

## CHAPTER 38

# THE ROLE OF DEFENSE IN SHAPING U.S. INTELLIGENCE REFORM

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The performance of the U.S. Intelligence Community (IC) prior to the terrorist attacks of September 2001 and the invasion of Iraq in March 2003 was consistently questioned and ultimately led to sweeping intelligence-reform legislation in 2004. While several commissions, national-security think tanks, and Congress weighed in during this tumultuous period, it was the 9/11 Commission that proved to be the primary catalyst for legislative remedies.<sup>1</sup>

This chapter will examine the intelligence-reform movement since 9/11, with a particular emphasis on Defense Intelligence reforms. It will explore the role of Defense Intelligence in shaping and implementing law and subsequent executive guidance and policy. It also highlights how long-term, trusted relationships among several key intelligence officials in place during 2007–8 were a critical factor in moving successfully through a number of contentious policy issues. Finally, the chapter concludes with my views on the work still to be done to bring the full spirit and intent of the intelligence-reform movement to fruition.

<sup>1</sup> One of the more important commissions investigating intelligence performance during this period was the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, which did not publish its report until March 31, 2005. Although widely known as the 9/11 Commission, its official name is The National Commission on Terrorist Attacks upon the United States.

## 2. THE DRIVE TO REFORM

The National Security Act of 1947 established a new national-security structure within the United States, including the first components of a national Intelligence Community (IC).<sup>2</sup> In 1950, a new Director of Central Intelligence (DCI), Lt. Gen. Walter Bedell Smith, began to shape the nation's disparate intelligence agencies into something recognizable as an "Intelligence Community," a term first used during his tenure (Warner 2001, 6). He maneuvered the Department of State and the Joint Chiefs of Staff out of clandestine operations and pushed successfully to bring the signals-intelligence capabilities of the armed services under civilian control.

Since that time, a seemingly endless series of studies has examined the IC, typically prompted by a real or perceived abuse of power or shortfalls in the community's performance.<sup>3</sup> The Cuban Missile Crisis drove much of the reform in the 1960s. Concern over the conduct of covert operations and government abuses of Americans' civil liberties fostered many of the reforms in the 1970s that led to greater oversight in both the legislative and executive branches.<sup>4</sup> The signing of Executive Order 12333 by President Ronald Reagan in 1981 was the then-new president's effort to protect the rights of Americans and outline the roles and responsibilities of the members of the IC, particularly the Director of Central Intelligence (DCI). Many of the proposed intelligence reforms of the 1990s were the result of pressure to reap a "peace dividend" by downsizing the IC after the end of the Cold War.<sup>5</sup>

The executive branch once again found itself under significant pressure to reform the IC after the 9/11 Commission report, released just before the 2004 presidential election. Initially, President George W. Bush's National Security Council, working with the senior leadership in the IC, publicly responded to the report by drafting several new executive orders that strengthened the management authority of the DCI.<sup>6</sup> Neither the Congress nor its constituents found them sufficient and continued to push for legislation.

<sup>2</sup> The original members of this early intelligence system were the Central Intelligence Agency and the Departments of Justice, State, War, and Navy.

<sup>3</sup> For more information on the history of intelligence reforms, see DNI Mike McConnell's "Overhauling Intelligence" in *Foreign Affairs* or the ODNI publication, "Six Decades of Intelligence Reform."

<sup>4</sup> The Senate Select Committee on Intelligence was created in 1976 and the House Permanent Select Committee on Intelligence followed in 1977.

<sup>5</sup> The House Permanent Select Committee's Staff Report (IC21) and the Aspin-Brown Commission (formally titled "Preparing for the 21st Century: An Appraisal of U.S. Intelligence") are examples of some of the calls to downsize intelligence.

<sup>6</sup> President Bush signed four executive orders on August 27, 2007: "Directing the Streamlined Management of the Intelligence Community"; "Establishing the National Counterterrorism Center (NCTC)"; "Strengthening the Sharing of Terrorism Information to Protect Americans"; and "Establishing the President's Board on Safeguarding Americans' Civil Liberties."

The consensus of those pushing more aggressive reforms, including an assertive group of family members of the victims of 9/11, began to coalesce around the belief that the IC needed stronger, more centralized management and that the current construct—a DCI charged with both overseeing the performance of the IC as well as managing the day-to-day operations of the Central Intelligence Agency (CIA)—was unworkable. This was certainly central to the recommendations included in the 9/11 Commission Report released in July 2004 and echoed in the draft legislation approved by the Senate.<sup>7</sup> The proposal to create a strong Director of National Intelligence (DNI) was far more contentious within the House of Representatives, which advocated a different vision for intelligence reform.

Despite significant obstacles, the Congress managed to push through, and President Bush signed, the Intelligence Reform and Terrorism Prevention Act (IRTPA) in December 2004. The new law created a DNI whose primary responsibilities were to serve as principal advisor to the president on intelligence matters, to manage and oversee the programs and activities of the sixteen components of the IC—half of which are statutorily housed within the Department of Defense—and to determine the National Intelligence Program (Section 102).<sup>8</sup> While the IRTPA gave the DNI strengthened authorities in a number of areas, neither the Congress nor the American public were willing to go so far as to create a Department of Intelligence, a dream of some reformers. At the end of the day, IRTPA did not provide the DNI much more latitude than the DCI had in managing the IC.

The opposition to centralizing too much authority in a DNI was led by the Department of Defense and the members of Congress on the armed services committees, most notably Representative Duncan Hunter (R-CA) and Senators Carl Levin (D-MI), John Warner (R-VA), and Ted Stevens (R-AK). In the fall of 2004, the Congress had worked to a stalemate, and the legislation was in jeopardy. Reform-minded members of Congress, led by Senators Susan Collins (R-ME), Joseph Lieberman (D-CT) and Representative Jane Harman (D-CA), were concerned that this rare opportunity to pass reform legislation might be squandered if they compromised their original positions significantly to ensure passage. This compromise included what became a controversial provision—Section 1018.

Section 1018 essentially states that the president shall issue guidelines to the DNI explaining how the DNI will manage the components of the IC without abrogating the statutory authorities of other members of the executive branch.<sup>9</sup> Many in the IC, and those who closely follow the IC, immediately recognized that Section 1018

<sup>7</sup> Some in the Senate, notably Senators John McCain and Arlen Specter, had actually drafted legislation that would in essence create a Department of Intelligence.

<sup>8</sup> The National Intelligence Program is a budgetary aggregation straddling sixteen components which supplanted the National Foreign Intelligence Program. The FY08 top line for the NIP is \$42.7 billion.

<sup>9</sup> Section 1018 states: "The President shall issue guidelines to ensure the effective implementation and execution within the executive branch of the authorities granted to the Director of National Intelligence . . . in a manner that respects and does not abrogate the statutory responsibilities of the heads of departments . . ."

effectively neutered the legislation. To be a bit more generous, it did, in military parlance, help promote "unity of effort" within the IC but did not compel "unity of command." The governance system created by the new law relies on the "cooperate and graduate" approach rather than the Clausewitzian "compel one to do your will." Those who sought a strong, central authority figure for intelligence were disappointed.

Section 1018 was written by defense advocates to protect the Department of Defense, but it also prevented the DNI from unilaterally making decisions that would affect the intelligence elements of the Department of State, Federal Bureau of Investigation, Department of Homeland Security, and others. The CIA is the only intelligence component other than the Office of the DNI not housed within a cabinet department and that, by statute, reports directly to the DNI.<sup>18</sup>

Not long after the first DNI, Ambassador John D. Negroponte, was appointed and the Office of the DNI (ODNI) established, it became apparent that creating reform-minded new policies and programs for the IC would be difficult if not impossible. Whether the topic was personnel management, training, information-sharing, coordination of activities in the field, or the improvement of analysis, Negroponte found that his proposed policies and plans overlapped and often contradicted plans and policies already in place—many statutorily based—within the other departments. He quickly learned that the new management paradigm was not that much better than the old DCI model, which relied heavily on the goodwill and cooperation of the departments.

While it is true that Department of Defense intelligence and intelligence-related activities are subject to many of the authorities granted to the DNI in the IRTPA, it is the Secretary of Defense who ultimately exercises "authority, direction, and control" over the eight DoD elements designated as members of the IC.<sup>19</sup> The DNI's authorities do not extend to operational or tactical control over any DoD component. Thus, defense intelligence components must achieve a delicate balance between supporting the DNI and responding to the priorities he establishes while at the same time delivering the optimal set of capabilities to support the Department of Defense.

## 2.1 The "Dream Team" and its Window of Opportunity

After the Republican Party suffered defeat in both houses of Congress in the fall of 2006, President Bush made a number of changes in his national-security leadership team. By early 2007, he had a new DNI, J. Michael McConnell; a new Director of the

<sup>18</sup> The language from the IRTPA, Sec 104A: "The Director of the Central Intelligence Agency shall report to the Director of National Intelligence regarding the activities of the Central Intelligence Agency."

<sup>19</sup> Under Section 3(4) of the National Security Act, the following DoD elements are designated as elements of the IC: "NSA, DIA, NGA, NRO, other offices within the DoD that are collection of specialized national intelligence through reconnaissance programs, the intelligence elements of the Army, the Navy, the Air Force, and the Marine Corps..."

Central Intelligence Agency (DCIA), Michael V. Hayden; a new Secretary of Defense Robert Gates, and a new Under Secretary of Defense for Intelligence (myself), in place. All four of us were intelligence veterans who had worked together for decades. We had all been responsible one or more times for managing the day-to-day operations of a major intelligence agency. We had all been through several rounds of intelligence reform in our careers and understood the difficult job the DNI had undertaken. Both Mike Hayden and I had advocated for something akin to a Department of Intelligence during the debate on the IRTPA legislation, which clashed with the views of our then boss, then Secretary of Defense Donald Rumsfeld.

In early 2007 we all faced significant challenges in our new jobs, but we knew, given the loopholes in the law, that the DNI job that Mike McConnell had accepted was perhaps the most difficult and thankless, and we all vowed to help him carry out his mandate. We recognized that the viability of the IC and the safety and security of the American people (and the security of many outside the United States) depended on our improving the performance of U.S. intelligence.

Director McConnell expressed his reservations to President Bush about accepting the position and told the president he would need his support in order to make any progress on intelligence reform. The president agreed and Secretary Gates pledged his assistance as well. In one of our earliest meetings, I offered to do my part to help the new DNI, and, with the agreement of Secretary Gates, we created a new position—the Director of Defense Intelligence (DDI), which is dual-hatted as the Under Secretary for Intelligence (USD(I)) reporting to the Secretary of Defense and as the DDI reporting to the DNI. By doing this, I believed I could use both sets of my delegated statutory authorities (the Secretary's delegated authorities over DoD components, as well as the DNI's delegated authorities) to further the DNI's objectives and work more directly on his behalf. Secretary Gates and DNI McConnell quickly signed a Memorandum of Agreement (MOA) creating the DDI position in May 2007, "dual-hatting" my position. The DNI and Secretary of Defense later approved an annex that elaborated on my duties and responsibilities as the DDI.

According to the MOA, the DDI serves as the principal advisor to the DNI on all matters concerning DoD intelligence, counterintelligence, and security-related matters. The DDI reports to the DNI on three key areas: requirements, intelligence activities, and general "advice and assistance." As a member of the DNI staff, the DDI assists in the execution of DNI responsibilities for the oversight of defense intelligence matters. Under this construct, the DDI will receive direction from the DNI and then implement that direction as the USD(I), capitalizing on the authorities delegated by the Secretary of Defense to the USD(I). The DDI assists the DNI in bringing greater synchronization across the IC by establishing policies and plans for the Defense Intelligence Enterprise that comport with DNI guidance.<sup>12</sup>

<sup>12</sup> The Defense Intelligence Enterprise consists of the eight DoD components previously cited as members of the IC, as well as all other intelligence elements, including those of the Combatant Commands, within the Department of Defense.

The first test of the viability of this new concept came with the implementation of the DNI's new policy on joint-duty assignments. Joint duty is a civilian personnel rotation system aimed at encouraging and facilitating assignments among elements of the IC.<sup>17</sup> Joint-duty assignments assist in developing IC employees and leaders with an enterprise-wide perspective, cultivating cross-organizational networks and facilitating information sharing. This is an example of a sound logical initiative that proved very difficult to implement. As a result of Section 1018, the IRTPA did not transfer the personnel-management authority over intelligence personnel accorded the Secretary of Defense when it situated the DNI with establishing this new personnel policy.<sup>18</sup> Thus DoD would have to change its personnel policy before the new joint-duty policy would have any significant effect.

The idea of joint-duty assignments for members of the IC had been around for more than a decade but was given increased prominence during the IRTPA Commission debates. Although many believed that the IRTPA created the joint-duty program under the DNI, in fact a similar IC Assignment Program had been in place under the DCI since the mid-90s. It foundered, as year after year other agencies sent their best and brightest out on rotation and many politicians "waived" that would allow them to create their own rules on what constituted a rotational assignment.

Although I supported both the spirit and intent of the joint-duty rotational program, I quickly learned in my new job as USD/I: the difficulties it would present within the DoD. Military intelligence officers could not be governed by DoD rules; civilian intelligence officers were managed under DoD rules. Wearing my DNI hat, I worked to create rules within the Defense Civilian Intelligence Personnel System that would support the joint-duty program while at the same time not "dilute" the Secretary's authorities. After many months, my staff and I finally pushed it through the Department, but not without great difficulty.

This was the first of many seemingly intractable policy issues that, as the other members of the IC Executive Committee grappled with as the DNI continued to push for reforms.<sup>19</sup> On many occasions, as I developed intelligence policy for DoD, and the DNI developed national intelligence policy for the larger IC, we found ourselves at legal impasses as a result of Section 1018. Despite our desire to work toward a reasonable solution, we were informed time and again that legally we could not compromise. We were advised the Secretary of Defense could not legally cede his authority to anyone outside of DoD even if he wanted to do so.

<sup>17</sup> The military has had a similar system in place since the passage of the Goldwater-Nichols Act in 1966. A seminal work on the Goldwater-Nichols Act and the joint duty concept in the military is Locher (2002).

<sup>18</sup> See 10 U.S. Code 83.

<sup>19</sup> The EXCOM is composed of the heads of the various components of the IC, and the USD/I.

## 2.2 Executive Order 12333

The difficulties that the DNI had in formulating policy were magnified by challenges unique to the IC: creating unity of effort in addressing the domestic threat, formulating the intelligence program and budget, changing the culture of secrecy and "need to know," and establishing a new and healthy relationship between the ODNI and the CIA.

Congress was becoming increasingly impatient with what it believed was a lack of progress on these fronts, despite an ever-growing DNI staff. What the Congress and others failed to acknowledge, however, was that the systemic flaw created when Section 1018 became part of the IRTPA could not be overcome by the DNI staff or any cooperative group of IC leaders. The only recourse left to the DNI, short of rewriting the legislation, was to develop the presidential guidelines referenced in Section 1018. The President's Intelligence Advisory Board, after conversations with the DNI, felt this was a necessary next step and encouraged the president to begin the effort to revise Executive Order 12333.

President Bush charged DNI McConnell with redrafting Executive Order 12333, which had been in place, with few revisions, since 1981. Executive Order 12333 is the foundational document issued by the president governing how the IC will operate while safeguarding the rights and civil liberties of all Americans. Even the smallest changes to this executive order are not undertaken lightly. McConnell's policy staff began this effort in the early fall of 2007 by bringing together the IC agency deputies and the senior policy and legal officials of the IC for a two-day offsite to discuss what changes to the order should and should not be made. The group at the offsite was encouraged to take off their parochial hats and put on their "good government" hats in formulating changes to the executive order that would better allow a DNI to do his or her job. The group drafted a fairly lengthy list of recommended changes to the executive order, but recommended that the DNI not change the section that protected the rights and civil liberties of the American people.

Several early and important decisions made by the DNI set the redrafting of the executive order on a productive course. After the initial offsite, McConnell established a senior leadership group that included Secretary Gates and me and worked closely with us throughout the drafting process. Both the Secretary and I vowed to help him engage constructively throughout the process and keep the lines of communication open, even when we faced the most difficult and contentious issues. Later, once the DNI had completed an initial draft of the changes to the executive order, the NSC staff established a Principals Committee, a Deputies Committee, and a group of "trusted agents" whose responsibility was to work through the policy and legal issues raised during the redrafting, until only the most difficult policy choices were left. These were then elevated to my level, or if necessary, to the level of the "Principals," which included the National Security Advisor Stephen Hadley, DNI McConnell and Secretary of Defense Gates.

After a great deal of debate and deliberation throughout the winter and spring of 2008, these groups produced an extensive revision to Executive Order 12333.

which President Bush signed on July 30, 2008. Few believed this could be accomplished before the end of the administration. But McConnell, Fitzgerald, Gates, and I recognized that we had only a narrow window of time for us to take advantage of the lessons learned subsequent to the enactment of the IRTPA and the unique alignment of experienced senior officials.

A few deeply felt issues came close to scuttling the entire effort. The most significant of these issues for the Department of Defense was the challenge of resolving how Section 1018 was to be interpreted and implemented. On the one hand, it is recognized that Section 1018 preserved the authorities and responsibilities of the Secretary of Defense in the world of national intelligence, critical to the support of the war fighter during times of conflict. Not only did many officials within DoD feel strongly about the necessity of preserving these authorities—the armed services committees felt strongly as well. On the other hand, we recognized that we were hamstrung the DNI in his efforts at reform. Finding some middle ground was clearly necessary.

The DNI felt strongly that he needed the executive order to contain that if “presumption” would be that he was *not* abrogating the authorities of the other department heads, unless the departments could prove otherwise. That burden of proving he was violating their authorities rested with the departments. As the DNI would be free to exercise his authorities up until he was proven to be in violation. This was objectionable to all of the departments, but it was difficult to devise the argument opposing this language, as well as to help craft suitable the native language.

After many weeks of haggling over this language, Hadley, Gates, and I personally crafted language that would sufficiently explain how Section 1018 is to be interpreted and applied. In essence, the new language in the executive order “presumption clause” still maintains that the DNI may not abrogate departmental authorities. However, there is an important codicil. It now states that “directives issued and actions taken by the Director in the exercise of the Director’s authorities and responsibilities” shall be implemented by the elements of the DNI. It adds that any department head who believes that a directive or action of the DNI violates the requirements of Section 1018 of the IRTPA must bring the issue to the attention of the DNI, NSC, or the president for resolution. While this may seem convoluted and nuanced, the EO language makes clear that all the components must implement what the DNI tells them to implement, regardless of potential conflicts with departmental directives. It also creates a mechanism whereby departments can bring any potential violations of Section 1018 to the attention of the DNI, and if necessary up the chain of command all the way to the president. In the end, the DNI felt the EO language gave him the “cover” he needed to push his policies through. Historians may someday wonder why so much intellectual energy and effort was put into addressing this language, but only such effort is necessary to reach consensus in the world of high-stakes policy negotiations.

As the debate over the presumption clause was underway, Secretary Gates and I were obligated to represent DoD's institutional viewpoint and remind all parties that the Congress had not been willing to more strongly centralize the DNI's authorities. DoD also wanted to ensure that we honored an agreement made between Vice President Dick Cheney and the House and Senate Armed Services Committees during the IRTPA debate to inform the committees of any presidential guidelines that would affect Section 1018. In a somewhat unprecedented decision, DoD, DNI, and other stakeholder departments agreed to brief Congressional oversight committees on the actual language of EO 12333 prior to the president's signature.

Despite what were at times heated debates, in the end, we all were satisfied that the revised executive order represented a "good government" compromise, and the language that clarified Section 1018 would help the DNI promulgate new policies without abrogating existing authorities of the department heads. That said, without the trust and mutual respect established over decades among the president's senior intelligence team, I believe the successful revision of EO 12333 would have been in doubt.

### 3. WHERE WE GO FROM HERE

For true, systemic intelligence reform to take place, both internal and external pressure must be consistently applied for the IC to change its culture, its practices, its procedures, its deeply held beliefs about itself and its role in a changing world.<sup>16</sup> As new notions of how to conduct the business of intelligence in a democratic society faced with a serious domestic threat are explored, the DNI should have the wherewithal to implement good ideas quickly, and if warranted, institutionalize them in new statutes and policies.

Good policy is the key to getting things done in Washington. Although bureaucratic and unglamorous, the IRTPA and EO 12333—including subsequent DNI and DoD intelligence policy directives that will follow—are the legal and policy underpinnings of the current intelligence reform movement. While revising EO 12333 was an important step in bolstering the DNI's ability implement lasting policies, it does not—and really cannot—resolve all of the IRTPA's ambiguity. I have come to believe that we will not see legislation that gives the DNI unambiguous authority in the near term nor do I believe much more authority is warranted.

I no longer believe as strongly as I once did in greater centralization of intelligence activity or authority, and have changed my views on the establishment of a Department of Intelligence. Intelligence has become an integral function within most national-security organizations, and I realize that the individual needs of each

<sup>16</sup> See Barger 2005 and Gill, Martin, and Pivthan 2009.

department for tailored intelligence outweighs the benefits of more centralized management and control. Five years after signing IRTPA, the time has come for professionals both within as well as outside the IC to reengage in the debate on how much centralized management of intelligence is prudent.

Regardless of the outcome of that debate, IC still has much work to do to navigate the ambiguous lanes-in-the-road issues, which often lead to turf battles, particularly within the area of homeland defense. We need to find less expensive but more effective ways to collect data, analyze it quickly, and make that analysis relevant. The notion, adopted by the DNI, of intelligence providing a "decision advantage" may apply not only to the policymaker but to the soldier in Baghdad or Kabul who also needs to have the right intelligence allowing him to react faster than the enemy. We need to share more and hoard less information especially with our states, tribal, local, and tribal governments, and with our international partners.

I will end with two final thoughts on the future of U.S. intelligence. First, for the DNI to achieve truly meaningful intelligence reform, the DNI cannot rely solely on Congress to clarify IRTPA, rather the DNI must rely on the willingness of the Department of Defense to carefully balance the DNI's national intelligence priorities with the burgeoning requirements within Defense for timely, relevant, and actionable intelligence. This cannot be done unless the Secretary of Defense and the DNI work in full partnership to accomplish the nation's security strategy goals. Secretary Gates and Director McConnell have done.

Second, people matter. The makeup of the intelligence leadership positions must be chosen carefully, not only for their years of experience and knowledge but also for their ability to be team players. Five years after the passage of IRTPA and more than a year after revising EO 12333, the new administration and the incoming intelligence team inherit an Intelligence Community that is in a state of transition, and the individuals leading the IC will still have a unique opportunity to continue the initial reform efforts. While the IC has made great strides similar to its in improving information sharing, for example, there is still work to be done. Based on my experience within the IC and Defense Intelligence Enterprise, the following should be among the priorities of the IC in the new administration: reforming intelligence acquisition, investing in analytical tradecraft, continuing security-clearance reforms, strengthening security and counterintelligence activities, maximizing community collaboration, and forging closer intelligence relationships with foreign partners. Each of these areas will require strong leadership and interagency collaboration to develop and implement policies that will support long-term reforms.

<sup>10</sup> As described by Jennifer Sims, "... the key to intelligence-driven victories this is not the collection of objective 'truth' so much as the gaining of an information edge or competitive advantage over an adversary. Such an advantage can dissolve a decision-maker's qualms and allow him to act. This ability to lubricate choice is the real objective of intelligence." For more information, see the DNI's Vision 2015, [http://www.dni.gov/Vision\\_2015.pdf](http://www.dni.gov/Vision_2015.pdf) and Sims, "2015."

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### **Friends Indeed**

"Help Wanted: A Spy Chief Liked By All" [White House Week, May 9] got it half right. It is true that when asked at a recent National Geospatial-Intelligence Agency town hall meeting if I was leaving, I told my staff nothing official had been said to me about staying at NGA or going elsewhere. It is not true that Defense Intelligence Agency head Vice Adm. Lowell Jacoby and I don't like each other. We have an occasional professional disagreement, but we are personal friends and maintain an excellent relationship.

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