Accountability and Oversight

FOR the public, one of the most troubling aspects of intelligence activities is their perceived lack of accountability. Operating in secrecy, intelligence agencies are seen not simply as mysterious, but often as uncontrolled.

Compared with other institutions of the federal government, intelligence agencies do pose unique difficulties when it comes to providing accountability. They cannot disclose their activities to the public without disclosing them to their targets at the same time. As a result, intelligence agencies are not subject to the same rigors of public or congressional debate or the same scrutiny by the media as other government agencies. Their budgets are secret; their operations are secret; their assessments are secret.

Intelligence agencies, however, are institutions within a democratic form of government, responsible not only to the President, but to the elected representatives of the people, and, ultimately, to the people themselves. They are funded by the American taxpayers.

To solve this dilemma, special oversight arrangements for intelligence have been established within the Executive and Legislative branches. In the Congress, special committees in each House are charged with the oversight function, serving as surrogates for their respective bodies and for the public as well. Within the Executive branch, Inspectors General have been established within the agencies themselves or within their parent organizations. The White House also has an intelligence oversight office. Because of the need for secrecy, these bodies normally carry out their oversight functions in private, reporting as necessary and appropriate to the public without exposing the intelligence activities they are overseeing.

The Commission believes that these arrangements should, in principle, provide adequate oversight of intelligence activities, assuming that the various oversight bodies effectively carry out their mandates. We attempted, therefore, to assess the effectiveness of the current arrangements and to determine whether improvements are possible.

To understand the role these bodies play, however, one first must appreciate the extent to which intelligence agencies and their employees already are accountable for their activities.

Accountability in General

Many Americans believe that U.S. intelligence agencies (who are perceived as operating outside the laws of foreign countries) do not obey the laws of the United States or the policies of the President. This is simply not the case.

U.S. intelligence agencies are bound, and consider themselves bound, by the Constitution and laws of the United States, including treaty obligations and other international agreements entered into by the United States. They also are bound by Presidential orders,

guidelines issued by the Attorney General, and numerous internal directives. Employees who violate those laws and policies can be held criminally liable or subjected to administrative sanctions, like any other government employee.

The most detailed and authoritative statement of presidential policy for the conduct of U.S. intelligence activities is contained in Executive Order 12333, issued by President Reagan on December 4, 1981.[1] E.O. 12333 sets forth the duties and responsibilities of intelligence agencies and places numerous specific restrictions on their activities. These include restrictions on undisclosed participation by intelligence agency personnel in organizations in the U.S., restrictions on experimentation on human subjects, and a ban on engaging in assassination. While E.O. 12333 may provide an adequate framework, it is out of date in many ways.

14-1. The Commission recommends that the President issue a new Executive Order to govern U.S. intelligence activities. The new Executive Order should incorporate the recommended structural and procedural changes for the oversight, management, and conduct of intelligence activities contained in this report as well as ensure consistency with the statutory changes affecting the Intelligence Community enacted since 1981.

Intelligence agencies also are bound by guidelines approved by the Attorney General that govern the collection, analysis, and dissemination of information on U.S. citizens and aliens admitted for permanent residence. Promulgated following the congressional investigations of the mid-1970s, these guidelines prohibit intelligence agencies from collecting information about U.S. citizens relating to the exercise of their First Amendment rights, effectively precluding a return to the large-scale domestic surveillance programs undertaken by intelligence agencies during the Vietnam era. Internal guidelines also limit the use of clergy, journalists, and academics for operational purposes.

In addition to the policy restraints on their activities, intelligence agencies and their employees are subject to the judicial process. Like other government agencies and employees, they can be sued for actions undertaken in the course of their official duties. They can be subpoenaed in civil and criminal cases, and they must produce information when ordered by the courts.

Intelligence agencies are also limited in terms of the kind of activities they are permitted to undertake within the United States. As noted in Chapter 4, the CIA is prohibited by law from having any "police, subpoena, or law enforcement powers or internal security functions." A court order from a special federal court, the Foreign Intelligence Surveillance Court, is also required before intelligence agencies may carry out electronic surveillance and physical searches for any foreign intelligence or counterintelligence purpose within the United States.

[1] E.O. 12333 is the most recent in a series of executive orders governing U.S. intelligence activities. Previous orders had been issued by President Carter in 1978 (E.O. 12036) and by President Ford in 1975 (E.O. 11905).

Like other government agencies, intelligence agencies are subject to the Freedom of Information Act (FOIA).[2]

The most substantive public disclosures of intelligence information have come at the initiative of the intelligence agencies themselves. Especially since the end of the Cold War, intelligence agencies have released to the public significant information of historical interest, including thousands of photographs taken by the first satellite system (known as CORONA), decrypted KGB messages regarding espionage activities in the United States (codenamed VENONA), and sanitized versions of NIEs on Soviet military strength. General information about the organization and functions of intelligence agencies also has been released, and, where possible, responses to media inquiries are provided. Most of America's intelligence agencies, in fact, maintain public affairs offices which serve as official channels of information to the outside world.

Thus, substantial accountability to the public is achieved in a variety of ways, wholly apart from the accountability achieved through the special oversight mechanisms.

In general, the Commission believes openness should be encouraged whenever possible. What can be disclosed to the public, however, necessarily will depend on the circumstances, and care must be taken that disclosure does not damage the ability of intelligence agencies to accomplish their mission. In recent years, security discipline within the agencies themselves appears to have broken down. Employees no longer appear reluctant to deal with the media or to go public with their complaints and disagreements. The American people look to the Government to regain control and draw the proper line. The Commission believes they do not want public disclosure if disclosure means intelligence capabilities are damaged. They are willing to rely on the special oversight mechanisms to monitor on their behalf matters that cannot be publicly disclosed. At the same time, they expect candor and good faith from the intelligence agencies in determining what should and should not be released.

Disclosure of the Intelligence Budget

Since 1947, the budget for intelligence has been classified by the Executive branch. Whether it should be publicly disclosed has been a topic actively considered for the last 20 years. The Church and Pike Committees, as well as the Rockefeller Commission, all recommended some level of disclosure. Since the end of the Cold War, the issue has been debated almost annually in the Congress.

Repeated often, the arguments for and against disclosure are abundantly clear. Those who favor disclosure contend that the public should be permitted to know the amount of federal spending devoted to the intelligence function and that this amount can be disclosed

[2] Certain operational files of the CIA are exempted by law from the requirements of FOIA to search for records in response to a request from the public. Information classified pursuant to Executive Order is exempted by the Act from disclosure and, since most information held by intelligence agencies is classified, relatively little substantive information concerning intelligence activities is released under FOIA.

without providing useful information to potential U.S. adversaries. They point out that the budget for intelligence agencies has been disclosed repeatedly in the press—and once inadvertently by a congressional committee—without apparent harm.

Those who oppose disclosure contend that the overall number would be meaningless to the American public, and that, over time, trends could be discerned by potential adversaries that might allow them to draw conclusions about particular programs of activities. They worry that if the overall number is disclosed, there would be demands for further "peeling of the onion."

After weighing the arguments, the Commission concludes that the President should disclose to the public the overall figure for the intelligence budget. The Commission believes this can be done in manner that does not raise a significant security concern. While disclosure would necessarily convey limited information, it would let the American public know what is being spent on intelligence as a proportion of federal spending. This in itself is a worthwhile purpose, and may, to some degree, help restore the confidence of the American people in the intelligence function. A number of foreign governments, including the British and Australian, have disclosed their intelligence budgets to the public without adverse effect. The Commission believes it can be done here as well.

14-2. The Commission recommends that at the beginning of each congressional budget cycle, the President or a designee disclose the total amount of money appropriated for intelligence activities for the current fiscal year (to include NFIP, JMIP, and TIARA) and the total amount being requested for the next fiscal year. Such disclosures could either be made as part of the President's annual budget submission or, separately, in unclassified letters to the congressional intelligence committees. No further disclosures should be authorized.

Oversight of Intelligence by the Congress

The oversight committees of the Congress—the Select Committee on Intelligence in the Senate and the Permanent Select Committee on Intelligence in the House of Representatives—provide the only routine oversight of intelligence activities outside the Executive branch. As such, they bring a perspective to the oversight function that is not replicated by oversight bodies within the Executive branch. Inasmuch as both committees also authorize appropriations for intelligence activities and have subpoena power, they retain the practical leverage needed to make oversight effective.

In addition, the law specifically obligates the President to ensure that intelligence agencies keep the committees "fully and currently informed" of their activities, including all "significant anticipated intelligence activities" and all "significant intelligence failures," and make available any information requested by either of the two committees. The law does not define the categories of information to be reported, leaving intelligence agencies to ignore or misinterpret them at their own peril (which occasionally happens). The President also is obligated by law to notify the intelligence committees (or, in special cases, the congressional leadership) of all covert action "findings" once they have been approved by the President. The committees have no authority to disapprove these findings,

but can prohibit the expenditure of funds for such activities in subsequent years. As a practical matter, therefore, their views on covert action programs are given considerable weight.

By most accounts, the committees provide rigorous and intensive oversight. They have grown increasingly knowledgeable and have remained appropriately skeptical. No other country comes close to providing the same degree of legislative oversight of their intelligence services.

An enormous amount of detailed information—some extraordinarily sensitive—is provided to the legislative overseers by the Intelligence Community. Hearings are held frequently; meetings with staff occur daily. Disputes over access have arisen from time to time and occasionally the oversight process has broken down (e.g. the Iran-contra affair), but, by and large, the system has worked well. Over time, the agencies have come to appreciate what the committees expect, and the committees have come to appreciate the security concerns of the agencies and been willing to accommodate them. Both committees have established secure environments for the discussion and storage of classified information and have maintained good track records in terms of protecting the information shared with them.

Some interviewed by the Commission believed that security would be further improved if the two oversight committees were combined into a single joint committee, thus reducing the number of members and staff with access to sensitive information. The Commission considered this idea but is not prepared to recommend it. Creating a single joint committee would not substantially reduce the number in Congress needing access to intelligence, but would reduce the degree of oversight. It would also eliminate the checks and balances inherent in having committees in each body separately consider intelligence funding. A joint committee would no longer handle nominations received by the Senate. Having separate committees has worked. The case for altering this arrangement has not been made.

The Commission did identify, however, one area where improvements might be made and another where the Commission has no recommendation but offers a word of caution. Members on both committees are appointed for fixed terms by their respective congressional leaders and currently cannot serve more than eight consecutive years on either committee. The original rationale for the policy was that if Members were assigned more or less permanently, they might be coopted by the Intelligence Community and oversight would suffer. Reformers also believed that allowing more Members of Congress to serve on the committees through a system of rotating assignments would increase the understanding of the intelligence mission in both Houses.

The reality has been, however, that because of the fixed tenure rule, Members often have to rotate off the committees at the very time they have begun to master the complex subject matter. Indeed, knowing their tenure is limited, some put their time in on other committees. As a consequence, in the view of many Commission witnesses, an unfortunate loss of expertise and continuity occurs, weakening the effectiveness of the committees.

14-3. The Commission recommends that the members of the House and Senate intelligence committees not be limited by fixed term or tenure. Appointments should be made in the same manner as appointments to other committees, with new members being assigned to fill spaces resulting form normal attrition, except that new members should continue to be appointed by the leadership of the House and Senate, rather than by their respective party structures. The respective Chairmen and Ranking Minority Members could be appointed for fixed terms to provide for rotation of the leadership responsibilities. If the House and Senate choose instead to maintain the current policy in order to allow more Members to serve, the Commission suggests that the maximum period of service on the committees be extended to a least ten years.

Despite a relationship between the oversight committees and the intelligence agencies that appears to work well in practice, many informed witnesses told the Commission that oversight by the Congress has become so burdensome and intrusive that it is having a negative effect on intelligence operations. Some suggested that the possibility that intelligence officers or their supervisors might one day be required to appear before the committees and have their judgments (perhaps made years before) questioned in the light of hindsight stifles risk-taking and encourages timidity. Intelligence officers also are seen as becoming increasingly leery of putting things on paper, thus creating problems for agency managers and reducing the ability of overseers to get to the heart of a problem at a later juncture. Finally, some argued that the public reports and statements of the oversight committees almost always are negative, thus distorting the public's perception of intelligence, creating an unfavorable impression among potential sources of cooperation, and undermining the morale of intelligence personnel.

The Commission had no means of reliably evaluating these concerns. Undoubtedly, oversight has its costs. Yet, congressional oversight in the intelligence area is not qualitatively different from congressional oversight in other domains. No government official likes to have his judgment questioned or his actions criticized. It is the nature of oversight that congressional reports are generally negative where Executive agencies are concerned.

That said, the Commission believes that intelligence oversight requires careful handling on the part of the Congress. Intelligence is an area of government activity where risk-taking and innovative thinking, within the confines of applicable law and policy, should be encouraged. It is an area that relies heavily on the professional judgment and candor of its employees. It also is an area highly dependent upon the cooperation of other governments and individuals. What the oversight committees do, especially in public, does have an effect beyond the circumstances of a particular inquiry or investigation. While the committees are naturally eager to demonstrate that their oversight is effective, they should take into account the possible negative consequences of their actions for the agencies they oversee. The Commission believes the committees ought to ensure a balanced picture is presented to the public, giving credit where deserved and defending intelligence agencies where their performance has been inaccurately portrayed or their integrity unfairly maligned. Intelligence agencies cannot credibly defend themselves.

The Commission makes no specific recommendation here, but emphasizes the need for the oversight committees to balance the various interests at stake in carrying out their crucial responsibilities.

Oversight Arrangements within the Executive Branch

Each element of the Intelligence Community falls within the purview of an Inspector General (IG), who typically carries out inspections, investigations, and audits of the intelligence activities under his or her purview. Large intelligence elements have their own IG; smaller ones come under the IG of their parent organization. Several intelligence components of the Department of Defense have their own IG and also are within the purview of the DoD IG. CIA is the only intelligence agency with an internal IG who is presidentially-appointed and Senate-confirmed and who is required by law to make reports directly to the oversight committees. The IGs who are internal to other intelligence components are appointed by the head of the component concerned.

The Department of Defense also has an Assistant to the Secretary of Defense for Intelligence Oversight, who conducts investigations and monitors the activities of IGs internal to DoD intelligence components, principally to ascertain compliance with the rules governing the collection and dissemination of information on Americans.

Within the Executive Office of the President, there is an Intelligence Oversight Board (IOB) with jurisdiction extending across the entire Intelligence Community. Currently, the IOB is constituted as a standing committee of the President's Foreign Intelligence Advisory Board (PFIAB). Four members of the PFIAB serve in a dual capacity as members of the IOB. The IOB reviews the activities of, and receives regular reports from, the agency IGs and other oversight offices. Periodically, it reviews covert action programs and conducts inquiries regarding possible violations of law or Presidential directives at the direction of the President, upon the request of the DCI, or upon its own motion. It reports to the President and refers apparent violations of law to the Attorney General.

The Commission did not delve deeply into the work of these oversight mechanisms. Nonetheless, it is clear at the agency level that wide disparities exist in terms of the resources devoted to the IG function and the impact the IG has on agency operations. Some recommended that each intelligence agency should have an independent statutory IG similar to the CIA. Others suggested, at a minimum, that intelligence agencies other than the CIA ought to bring in qualified persons from outside the agency to serve as IG, rather than relying on career employees to perform this role.

14-4. The Commission recommends that the Intelligence Oversight Board, which is already charged with monitoring the performance of IGs, conduct a review of the existing IG framework with the objective of ensuring the effectiveness of this important instrument of oversight. The Commission also recommends that the Intelligence Oversight Board be constituted with a greater degree of independence from the PFIAB because its functions are qualitatively different.