is appropriate . . . ."[326]

But that doesn't fully respond to the potential shortcomings of presidential intelligence in this regard. First, although stylized presentations of the intelligence process sharply distinguish between collection and analysis, as discussed above, that boundary is increasingly murky. As a result, presidential intelligence might tend to tip the balance on analytic judgments in favor of the White House's preferred views, especially concerning relatively low-profile issues. Second, as Zegart has observed, the CIA, subject to political pressures imposed by the White House, has veered away from its founding mission of forecasting strategic threats, and has taken on a much more tactical focus.[327] Presidential control might "politicize" intelligence in the sense of further imposing a short-term outlook on what are meant to be more long-term strategic intelligence estimates. Third, politicization might take place in the White House itself, to the extent that the President's political advisors, mindful of election dynamics, encroach on the more policy-oriented decisionmaking by the NSC.

Recognizing the intractability of these issues, it is worth recalling that presidential intelligence is not a unique vector for these sorts of pathologies. In his capacity as intelligence Consumer-in-Chief, the President arguably has more ability to shape (and distort) intelligence priorities than in his role as strategic overseer of collection. But these tensions are clearly real and, over the long term, could threaten the integrity of key aspects of the intelligence enterprise. Intelligence scholar Professor Joshua Rovner argues that the only antidote to politicization is a return to greater secrecy.[328] Even setting aside the normative implications of that claim, such a plan is practically unattainable for reasons discussed above. Instead, good institutional design — for example, replication of aspects of the "finding" process (as discussed

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[326] *See* Kagan, *supra* note 1, at 2356–57; *cf.* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 634–35 (2010) ("[Bernanke] recognize[d] that for decisions so profoundly national in scope, the combination of politics and expertise is more powerful than expertise alone. All else equal, the President is likely to have information that is relevant to generating sound policy on market stability and to mobilizing the necessary political will to achieve the results.").

[327] *See* Amy Zegart, *Let the C.I.A. Do What It Is Supposed to Do*, N.Y. TIMES (Dec. 22, 2014, 9:39 AM), http://www.nytimes.com/roomfordebate/2014/12/21/do-we-need-the-cia/let-the-cia-do-what-it-is-suppose-to-do ("White House officials and warfighters naturally worry most about today. The C.I.A.'s job is to also worry about tomorrow.").

[328] *See* ROVNER, *supra* note 313, at 203–04.

below)[329] — represents a more promising avenue for addressing or preempting these concerns.

2. Partisanship. — A different concern focuses on the perils of heightening presidential power at the expense of Congress — and, more generally, of endorsing political controls in an age in which norms of hyperpartisanship have become pervasive across government, up to and including the national security state. Here, too, the normative debates sparked and informed by the presidential administration literature are suggestive. As to both accountability and effectiveness, the presidential administration literature points to certain advantages rooted in the President's status as the nationally elected leader, as well as the relative shortcomings of Congress,[330] including its limited institutional attention span, the nonrepresentative nature of committees,[331] the committees' state of being captured and their stovepiped regulatory purviews, and the legislature's resource and expertise gaps — all of which get to the heart of why Congress chooses to delegate policymaking to agencies in the first instance.[332] Furthermore, unlike the President, who is incentivized to take ownership of issues because he is held accountable for them regardless,[333] Capitol Hill does not operate on such political logic.[334]

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[329] *See infra* section IV.A, pp. 706–12.

[330] *See, e.g.*, Kagan, *supra* note 1, at 2347 ("Congress, of course, always faces disincentives and constraints in its oversight capacity . . . . Because Congress rarely is held accountable for agency decisions, its interest in overseeing much administrative action is uncertain; and because Congress's most potent tools of oversight require collective action (and presidential agreement), its capacity to control agency discretion is restricted.").

[331] *See* David J. Arkush, *Direct Republicanism in the Administrative Process*, 81 GEO. WASH. L. REV. 1458, 1478–79 (2013) ("[T]he notion of 'congressional' oversight, in the sense of the whole Congress watching over regulators, is rarely more than a metaphor. Legislative supervision typically takes the form of oversight by a small number of individuals in Congress, usually the heads of relevant committees or, more specifically, their staffs, some of whom may be as removed from electoral accountability as agency officials." (footnotes omitted)).

[332] *See id.* at 1479 ("[C]riticisms point to a circularity in aspirations for congressional oversight: Congress delegates broad authority to administrative agencies because it is unwilling or unfit to make all of the decisions required in various policy areas. If Congress were willing and able to evaluate agency performance on the relevant matters, then it need not have delegated the authority in the first place.").

[333] *See* Moe & Wilson, *supra* note 91, at 11–12.

[334] *See* Brian D. Feinstein, *Congressional Government Rebooted: Randomized Committee Assignments and Legislative Capacity*, 7 HARV. L. & POL'Y REV. 139, 160 (2013) ("Despite the theoretical importance and demonstrated efficacy of oversight, Congress appears relatively uninterested in performing its oversight function. Oversight-focused subcommittees tend to be disproportionately populated by less powerful legislators, with senior legislators, party leaders, and full committee chairs and ranking members rarely serving on subcommittees devoted to oversight and investigatory work."); Douglas Kriner, *Can Enhanced Oversight Repair "the Broken Branch"?*, 89 B.U. L. REV. 765, 792 (2009) ("[R]eforms do little to address the underlying problem of variable congressional motivation to oversee the executive in the first place.").

Supporters of congressional oversight meanwhile resist these assumptions. They point to Congress's unmistakable power to control agencies through appropriations and, of course, through substantive legislation.[335] Professor Thomas Sargentich has cautioned that skepticism of the capacity of congressional committees to underwrite democratic accountability should not "defeat the claim that when Congress acts as a whole, with majorities of both the House of Representatives and the Senate in agreement, it represents a broad range of interests, geographical areas, and political orientations."[336]

Although the academic literature on presidential control of intelligence collection is relatively scant, a rich body of commentary diagnoses the limitations of congressional oversight. In its earlier days, there was a hopeful air about the project. Former CIA Director Robert Gates went so far as to suggest that, starting in 1975, the "CIA . . . move[d] from its exclusive relationship with the President to a position roughly equidistant between the Congress and the President."[337] Furthermore, congressional oversight — especially of covert action — paid dividends early on, including helping to avoid operations that would have produced more harm than good. Gates has observed that "some awfully crazy schemes might well have been approved had everyone present not known and expected hard questions, debate, and criticism from the Hill."[338]

But over time the limits of congressional oversight came to the fore. For a host of reasons, congressional oversight began to decline, or at least so the familiar story goes. With committee members largely unable to take public credit for their work, investment of time and effort on intelligence oversight defied basic political logic.[339] The problem was only compounded by the difficulty of sharing highly classified information with committee members and congressional staff.[340] Add to

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[335] *See* Strauss, *supra* note 309, at 759–60 ("Congress can, to be sure, give the President decisional authority, and it has sometimes done so. In limited contexts — foreign relations, military affairs, coordination of arguably conflicting mandates — the argument for inherent presidential decisional authority is stronger. But in the ordinary world of domestic administration, where Congress has delegated responsibilities to a particular governmental actor it has created, that delegation is a part of the law whose faithful execution the President is to assure. Oversight, and not decision, is his responsibility." (footnote omitted)).

[336] Sargentich, *supra* note 35, at 30.

[337] *See* ROBERT M. GATES, FROM THE SHADOWS: THE ULTIMATE INSIDER'S STORY OF FIVE PRESIDENTS AND HOW THEY WON THE COLD WAR 61 (1996).

[338] *Id.* at 559.

[339] *See* ZEGART, *supra* note 32, at 74–75.

[340] *See* Patrick Radden Keefe, *Listening In and Naming Names*, SLATE (Dec. 20, 2005, 3:22 PM), http://www.slate.com/articles/news_and_politics/politics/2005/12/listening_in_and_naming_names.html [http://perma.cc/T3C6-2B3K]; Timothy B. Lee, *Obama Says the NSA Has Had Plenty of Oversight. Here's Why He's Wrong*, WASH. POST: WONKBLOG (June 7, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/07/obama-says-the-nsa-has-had-plenty-of-oversight-heres-why-hes-wrong [http://perma.cc/9WUM-Y4DF].

that the fragmentation of oversight responsibilities among multiple committees,[341] the lack of meaningful budgeting authority on the part of congressional intelligence overseers,[342] and the limited capacity to deploy police patrol–type oversight, and the limits of congressional oversight come into sharp relief.[343] As Representative Norman Mineta, who served on the House Permanent Select Committee on Intelligence in the Reagan years, caustically observed, "We are like mushrooms . . . . They keep us in the dark and feed us a lot of manure."[344] Zegart quotes a frustrated congressional staffer to the effect that "[t]he silver lining with the FBI is that at least they're nonpartisan in their non-cooperation with Congress."[345] Nor have things improved in the years since Zegart undertook her study. If anything, relations between the CIA and Congress have recently been described as "more fraught than at any point in the past decade."[346]

And yet other commentators resist this (by now familiar) narrative. Intelligence scholar L. Britt Snider has offered the view that whatever the shortcomings of the current system, "[c]ompared with the level of congressional awareness that existed in 1975, the difference is like night and day."[347] Furthermore, and not trivially, although Congress initially regulated the intelligence community with an exceedingly light touch — the CIA's organic law is breathtakingly short on detail, while the FBI lacks a basic legislative charter altogether — the last decades have witnessed greater congressional regulation. The initial FISA law

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341 *See* Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1671 (2006) ("While Congress and the Administration have made at least some serious efforts to reorganize the intelligence community, Congress has made little effort to reorganize its overlapping committee oversight of the intelligence community.").

342 *See, e.g.*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 103 (2004) (discussing fragmented nature of congressional appropriations and oversight of intelligence organizations); *see also id.* at 419–21 (calling congressional oversight of intelligence community "dysfunctional" and recommending each house of Congress create a single committee responsible for intelligence oversight to prevent attacks in the future).

343 *See* Johnson, *supra* note 141.

344 Edward Luce, *The Shifts in US National Security Policy Since 9/11*, FIN. TIMES (Nov. 7, 2014, 4:59 PM), http://www.ft.com/intl/cms/s/0/21b69fca-6428-11e4-8ade-00144feabdc0.html (quoting Representative Mineta).

345 Zegart, *supra* note 31, at 215.

346 *See* Siobhan Gorman, *CIA and Congress Clash over Classified Report on Interrogation Program*, WALL ST. J. (July 2, 2014, 1:33 PM), http://www.wsj.com/articles/cia-and-congress-clash-over-classified-report-on-interrogation-program-1404316923.

347 L. Britt Snider, Congressional Oversight of Intelligence: Some Reflections on the Last 25 Years 10, (unpublished manuscript) https://web.law.duke.edu/lens/downloads/snider.pdf [https://perma.cc/NCA5-LG69] ("For all of the situations in which the oversight committees — even today — might find themselves in the dark, they are, for the most part, aware of what the intelligence agencies are doing, however sensitive those activities might be.").

of 1978, the Patriot Act, the Intelligence Reform Act of 2004,[348] the FISA Amendments Act of 2008,[349] and the recently passed USA Freedom Act of 2015 attest to this evolution.

Against this backdrop, it is difficult to offer a confident assessment of how heightened presidential intelligence might interact with congressional controls. On one level, there are some reasons to be hopeful that the combination of presidential and congressional control might lead to better overall oversight. For example, as discussed below, any presidential "finding" on sensitive collection programs could then be briefed on the Hill (much as in the parallel case of covert action), teeing up and focusing congressional oversight of collection platforms or modalities. It is suggestive in this regard that the Senate Intelligence Committee has recently evinced an appetite for an enlarged role in overseeing intelligence collection under Executive Order 12,333 — including an unprecedented step by that body to catalogue and account for the full spectrum of intelligence gathering.[350] Furthermore, an expanded list of intelligence posts that require Senate confirmation (along the lines I propose below) would increase the opportunities for congressional buy-in. Thinking more structurally, the same interest group pressures that have catalyzed and shaped the exercise of presidential controls are also in play on Capitol Hill, at least as far as privacy activists and technology firms are concerned (the lobbying efforts of allies are less visible in Congress). The recent passage of the USA Freedom Act may imply more sustained congressional attention to issues of surveillance in a way that is likely to be mutually compatible with presidential controls. And at the theoretical level, a leading piece of empirical research into wartime interbranch relations recently concluded that "members of Congress will enact policies that more closely reflect presidential preferences when they assign greater importance to the national vis-à-vis local implications of public policy,"[351] implying that on questions of intelligence policy, Congress and the White House might be fairly well aligned. In sum, it is not at all clear that presidential intelligence will have the effect of "crowding out" or (further) mar-

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348 Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S. Code).

349 Pub. L. No. 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 18 and 50 U.S.C.).

350 *See* Eli Lake, *Congress Scouring Every U.S. Spy Program*, DAILY BEAST (Oct. 10, 2014, 5:45 AM), http://www.thedailybeast.com/articles/2014/10/10/congress-scouring-every-u-s-spy-program.html [http://perma.cc/L97Q-GNBE] (quoting a senior committee staff member describing the investigation's unprecedented scope as encompassing "[a]ll the programs through which the intelligence community collects intelligence. Human intelligence, signal intelligence, open source. It is all subject to the review").

351 WILLIAM G. HOWELL ET AL., THE WARTIME PRESIDENT: EXECUTIVE INFLUENCE AND THE NATIONALIZING POLITICS OF THREAT 262 (2013).

ginalizing congressional intelligence oversight; it is even possible that congressional oversight will be improved.

But these more optimistic assessments might well be eclipsed by the dynamics of hyperpartisanship. Under conditions of "separation of parties,"[352] presidential intelligence can be expected to elicit partisan blowback on Capitol Hill more so than a set of policies identified with the intelligence bureaucracy (rather than the White House) might. Professors Daryl Levinson and Richard Pildes have taken issue with Kagan's optimism about the complementarity of presidential and congressional controls under conditions of divided government, noting that "[w]e should expect that the same party competition under divided government that gridlocks the legislative process and motivates presidential administration will create an adversarial 'oversight arms race' between the President and Congress over the bureaucracy."[353] As a corollary, under conditions of unified government, presidential intelligence might foster a climate in which congressional overseers — especially those who belong to the President's party — pull their punches.[354]

It may be that certain structural features of the intelligence world better insulate it from the partisan dynamics that dominate the work of Congress on regulatory matters, or even the rest of the national security state.[355] For one, some of the most pressing intelligence controversies defy the familiar right–left politics that typically organize debate and inflame partisan sentiment in Washington.[356] Second, some of the background conditions under which intelligence committees work — conditions that, as noted above, tend to interfere with their ability to perform effective oversight — actually insulate them from some of the hard edges of hyperpartisanship. Committees that operate with lean staffing and in secret, and that oversee complex policies and bureaucracies, supply relatively inhospitable environments for partisan grandstanding. That said, as presidential intelligence takes root, and as the lobbying dollars of technology and telecommunications firms reshape the economic incentives of congressional participation, this once

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[352] *See generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

[353] *Id.* at 2363 (quoting Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 235 (1998)).

[354] *See, e.g.*, Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 OXFORD J. LEGAL STUD. 189, 207 (2009) ("[I]t is a matter of profound dishonor to our constitutional system that, prior to the 2006 elections, not once did Congress, under the control of the Republican Party, hold meaningful hearings over the conduct of the Iraq War by a Republican President.").

[355] *See id.*

[356] *See, e.g.*, Connie Cass, *NSA Surveillance: Privacy Makes Strange Bedfellows*, DENVER POST (Feb. 18, 2014, 12:01 AM), http://www.denverpost.com/nationworld/ci_25166346/privacy-makes-strange-bedfellows [http://perma.cc/3V4G-BBZL].

sleepy outpost of congressional oversight may take on more of the familiar excesses of partisan politics.

In this light, it remains to be seen how to interpret the dynamics behind the report that the Democratic Chairman and the (exclusively) Democratic membership of the Senate Intelligence Committee issued on CIA interrogations.[357] On the one hand, it can be viewed as a refreshingly nonpartisan effort in which a congressional leader took aim at the CIA despite the fact that she shares a party affiliation with the sitting President, whose close ally runs the CIA. On the other, it can be seen as evidence of heightened partisanship in congressional oversight, in view of the fact that the report principally scrutinizes the CIA's conduct during the Bush Administration and that the Republican members of the Senate committee (and their staff) did not participate in the research or the issuance of the report.[358]

3. Abuse. — I have argued above that presidential intelligence may well serve to enhance privacy protections. Yet, under certain specifications, fusing presidential power with intelligence capabilities might have the opposite effect, possibly even enabling the sorts of abusive practices that occasioned the significant intelligence reforms of the 1970s. Given the "very extensive history of intelligence activities infringing on the rights of Americans,"[359] this concern is undoubtedly serious. The case of the PSP is instructive. Through the PSP, the White House invoked the President's commander-in-chief authority to authorize certain kinds of intelligence collection that would otherwise have been governed by FISA.[360] Former Congresswoman Jane Harman recently revealed that, as a member of the "Gang of Eight"[361] legislators initially briefed by the White House about the PSP, she was advised that the program was in full compliance with the law.[362] What she did not know at the time, and learned only when *The New*

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[357] *See* DETENTION AND INTERROGATION REPORT, *supra* note 63.

[358] Indeed, the current Republican Chairman, Senator Richard Burr "has demanded that the Obama administration return every copy of the report." *See* Mark Mazzetti & Matt Apuzzo, *Classified Report on the C.I.A's Secret Prisons Is Caught in Limbo*, N.Y. TIMES (Nov. 9, 2015), http://www.nytimes.com/2015/11/10/us/politics/classified-report-on-the-cias-secret-prisons-is-caught-in-limbo.html. Professor Aziz Huq argues that when it comes to congressional intelligence oversight, "failure has been fairly constant regardless of whether we have divided government or the same party in the White House and in command on Capitol Hill." Huq, *supra* note 5.

[359] DAVID S. KRIS & J. DOUGLAS WILSON, 1 NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS 38 (2d ed. 2012).

[360] John Yoo, Essay, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 565 (2007).

[361] This select group of elected officials, consisting of the chairmen and ranking minority members of the congressional intelligence committees, the speaker and minority leader of the House, and the majority and minority leaders of the Senate, has privileged access to certain high-level intelligence matters. *See* 50 U.S.C. § 3093(c)(2) (Supp. 1 2013).

[362] Jane Harman, *What the CIA Hid from Congress*, L.A. TIMES (July 25, 2009), http://articles.latimes.com/2009/jul/25/opinion/oe-harman25 [http://perma.cc/KTE7-6XE9].

York Times exposed the program years later, was that the White House's claim to legality rested on a theory that the President is empowered to override statutory law in the area of national security.[363]

To argue (as I have done above) that the PSP was hardly an instance of presidential intelligence as I define it is not to put to rest the more general concern that enhancing the White House's role in spying carries risk for abuse. That said, there are a number of structural factors that tend to reduce the likelihood that notorious episodes such as this will be repeated.

First, as noted above, presidential intelligence presupposes and entails greater visibility of the intelligence apparatus than has ever been the case. To be certain, as discussed above, visibility is not the same as transparency. But — and this is the nub for present purposes — outright abuse is less likely to go unnoticed under conditions of greater visibility, including within the government. The emergence of what Goldsmith refers to as the "synoptic" presidency — the President's state of being pervasively monitored by a vigilant press and civil-liberties bar, as well as by internal watchdogs[364] — marks a significant difference between now and the era of abuses that led up to the Church Committee's damning inquest (and even between now and the years immediately after 9/11, when the PSP debuted). Second, and relatedly, as presidential intelligence becomes a matter of institutional habit within the White House, it will become increasingly difficult to operate outside of the internal processes that define it. It is instructive in this regard that the legal and political pushback to aspects of the PSP from within the administration was as robust as it was. Then–Deputy Attorney General Comey and OLC head Goldsmith concluded that one of the PSP programs having to do with internet metadata was illegal,[365] and the issue culminated in a now-famous showdown between the White House chief of staff and senior legal and law enforcement officials who were all gathered at the hospital bedside of the then–Attorney General John Ashcroft.[366] Third, the sheer scale of the contemporary intelligence state (including the number of private actors who are part of its workforce) — coupled with the interest group politics that have coalesced around these issues — also contributes to the unlikelihood that presidential intelligence could bring about a situation

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[363] *Id.*

[364] *See* GOLDSMITH, *supra* note 14, at 205–07.

[365] *See* Lizza, *supra* note 87; Julian Sanchez, *Reading Jack Goldsmith's STELLARWIND Memo (Part 1)*, JUST SECURITY (Sept. 10, 2014, 5:05 PM), https://www.justsecurity.org/14789/reading-jack-goldsmiths-stellarwind-memo [https://perma.cc/77F7-5DT7].

[366] Dan Eggen & Paul Kane, *Gonzales Hospital Episode Detailed*, WASH. POST (May 16, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051500864.html [http://perma.cc/P72H-5WND].

in which the intelligence arm runs amok. After Snowden, no President can reasonably count on the obeisance of the intelligence bureaucracy — which includes legions of young techies who may well be inclined to leak any evidence of abusive behavior.[367]

Another reason to believe that presidential intelligence is not likely to translate readily to abuse is the growing availability of judicial review of intelligence programs.[368] At first blush, this is an area where the differences between the administrative and the intelligence states stand out. In the regulatory arena, judicial review is axiomatic,[369] and it typically implicates a judgment by a court about the essential plausibility of an agency interpretation of a statute or piece of regulation. In the intelligence domain, the picture has been quite different. To be sure, as Professors Samuel Issacharoff and Richard Pildes have shown, it is a mistake to assume that national security policies have been or are off-limits to judicial review.[370] But when it comes to the intelligence milieu, judicial participation really has been largely missing, at least until recently. Granted, some amount of judicial review takes place before the FISC, including a mechanism for that court to pass on the basic validity of certain kinds of collection under the FISA Amendments Act (a process that I have elsewhere analogized to hard look review).[371] But quite unlike rationality review of a proposed administrative rule, that process typically takes place ex parte and in secret — a far cry from the framework, established by the APA, through which private litigants challenge administrative action.[372] And in any event, as noted above, the vast majority of electronic surveillance is undertaken pursuant to legal authorities, such as Executive Order 12,333,[373] which do not entail any judicial oversight at all. The same is true of human intelligence gathering, both overseas and domestically.

Even where there have been plausible bases for judicial review of intelligence practices in courts of general jurisdiction, judges (at least until recently) have been exceedingly reluctant to weigh in on the mer-

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367 *See* SWIRE, *supra* note 23, at 3.

368 This explanation is predicated on the classic Madisonian conception that, as Congress put it in the counterterrorism context, a "shift of power and authority to the Government calls for an enhanced system of checks and balances." 42 U.S.C. § 2000ee(b)(2) (2012).

369 *See* 5 U.S.C. § 702 (2012) (establishing judicial review of agency action).

370 *See* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, *in* THE CONSTITUTION IN WARTIME 161, 162–63 (Mark Tushnet ed., 2005).

371 *See* Rascoff, *supra* note 60, at 586.

372 The provision for amici curiae at the FISC as part of the recently enacted USA Freedom Act may go some way toward addressing the limitations of the preexisting system. *See supra* note 127.

373 *See supra* note 65 and accompanying text.

its, interposing familiar doctrinal barriers such as standing[374] and state secrets.[375] But there are some signs pointing to the prospect of more vigorous judicial review of intelligence practices. It is noteworthy that the Second Circuit recently rejected the government's statutory interpretation of section 215, though it withheld judgment on the underlying constitutional issues.[376] And the legality of collection under section 702 of the FISA Amendments Act, an issue that the Supreme Court deflected on standing grounds only two years ago,[377] is now wending its way through the federal courts, on a trajectory likely to culminate in a grant of certiorari.[378] Furthermore, the Supreme Court's recent pronouncements on the intersection of technology and the Fourth Amendment in criminal cases,[379] though ostensibly having no bearing on national security–motivated surveillance, have already begun to inform debate and policy in that area. These developments are themselves linked to the public choice dynamics analyzed above. While privacy groups and activists have historically been responsible for legal challenges to surveillance authority, including, increasingly, before foreign and international tribunals,[380] technology firms are now also involved in a number of high-profile lawsuits that are being contested in the shadow of the post-Snowden recalibration on intelligence.[381]

This trend toward increasingly robust judicial checks on intelligence may help to deter and curtail certain potential excesses latent in a cozier relationship between the White House and the spy agencies.[382] Certainly much work remains to be done. As courts tiptoe in the direction of substantive engagement with intelligence issues, they will need to address doctrinal uncertainty on a range of issues, from the

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374 *See, e.g.*, Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013) (holding that plaintiffs failed to demonstrate that their claimed injuries were fairly traceable to the government's surveillance activities at issue).

375 *See The State Secrets Privilege: Selected Case Files*, FED'N AM. SCIENTISTS, http://fas.org/sgp/jud/statesec [http://perma.cc/8X9E-WY4R].

376 ACLU v. Clapper, 785 F.3d 787, 821 (2d Cir. 2015) (holding that the telephone metadata collection program exceeded the scope of what Congress authorized in section 215).

377 *Clapper*, 133 S. Ct. at 1143.

378 *See* Charlie Savage, *Warrantless Surveillance Challenged by Defendant*, N.Y. TIMES (Jan. 29, 2014), http://www.nytimes.com/2014/01/30/us/warrantless-surveillance-challenged-by-defendant.html.

379 *See* Riley v. California, 134 S. Ct. 2473 (2014); United States v. Jones, 132 S. Ct. 945 (2012).

380 *See, e.g.*, *Amnesty International Takes UK to European Court over Mass Surveillance*, AMNESTY INT'L (Apr. 10, 2015, 12:01 AM), http://www.amnesty.org/en/latest/news/2015/04/amnesty-international-takes-uk-government-to-european-court-of-human-rights-over-mass-surveillance [http://perma.cc/28BV-ESFM] (announcing Amnesty International's challenge to the U.K. government's "indiscriminate mass surveillance practices" in the European Court of Human Rights).

381 *See, e.g.*, Amended Notice of Appeal, Microsoft v. United States, No. 14-2985 (2d Cir. Sept. 8, 2014).

382 *See* Issacharoff, *supra* note 354, at 206 ("However much the burdens of wartime democracy must rest on the political branches, there remains the need for a fuller rendition of the role of the judiciary.").

questionable ongoing applicability of the third-party doctrine[383] to the scope of extraterritorial application of constitutional and treaty-based privacy rights,[384] to the viability of a foreign-intelligence exception to the Fourth Amendment.[385] It may be that the Supreme Court will eventually have to take its Fourth Amendment doctrine apart and put it back together again. But the fact that that prospect seems increasingly realistic should go some way toward alleviating the worry that presidential intelligence will lead to abusive practices.

IV. DESIGNING PRESIDENTIAL INTELLIGENCE

As documented above, presidential intelligence is in its bureaucratic infancy, and currently operates in a somewhat ad hoc manner. If its potential is to be fully realized, it must be well designed and thoughtfully nested in the larger intelligence-oversight and national security–policy ecosystems. Presidential intelligence ought to be able to leverage the preexisting oversight infrastructure within — and outside — the executive branch. Meanwhile, innovations in presidential intelligence should benefit congressional and other overseers as well. I have two concrete recommendations in mind to help realize these goals. First, as to certain politically, economically, or strategically sensitive or high-stakes collection efforts, the White House ought to be required to involve itself directly in the alignment of intelligence gathering with American interests and values through a process resembling the one employed for covert action. Second, in order to augment accountability within the agencies and to unclog the information flow between the intelligence community and the White House, the ranks of presidential nominees within the intelligence bureaucracy (with and without Senate confirmation) ought to be substantially increased.

A. Presidential "Findings" for Intelligence Collection

The President ought to employ the equivalent of a "covert-action finding" — arguably one of the most successful pieces of oversight architecture from the last generation[386] — to authorize specific, highly sensitive intelligence collection programs. The goal of the finding is to

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[383] *See* Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239 (2009).

[384] *See, e.g.*, United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157 (2d Cir. 2008).

[385] *See* Trevor W. Morrison, *The Story of* United States v. United States District Court (Keith)*: The Surveillance Power*, *in* PRESIDENTIAL POWER STORIES 287, 320–25 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

[386] *Cf.* ERWIN, *supra* note 61.

specify and reduce to writing the objectives of the proposed action[387] and to detail the government agencies and any third parties that will be involved.[388] The finding, which contains a nonquantified CBA,[389] is typically reviewed on an interagency basis and then must be personally approved by the President so as to disallow him resort to deniability.[390] The finding must then be submitted to the congressional intelligence committees in a timely fashion.[391] Furthermore, significant changes that come about with respect to covert action once it has been commenced must be captured in a Memorandum of Notification.[392]

The oversight mechanism for covert action came about in three legislative stages, beginning with the passage of the Hughes-Ryan Act of 1974,[393] which required the President to determine that any proposed covert action "is important to the national security of the United States" and mandated reporting to various congressional committees. Next, the Intelligence Oversight Act of 1980[394] established the relatively new intelligence committees as the key sources of congressional over-

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387 William J. Daugherty, *Approval and Review of Covert Action Programs Since Reagan*, 17 INT'L J. INTELLIGENCE & COUNTERINTELLIGENCE 62, 75 (2004).

388 ERWIN, *supra* note 61, at 6. Further, the finding "may not authorize any action intended to influence" domestic affairs and "may not authorize any action which violates the Constitution . . . or any statutes of the United States." *Id.* (quoting 50 U.S.C. § 413b (recodified as 50 U.S.C. § 3093 (Supp. 1 2013))); *see also* Benjamin Powell, *Secret Operations: Covert Action and Military Activities*, *in* NATIONAL SECURITY LAW IN THE NEWS: A GUIDE FOR JOURNALISTS, SCHOLARS, AND POLICYMAKERS 123, 128–29 (Paul Rosenzweig et al. eds., 2012).

389 *See* Daugherty, *supra* note 387, at 75.

390 WILLIAM J. DAUGHERTY, EXECUTIVE SECRETS: COVERT ACTION AND THE PRESIDENCY 93–94 (2004) (noting that this procedure "was the practical death of 'plausible deniability,'" *id.* at 94); LESTER, *supra* note 58, at 138 ("The finding is a critical legal document and is usually briefed to the president in person.").

391 *See* Marshall Silverberg, *The Separation of Powers and Control of the CIA's Covert Operations*, 68 TEX. L. REV. 575, 602 (1990) ("The . . . debate [in 1990] . . . focuse[d] on the time period within which the President must inform Congress of a covert action."). The congressional notification requirement is "not a precondition to carrying out a covert action" and its implementation may be delayed "until after the operation has commenced or occurred" in some unique circumstances. Powell, *supra* note 388, at 129. However, in these circumstances, the President is still required to report to the committees "in a timely fashion and . . . provide a statement of the reasons for not giving prior notice." *Id.* (omission in original) (quoting 50 U.S.C. § 413b(c)(3) (recodified as 50 U.S.C. § 3093(c)(3) (Supp. 1 2013))).

392 *See* Daugherty, *supra* note 387, at 63. Former CIA Acting General Counsel John Rizzo relates that the idea for the Memorandum of Notification originated with White House Counsel Lloyd Cutler in 1980. Cutler was concerned that President Carter was signing too many Findings, and so asked CIA lawyers to "create a different name for a Finding that simply expands or otherwise changes the scope of a preexisting Finding." *See* RIZZO, *supra* note 101, at 75.

393 Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804–05 (repealed 1991).

394 Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, tit. IV, § 407, 94 Stat. 1975, 1981 (1980) (repealed 1991).

sight in this area.[395] Finally, there was the Intelligence Authorization Act, Fiscal Year 1991,[396] the main legislative response to the Iran-Contra Affair,[397] which defined "covert action" and memorialized in statute many of the practices and understandings that had grown up around the oversight of covert action since 1974.[398]

Although it admits some variety as a function of presidential preference,[399] the "systematic, institutionalized process" underpinning covert action is designed to evaluate "effectiveness, risk, and policy adherence."[400] Former officials who have participated in the finding process have offered insights as to how it is structured and what core questions need to be answered before action can be authorized. For example, former Secretary of State Cyrus Vance remarked that "it should be the policy of the United States to engage in covert actions only when they are absolutely essential to the national security."[401] Meanwhile, former CIA Director William Webster established four separate criteria for determining whether a proposed covert action ought to be undertaken: (1) "Is it legal?"; (2) "Is it consistent with American foreign policy, and, if not, why not?"; (3) "Is it consistent with American values?"; and (4) "If it becomes public, will it make sense to the American people?"[402]

How well the finding process works in practice remains an open question. Some contend that it embodies an inherent short-term bias.[403] Others argue that the effectiveness of the finding turns on the degree of specificity or generality in the relevant documents.[404] For

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[395] Additionally, if the President "determines it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States," reporting can be limited to the Gang of Eight. 50 U.S.C. § 3093(c)(2) (Supp. I 2013).

[396] Pub. L. No. 102-88, 105 Stat. 429 (codified as amended in scattered sections of 10, 42, and 50 U.S.C.).

[397] *See* William E. Conner, *Reforming Oversight of Covert Actions After the Iran-Contra Affair: A Legislative History of the Intelligence Authorization Act for FY 1991*, 32 VA. J. INT'L L. 871, 872 (1992).

[398] § 503, 105 Stat. at 442–44.

[399] *See* Daugherty, *supra* note 387, at 68–73 (describing the process under President Reagan and President Clinton).

[400] *Id.* at 68.

[401] LOCH K. JOHNSON, AMERICA'S SECRET POWER: THE CIA IN A DEMOCRATIC SOCIETY 21 (1989); *see also id.* at 20 (quoting former Secretary of Defense and National Security Act of 1947 author Clark Clifford as saying "the guiding criterion . . . should be the test as to whether or not a certain covert project *truly affects* our national security" (emphasis added)).

[402] Loch K. Johnson, *The Myths of America's Shadow War*, THE ATLANTIC (Jan. 31, 2013), http://www.theatlantic.com/international/archive/2013/01/the-myths-of-americas-shadow-war/272712 [http://perma.cc/3MSS-85CB].

[403] John Prados, *The Continuing Quandary of Covert Operations*, 5 J. NAT'L SECURITY L. & POL'Y 359, 362–68 (2012) (arguing that the CIA's lack of "detailed knowledge that might enable it to choose among alternatives," *id.* at 365, as well as its inability to anticipate potential "blowback," *id.* at 363, call into question the "finding" methodology).

[404] *See* Johnson, *supra* note 62, at 54–55 (positing that general, broad wording of findings such as "'to fight global terrorism' . . . could be interpreted to mean almost anything, with *carte*

example, the recently issued Senate report on CIA interrogation suggests that the CIA's claimed authority to carry out its detention and interrogation activities was rooted in a Memorandum of Notification that was signed on September 17, 2001.[405] But the Memorandum did not mention detention or interrogation at all, let alone the specific techniques that occasioned the report.[406] It thus remains an open question what President Bush knew, and when, about the various interrogation techniques.[407] That said, recent reporting on the drone program suggests that the President devotes extensive personal and White House attention to its oversight, approving targeting lists and weighing in on individual cases on the advice of senior policy and legal advisors.[408] Flawed and contested though the process has been, covert-action findings have fortified the degree to which certain intelligence activities are exposed to oversight and have promoted serious consideration of the potential costs and benefits of pursuing inevitably controversial courses of action.

It makes sense to transpose the regulatory regime that has grown up around covert action to the world of intelligence collection.[409] A

blanche [for the CIA] to carry out operations anywhere, anytime"); Austin Long, US Covert Action Success and Intelligence Policy 3 (Naval War College Conference Paper) (Mar. 25, 2013), https://www.usnwc.edu/Academics/Faculty/Derek-Reveron/Workshops/Intelligence,-National-Security-and-War/Documents/Long.aspx (last visited Nov. 22, 2015) ("The crafting of the finding's language can either facilitate or hamper tactical improvisation in the field, and is one indicator of the level of trust the President has in covert action."); Pam Benson, *What's Allowed by a "Presidential Finding"?*, CNN (Mar. 31, 2011, 9:24 PM), http://www.cnn.com/2011/POLITICS/03/31/libya.presidential.finding (quoting a former intelligence official for the proposition that findings are "written in a way that is 'general enough to allow flexibility, but specific enough to know legally what you can do'").

405 DETENTION AND INTERROGATION REPORT, *supra* note 63, Executive Summary at 11.

406 *Id.*, Findings and Conclusions at 9.

407 *See* Peter Baker, *Bush Team Approved C.I.A. Tactics, but Was Kept in Dark on Details, Report Says*, N.Y. TIMES (Dec. 9, 2014), http://www.nytimes.com/2014/12/10/world/cia-kept-bush-ill-informed-on-interrogation-tactics-torture-report-says.html.

408 *See* MARK MAZZETTI, THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH 217 (2013) ("Obama's desire to manage aspects of the targeted-killing program directly from the White House gave Brennan a role unique in the history of American government: one part executioner, one part chief confessor to the president, one part public spokesman sent out to justify the Obama doctrine of killing off America's enemies in remote parts of the world."). The President himself made a connection between drone strikes and surveillance practices, observing in his January 2014 speech that "after an extended review of our use of drones in the fight against terrorist networks, I believed a fresh examination of our surveillance programs was a necessary next step in our effort to get off the open-ended war footing that we've maintained since 9/11." Presidential Remarks on Signals Intelligence, *supra* note 42.

409 It may seem strange to use covert action — which, by statute, refers to certain activities undertaken by the U.S. government as to which "the role of the United States Government will not be apparent or acknowledged publicly," 50 U.S.C § 3093(e) (2014) — as a template for presidential intelligence under conditions of ever-greater visibility. But, as a practical matter, the contrast need not be that great. The bin Laden raid counted as covert action even though the White House

first step in this process appears to have been taken already. The public portion of PPD-28 states that its classified annex mandates that "determinations about whether and how to conduct signals intelligence activities must carefully evaluate the benefits to our national interests and the risks posed by those activities."[410] Intimations of the finding process can be picked up here. The PRG's Recommendation 16 is that "the President should create a new process requiring high-level approval of all sensitive intelligence requirements and the methods the Intelligence Community will use to meet them."[411] Furthermore, as noted above, a select number of highly sensitive collection efforts already receive high-level White House attention. But a more formal institutionalization culminating in a legal requirement would allow for the realization of the full benefits of this sort of oversight technology. At a minimum, a finding ought to establish that "for any individual line of intelligence-gathering . . . there is no reasonable alternative way of acquiring the information from less sensitive or non-secret sources, thereby avoiding all the possible moral hazards and trade-offs that collecting secret intelligence may involve."[412]

The most straightforward (and politically frictionless) way to accomplish this goal would be to amend Executive Order 12,333. Meanwhile, in order to trigger congressional oversight under existing legislation, it would be sufficient to deem any collection program that met the criteria for presidential review to be a "significant anticipated intelligence activity."[413] To be sure, structuring a process to handle intelligence collection, as opposed to covert action, requires careful thought. At the outset, there is a question of what the proper "unit of analysis" ought to be when it comes to surveillance. Should specific intelligence techniques or platforms warrant presidential attention?[414] Or is surveillance of especially sensitive targets a more appropriate focus? Would all surveillance of foreign leaders, for example, require presidential sign-off? Or only the surveillance of the leaders of close allies? Making matters more complicated is the fact that unlike covert action, which is principally undertaken by the CIA, surveillance is a core function of all intelligence agencies and is vastly resourced. Only

took public credit for it hours after it transpired. *See* Remarks on the Death of Al Qaida Terrorist Organization Leader Usama bin Laden, 1 PUB. PAPERS 480 (May 1, 2011).

410 PPD-28, *supra* note 43.

411 *See* PRG, *supra* note 65, at 167.

412 Omand, *supra* note 132, at 624.

413 50 U.S.C. § 3091 (Supp. 1 2013).

414 In the (admittedly, quite different) context of OIRA review, only "major" rules qualify for presidential cost-benefit analysis. Exec. Order No. 12,291, 3 C.F.R. 200 (1982). One way for a rule to be deemed "major" is if it has "an annual effect on the economy of $100 million or more." *Id.* Another is if it will likely result in a "major increase in costs" for "consumers [or] individual industries." *Id.*

a small fraction of the CIA recruitment approaches, NSA collection orders, or National Reconnaissance Office imagery shots could be handled through a finding process without overwhelming the White House and undercutting a core motivation for a finding in the first place: meaningful engagement by the President and his senior staff with the potential costs and benefits of the underlying activity. One way to begin to get traction on the problem and to define a manageable universe of items that would receive attention in the White House would be to establish a set of presumptions that certain kinds of collection (say, on certain allies and foreign leaders, or employing certain means) would be potentially elevated for presidential attention.[415]

Implementing a finding process might necessitate some changes in White House staffing in order to ensure the availability of the relevant capacity to assess the risks and rewards of contemplated surveillance practices.[416] In particular, such a process may entail augmenting the NSC's intelligence component in order to compensate for the reality that "agency officials frequently possess subject-specific skills and knowledge that the White House lacks."[417] Currently, the NSC's intelligence directorate is small. By enlarging it, presidential intelligence can gain a necessary foothold within the nerve center of foreign policy and national security decisionmaking.[418] But presidential intelligence is not a matter of hiring more spies in downtown Washington to oversee the work of spies in suburban Virginia and Maryland. Rather, it is imperative to expose intelligence programs to the generalist review that is characteristic of the NSC's interagency process. It may well be that some amount of collection on allies is, in fact, vital to American security or that eroding the bottom lines of technology firms is a cost worth absorbing in some cases. But the critical task of clarifying the line where the advantages of collection are outweighed by the potential political and economic fallout in the aftermath of exposure would be greatly enhanced by a finding process that culminated in presidential sign-off. For the majority of intelligence collection efforts that will not qualify for the presidential finding process adumbrated above, the Of-

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415 The President's Review Group proposed a number of potential criteria for determining what sort of intelligence activities senior policymakers should review, including: (1) the means of collection; (2) the specific people being monitored; (3) the country in which the collection takes place; (4) any international meeting where the collection takes place; or (5) some combination of these factors. *See* PRG, *supra* note 65, at 168–69.

416 *Cf.* Bressman & Vandenbergh, *supra* note 223, at 97–98 ("If regulatory review is extended to include scientific review, OIRA (or other White House offices) should acquire additional scientific expertise.").

417 *See* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 40 (2013).

418 *Cf.* PRG, *supra* note 65, at 167 ("A small staff of policy and intelligence professionals should review intelligence collection for sensitive activities on an ongoing basis throughout the year and advise the National Security Council Deputies and Principals when they believe that an unscheduled review by them may be warranted.").

fice of the Director of National Intelligence could perform some amount of centralized review for overall coherence. It is arguably already accomplishing some of this work through the so-called "Mission Managers."[419] But inevitably, a great deal of discretion will remain in the hands of the various intelligence agencies.

B. Appointing Intelligence Officials

Moe and Wilson write that "[p]residents politicize by using their appointment authority to place loyal, ideologically compatible people in pivotal positions in the bureaus, the departments, and, of course, the OMB and other presidential agencies whose job it is to exercise control."[420] But politicization (in this sense) is a far more complicated strategy for the President to execute in the intelligence domain.[421] Whereas the NSC supplies the institutional foundation for a centralizing tendency in intelligence oversight, the intelligence bureaucracy has been notably lacking in political appointments.[422] To be sure, Presidents have placed political allies in delicate intelligence posts. One need think no further than President Reagan appointing his campaign

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[419] *See* OFFICE OF THE DIR. NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NO. 900, INTEGRATED MISSION MANAGEMENT (2013), http://www.dni.gov/files/documents/ICD/ICD%20900%20-%20Integrated%20Mission%20Managemement.pdf [http://perma.cc/73BV-NZUT]. That said, the creation of these positions roughly coincided with the disbanding of the position of Deputy Director of National Intelligence for Collection across the entire intelligence community, a post whose first occupant strove to "conceptualize and manage DNI oversight of intelligence collection programs across the Intelligence Community." *See Mary Margaret Graham*, HARV. INST. POL., http://www.iop.harvard.edu/mary-margaret-graham [http://perma.cc/6QFR-3KFL].

[420] Moe & Wilson, *supra* note 91, at 18. Professors Robert Durant and William Resh put forward a number of reasons that a politicization strategy "may not only be difficult but may actually be counterproductive." Robert F. Durant & William G. Resh, *"Presidentializing" the Bureaucracy*, *in* THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY, *supra* note 31, at 545, 553. Of the reasons that they summon, (at least) one is particularly applicable to intelligence, namely the concern that short-term nonexpert appointees would become beholden to the expert professional bureaucracy. *Id.* But in a world of greater uses of "intelligence" in the private sector, it may be increasingly plausible to draw on knowledgeable outsiders to assume leadership roles within the intelligence bureaucracy.

[421] *Cf.* Moe, *supra* note 46, at 150 ("The legacy of the past discourages comprehensive reform efforts — but, precisely because it does, it magnifies the president's incentives to pour effort into minor but feasible changes by making maximum use of the structures and resources closest to him . . . .").

[422] A lack of presidential control does not characterize all security agencies. As far back as President Franklin Roosevelt's administration, Presidents have sought to control the national security bureaucracy through a combination of centralization and politicization. *See* MARIANO-FLORENTINO CUÉLLAR, GOVERNING SECURITY: THE HIDDEN ORIGINS OF AMERICAN SECURITY AGENCIES 88 (2013) ("[T]he Roosevelt administration . . . sought substitutes for the White House staff increases in the form of new layers of political appointees to oversee existing bureaus . . . .").

manager Bill Casey,[423] or President Obama tapping his national security confidant John Brennan, to run the CIA.[424] The current deputy director of the CIA and his immediate predecessor are also administration veterans, as opposed to intelligence insiders.[425] Nor has President Obama shied away from making changes in senior intelligence posts, as when he accepted the resignations of General David Petraeus at the CIA[426] and Admiral Blair at the ODNI.[427] But the trend does not generalize past these high-profile appointments and departures. By and large, intelligence agencies, notwithstanding the fact that they are quintessential executive agencies on the traditional administrative law metric, have successfully resisted politicization.[428]

Currently, there are fewer than twenty Senate-confirmed presidential appointees across the sprawling intelligence state.[429] For example, in the CIA, there are three such posts — the Director, Inspector General, and General Counsel — only one of which has managerial responsibility for the organization.[430] Within the FBI (which plays a key role as a domestic intelligence service in addition to its role in federal law enforcement), there is only the Director, who also enjoys a statuto-

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[423] *See* Eric Pace, *William Casey, Ex-C.I.A. Head, Is Dead at 74*, N.Y. TIMES (May 7, 1987), http://www.nytimes.com/1987/05/07/obituaries/william-casey-ex-cia-head-is-dead-at-74.html.

[424] *See* Baker & Mazzetti, *supra* note 47. Unlike Casey, Brennan is a career intelligence officer who previously spent twenty-five years at the CIA. Different CIA directors have adopted different postures toward the President. Writing in Time Magazine about the close personal tie between President Obama and Brennan, former spy Robert Baer observed that "[t]he last CIA director with a close personal relationship with his President was Reagan's CIA director Bill Casey" who, Baer goes on to say, "played an important role in shaping Reagan's foreign policy." Robert B. Baer, *What Awaits John Brennan at the CIA*, TIME (Jan. 9, 2013), http://swampland.time.com/2013/01/09/what-awaits-john-brennan-at-the-cia [http://perma.cc/FA2L-BWF3]. Notably, Casey was the first (and perhaps also the last) CIA Director to "take a place at the White House table as a fully participating Cabinet member." *See* Pace, *supra* note 423.

[425] *See* Daniel Klaidman, *Avril Haines, The Least Likely Spy*, NEWSWEEK (June 26, 2013, 4:45 AM), http://www.newsweek.com/2013/06/26/avril-haines-least-likely-spy-237616.html [http://perma.cc/5Y4Q-MME9]; Greg Miller & Karen DeYoung, *David Cohen, Architect of Sanctions on Iran and Russia, Picked as CIA Deputy Director*, WASH. POST (Jan. 9, 2015), http://www.washingtonpost.com/world/national-security/david-cohen-architect-of-sanctions-on-iran-and-russia-picked-as-cia-deputy-director/2015/01/09/ccbe183e-9809-11e4-aabd-d0b93ff613d5_story.html [http://perma.cc/TH9L-UHDL].

[426] *See* Michael D. Shear, *Petraeus Quits; Evidence of Affair Was Found by F.B.I.*, N.Y. TIMES (Nov. 9, 2012), http://www.nytimes.com/2012/11/10/us/citing-affair-petraeus-resigns-as-cia-director.html.

[427] *See* Mark Mazzetti, *Facing a Rift, U.S. Spy Chief to Step Down*, N.Y. TIMES (May 20, 2010), http://www.nytimes.com/2010/05/21/us/politics/21intel.html.

[428] *See* Robertson, *supra* note 16, at 249.

[429] *See* CHRISTOPHER M. DAVIS & JERRY W. MANSFIELD, CONG. RESEARCH SERV., RL30959, PRESIDENTIAL APPOINTEE POSITIONS REQUIRING SENATE CONFIRMATION AND COMMITTEES HANDLING NOMINATIONS 38 (2013); PLUM BOOK, *supra* note 112.

[430] *See* PLUM BOOK, *supra* note 112, at 141.

ry ten-year term.[431] While the President may fire the FBI Director in the middle of his term and appoint a replacement (and occasionally has[432]), there are political costs associated with doing so.[433] President-elect Obama went so far as to pledge to "insulate the Director of National Intelligence from political pressure by giving the DNI a fixed term, like the Chairman of the Federal Reserve."[434] But there is no evidence that he has pursued that strategy since entering office.

To be sure, there are more officials who are appointed by the President (without a Senate role), but not that many. Most are chosen by department heads with the concurrence of the DNI.[435] Even the NSA Director has faced Senate confirmation in the past — by the Armed Services Committee, not the Intelligence Committee — only because he concurrently serves as a senior military officer and, of late, also as the four-star officer in charge of Cyber Command.[436] Under new legislation, the Director of the NSA will face Senate confirmation and hearings before the Intelligence Committee.[437] Still, in its lack of politicization, the intelligence community remains an outlier in Washington.

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[431] *See* VIVIAN S. CHU & HENRY B. HOGUE, CONG. RESEARCH SERV., R41850, FBI DIRECTOR: APPOINTMENT AND TENURE (2014).

[432] *See, e.g.*, Mitchell Locin & Nicholas M. Horrock, *Clinton Fires Sessions: FBI Shakeup Is Expected*, CHI. TRIB. (July 20, 1993), http://articles.chicagotribune.com/1993-07-20/news/9307200053_1_fbi-director-william-sessions-premier-investigative-agency-gen-janet-reno [http://perma.cc/6G83-6ZH9].

[433] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 791 (2013) ("[T]he decision to remove an officer before the end of a specified term imposes at least some costs on a President.").

[434] *See The Obama-Biden Plan*, *supra* note 39; *see also* Ben S. Bernanke, Chairman, Fed. Reserve, Central Bank Independence, Transparency and Accountability, Address at the Institute for Monetary and Economic Studies International Conference (May 25, 2010), http://www.federalreserve.gov/newsevents/speech/bernanke20100525a.htm [http://perma.cc/NWG9-RJC4] ("Because monetary policy works with lags that can be substantial, achieving this objective requires that monetary policymakers take a longer-term perspective when making their decisions. Policymakers in an independent central bank, with a mandate to achieve the best possible economic outcomes in the longer term, are best able to take such a perspective."). This rationale for independence is not particularly applicable to the intelligence domain.

[435] 50 U.S.C. § 3041 (Supp. I 2013). For example, the director of the National Geospatial-Intelligence Agency (NGA) is tapped by Pentagon leaders and faces no Senate confirmation. Dan Verton, *Cardillo Tapped to Run National Geospatial-Intelligence Agency*, FEDSCOOP (June 2, 2014, 8:13 AM) http://fedscoop.com/cardillo-tapped-run-national-geospatial-intelligence-agency [http://perma.cc/49WY-8LWS].

[436] Although the PRG recommended divesting the NSA Director of the responsibility to lead Cyber Command, the President ultimately decided to maintain the status quo. *See* Ellen Nakashima, *White House to Preserve Controversial Policy on NSA, Cyber Command Leadership*, WASH. POST (Dec. 12, 2013), http://www.washingtonpost.com/world/national-security/white-house-to-preserve-controversial-policy-on-nsa-cyber-command-leadership/2013/12/13/4bb56a48-6403-11e3-a373-0f9f2d1c2b61_story.html [http://perma.cc/JTV5-DYA9].

[437] *See* Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, tit. IV, 128 Stat. 1390, 1407–11 (2014) (codified at 50 U.S.C. §§ 3512, 3602 (Supp. I 2013)). The same statute also mandates presidential nomination and Senate confirmation for the Director of the National Reconnaissance Office (NRO) as well as the NSA and NRO Inspectors General. *Id.*

For purposes of comparison, within the executive branch there are anywhere from 1200 to 1400 posts that require presidential nomination and Senate confirmation.[438] At the EPA alone there are a dozen such positions,[439] and in the Pentagon there are approximately fifty.[440]

Heightened politicization would accentuate the President's ability both to extract information from the intelligence bureaucracy and to ensure that his oversight preferences (or, for that matter, those of the FISC) are, in fact, implemented.[441] The proliferation of lawyers in the various spy agencies provides a good template for thinking about the value of an increase in the number of political appointees. Just as the growing number of lawyers has promoted a culture of fidelity to law, an increase in the number of presidential appointees would foster greater attentiveness to the President's policies.[442] Furthermore, the pool of potential political appointees with relevant backgrounds (who are not themselves current or former intelligence officials) might be small.[443] But as the nature of intelligence evolves, individuals with training in a host of disciplines and professions ranging from area studies to data science would seem to be good candidates for intelligence posts. That some (especially intelligence veterans) will resist this move on the grounds that it will politicize intelligence should not be decisive.[444] As discussed above, presidential control will always run

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438 PLUM BOOK, *supra* note 112, at 200; Brad Plumer, *Does the Senate Really Need to Confirm 1,200 Executive Branch Jobs?*, WASH. POST: WONKBLOG (July 16, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/16/does-the-senate-really-need-to-confirm-1200-executive-branch-jobs [http://perma.cc/MYZ9-VGEV].

439 PLUM BOOK, *supra* note 112, at 198.

440 *See id.* at 197; *see also* CHERYL Y. MARCUM ET AL., RAND NAT'L DEF. RESEARCH INST., DEPARTMENT OF DEFENSE POLITICAL APPOINTEES 5–6 (2001), http://www.rand.org/content/dam/rand/pubs/monograph_reports/2009/MR1253.pdf [http://perma.cc/5RAX-HBF4].

441 Any additional politicization of the intelligence agencies would need to take into account the rise of centralized review, for the two phenomena are necessarily interactive. *See* Bubb & Warren, *supra* note 285, at 100–01.

442 *Cf.* RIZZO, *supra* note 101, at 44–47 (discussing the growing number and prominence of lawyers in the CIA).

443 Here a comparison with financial regulation may be apt. In that domain, the most qualified potential political appointees are likely to be veterans of the financial services industry. *See, e.g.*, Jim Tankersley, *Wall Street Veteran Heads New Federal Office Tasked with Making Better Economic Forecasts*, WASH. POST (Apr. 5, 2013), http://www.washingtonpost.com/business/wall-street-veteran-heads-new-federal-office-tasked-with-making-better-economic-forecasts/2013/04/05/bc9c912e-9ad6-11e2-9a79-eb5280c81c63_story.html [http://perma.cc/34DJ-S8WY].

444 Certainly caution must be exercised here, as the problematic tenure of Porter Goss at the CIA reveals. *See* Dana Priest & Walter Pincus, *CIA Chief Seeks to Reassure Employees*, WASH. POST (Nov. 16, 2004), http://www.washingtonpost.com/wp-dyn/articles/A51301-2004Nov15.html [http://perma.cc/8P4Q-7DV6] ("His critics say the director, a former CIA case officer and Republican chairman of the House intelligence committee, is purging the agency of career officers whom he incorrectly perceives as critical of Bush administration policies. In addition, Goss has over the last month put in charge several former Hill staff members who are not well regarded by senior officials because they lack managerial and operational experience, and are believed to have treated career officers disrespectfully."). Goss lasted less than two years in the job.

some risk of eroding expert judgment. This concern is heightened in the context of the politicization of posts that demand neutral decisionmaking.[445] But the sorts of managerial and leadership positions in intelligence that I advocate politicizing inevitably comingle normative judgments with intelligence assessments.

The paucity of Senate-confirmed posts is also a missed opportunity for congressional oversight. Here, too, caution must be exercised, because under conditions of hyperpartisanship, the requirement of Senate confirmation might be a recipe for deadlock on appointments and an invitation to grow the ranks of "acting" officials.[446] But it remains the case that with fewer posts that require Senate confirmation come fewer opportunities for the public to learn about the career trajectories and backgrounds of senior intelligence personnel. Confirmation hearings of this sort would function as instances of meta-transparency where the public would be able to assess not the nature of intelligence collection as such but the nature of the people who practice it.

CONCLUSION

Almost fifty years ago, Professor Aaron Wildavsky offered that "[t]he United States has one President, but it has two presidencies; one presidency is for domestic affairs, and the other is concerned with defense and foreign policy."[447] For some time that claim has been off-target with respect to large swaths of the national security state, which have been on a convergence course with the ordinary regulatory state.[448] But, until very recently, Wildavsky's observation retained some of its descriptive accuracy with respect to the intelligence community — specifically, as to the ways that spy agencies gather intelligence. Even as the President came to loom large in just about every other major area of policymaking, presidential involvement in the domain of intelligence collection remained episodic and minimal. That, too, is now changing. While the CIA, NSA, FBI, and every other spy agency each carries out a particular mission and maintains a distinc-

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445 For example, President Bush (briefly) managed through Executive Order 13,422 to require that so-called "regulatory policy officers" who play key roles in agency regulatory planning and cost-benefit analysis be presidential appointees. *See* CURTIS W. COPELAND, CONG. RESEARCH SERV., RL33862, CHANGES TO THE OMB REGULATORY REVIEW PROCESS BY EXECUTIVE ORDER 13,422, at CRS-6 (2007).

446 *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 913–14 (2009) (describing the difficulties Presidents face in filling appointed positions and pointing out that the average Senate-confirmed position was empty or filled by an acting official approximately one-quarter of the time).

447 Aaron Wildavsky, *The Two Presidencies*, TRANS-ACTION, Dec. 1966, at 7, 7.

448 *Cf.* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (describing the convergence of civilian and military detention policies since the 9/11 terrorist attacks).

tive organizational culture, the intelligence community collectively is more than ever of a piece with the balance of government, in terms of the political and economic forces that affect it and the oversight methodologies and institutions that constrain it.

With intelligence having rejoined the regulatory mainstream after an extended hiatus, there is a lot of catching up that needs to be done. Building on previous work, this Article has emphasized the ways in which concepts and scholarly insights that have come to define administrative law are ripe for export to the intelligence bureaucracy. But in the future, interdisciplinary insights ought to flow in the other direction as well.[449] The administrative state increasingly has things to learn from the intelligence world. For example, the intelligence community has had extensive experience with the legal and policy issues implicated by the revolution in "Big Data." As the delivery of health care and education, for example, come to depend upon Big Data, regulatory agencies could learn a great deal from spy agencies.[450] Furthermore, in an age of mounting threats in cyberspace, regulators from the "ordinary" administrative state — not to mention private actors — can and must learn from, and interact with, intelligence and national security agencies.[451] But setting these emerging issues aside for future research, the key insight for now is that a meaningful and durable dialogue between the intelligence and regulatory states has begun.

In this Article, I have described a set of processes by which the intelligence community has been presidentialized, and have expressed qualified optimism that the trend will promote more effective, accountable, and rights-protective intelligence collection practices. Under conditions of robustly implemented presidential intelligence, the indiscriminate collection of American metadata premised on a secret, dubious statutory interpretation and the gratuitous eavesdropping on friendly foreign leaders' cellphone conversations will be less likely to come to pass again. At a minimum, the White House will have to devote serious attention to the potential upsides of these otherwise costly efforts before choosing to embark on them.

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449 *See* Eric Lichtblau & William M. Arkin, *More Federal Agencies Are Using Undercover Operations*, N.Y. TIMES (Nov. 15, 2014), http://www.nytimes.com/2014/11/16/us/more-federal-agencies-are-using-undercover-operations.html.

450 *See* PODESTA ET AL., *supra* note 75 (considering the potential impacts of Big Data on health care, education, homeland security, and law enforcement).

451 One commentator has recently called for OIRA to play a more prominent role in shaping American cybersecurity policy. *See* Bruce Levinson, *Why OIRA Needs to Coordinate Federal Cyber Security Regulation*, CIRCLEID (Dec. 10, 2014, 9:40 AM), http://www.circleid.com/posts/20141210_why_oira_needs_to_coordinate_federal_cyber_security_regulation [http://perma.cc/LBP3-PZQ3].