



## MULTIPLE PRINCIPALS AND THE (LACK OF) INTELLIGENCE OVERSIGHT<sup>1</sup>

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*One constant in American politics is that an intelligence scandal leads to calls for an increase in the number of institutions to administer oversight. This paper argues, perhaps counterintuitively, that increasing the number of oversight mechanisms (principals), specifically over the agencies in the intelligence community, leads to a decrease in effective oversight. Using Principal Agency Theory, I argue that too many overseers often promulgates a pattern of shirking oversight duties, and encourages agencies to “forum shop” among their overseers to achieve preferred results. Thus, agencies, rather than their overseers, dictate policy outcomes. The paper suggests that to increase effective oversight of agencies of the intelligence community, alterations must be made to the relationship between the multiple principals of the three branches of the federal government and the intelligence community.*

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## INTRODUCTION

In recent decades, the United States has dealt with a variety of intelligence scandals, including the discovery of intelligence abuse during the Nixon presidency, the Iran-Contra Scandal during the Reagan administration, treasonous activities of agents in both the Central Intelligence Agency (“CIA”) and the Federal Bureau of Investigation (“FBI”), leaks by National Security Agency (“NSA”) contractor Edward Snowden, and the report by the Senate Select Committee on Intelligence Study (“SSCI”) on CIA Detention and Interrogation Program.<sup>2</sup> Despite the variety of actions that led to scandal, the reactions on the part of the President and Congress have been largely uniform: calls for more oversight of the intelligence community (“IC”).

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<sup>2</sup> MICHAEL WARNER & J. KENNETH McDONALD, U.S. INTELLIGENCE COMMUNITY REFORM: STUDIES SINCE 1947 (2005), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/US%20Intelligence%20Community%20Reform%20Studies%20Since%201947.pdf>; COMMISSION ON THE ROLES AND CAPABILITIES OF THE U.S. INTELLIGENCE COMMUNITY, PREPARING FOR THE 21<sup>ST</sup> CENTURY: AN APPRAISAL OF U.S. INTELLIGENCE (1996), <https://www.gpo.gov/fdsys/pkg/GPO-INTELLIGENCE/content-detail.html>; FEDERATION OF AMERICAN SCIENTISTS, THE EVOLUTION OF THE U.S. INTELLIGENCE COMMUNITY-AN HISTORICAL OVERVIEW (1996), <https://fas.org/irp/offdocs/int022.html>; Glenn Greenwald, Ewen McAskill & Laura Poitras, *Edward Snowden: the whistleblower behind the NSA surveillance revelations*, GUARDIAN (June 11, 2013, 9:00 AM), <https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>; Rebecca Roberts, *Robert Hanssen: A Brief History*, NPR (Feb. 4, 2007, 8:00 AM), <http://www.npr.org/templates/story/story.php?storyId=7152496>.

For example, in the wake of the abuses under Nixon, both Congress<sup>3</sup> and President Gerald Ford, who created the President's Intelligence Oversight Board,<sup>4</sup> acted to increase oversight mechanisms of the intelligence community. About a decade later, the Iran-Contra scandal occurred because it was said to be "outside the normal oversight framework."<sup>5</sup> Following months of public hearings, captivating the attention of the country, Congress again sought to refine intelligence oversight procedures by placing greater pressure on the President to inform Congress of actions taken by the Executive Branch. In 1991, Congress passed legislation limiting the President's covert action powers.<sup>6</sup>

In June 2013, Edward Snowden, a former NSA contractor, began a series of intelligence leaks that seemed to indicate the NSA had overstepped its constitutional and statutory confines in

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<sup>3</sup> Thomas Young, *40 Years Ago, Church Committee investigated Americans spying on Americans*, BROOKINGS (May 6, 2015), <https://www.brookings.edu/blog/brookings-now/2015/05/06/40-years-ago-church-committee-investigated-americans-spying-on-americans>.

<sup>4</sup> *About the Committee*, S. SELECT COMM. ON INTEL. (May 31, 2017), <https://www.intelligence.senate.gov/about>. The congressional committees were created to curb intelligence excesses. For example, part of the SSCI's founding mission is to "provide vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States." *Id.* President Ford "created the Intelligence Oversight Board to serve as a watchdog over spying agencies." Charlie Savage, *President weakens espionage oversight*, BOSTON GLOBE (Mar. 14, 2008), [http://archive.boston.com/news/nation/articles/2008/03/14/president\\_weakens\\_espionage\\_oversight/](http://archive.boston.com/news/nation/articles/2008/03/14/president_weakens_espionage_oversight/).

<sup>5</sup> L. Britt Snider, *Congressional Oversight of Intelligence: Some Reflections on the Last 25 Years*, DUKE UNIV. SCH. OF LAW, CTR. FOR LAW, ETHICS, AND NAT'L SEC. 1, 7 (2004). *But see* MALCOLM BYRNE AND PETER KORNBLOH, INTRODUCTION TO THE IRAN-CONTRA SCANDAL: THE DECLASSIFIED HISTORY at xix (Malcolm Byrne and Peter Kornbluh eds., Reed Bus. Info 1993) (arguing that rather than being beyond the usual confines of oversight, "the ability of the legislative and executive branches to hold U.S. officials accountable for their actions has proven virtually nonexistent").

<sup>6</sup> *See* MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., RL33715, COVERT ACTION: LEGISLATIVE BACKGROUND AND POSSIBLE POLICY QUESTIONS 2 (2013), <https://fas.org/sgp/crs/intel/RL33715.pdf>.

a variety of surveillance programs.<sup>7</sup> In response, members of Congress assured their constituents and the American people that these accusations would be investigated. Senator James Inhofe (R-OK) announced that “as ranking member of Senate Armed Services, I will work to investigate as to what laws were broken by the administration.”<sup>8</sup> Similarly, Senator Pat Toomey (R-PA) stated that “Congress must redouble its oversight efforts . . . .”<sup>9</sup> Not to be outdone by colleagues, Senator Patrick Leahy (D-VT), chair of the Senate Judiciary Committee, vowed that that committee would investigate when Congress reconvened post-recess in September.<sup>10</sup>

In the aftermath of the rolling leaks, congressional activity was fast and furious on the topic of the NSA and its surveillance programs. On September 26, 2013, the Senate Select Committee held a hearing on the Foreign Intelligence Surveillance Act (“FISA”) court (or “FISC”) oversight of the NSA surveillance of American citizens.<sup>11</sup> Intelligence officials, including then Director of National Intelligence James Clapper, then National Security Director General Keith Alexander, and then Deputy Attorney General James Cole, all testified.<sup>12</sup>

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<sup>7</sup> GLENN GREENWALD, *NO PLACE TO HIDE: EDWARD SNOWDEN, THE NSA AND THE U.S. SURVEILLANCE STATE* (2014); *see also* Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily* *GUARDIAN* (June 6, 2013, 6:05 PM), <https://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

<sup>8</sup> *See* Ramsay Cox, *Senate Republicans vow to investigate NSA's privacy violations*, *HILL* (Aug. 19, 2013, 9:01 PM), <http://thehill.com/blogs/floor-action/senate/317725-senate-gops-vow-to-investigate-nsas-privacy-violations>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *See, e.g., Legislative Changes to the Foreign Intelligence Surveillance Act Hearing Before the S. Select Comm. On Intelligence*, 113th Cong. (2013) (statement of Benjamin Wittes, Senior Fellow at the Brookings Institution).

<sup>12</sup> *Joint Statement for the Record Before the S. Select Comm. On Intelligence*, 113th Cong. (2013) (statement of James R. Clapper, Dir. of Nat'l. Intelligence, et al.).

Two members of the select committee introduced competing proposals to rein in the NSA. Diane Feinstein (D-CA), chair of the committee, proposed that the NSA annually issue a transparency report, limit the storage time of collected metadata, and create better guidelines for when the NSA can monitor phone numbers.<sup>13</sup> Additionally, Ron Wyden (D-OR) proposed intelligence reforms which would “end the collection of American metadata *en masse* and make it easier to sue the government for civil liberties violations, among other provisions.<sup>14</sup> Feinstein’s bill proposed better guidelines on when the NSA can monitor phone numbers.<sup>15</sup> Yet, Feinstein’s bill competed directly with Sen. Ron Wyden’s (D-OR) proposed intelligence reforms, which were geared more toward privacy concerns.

In the immediate wake of the 9/11 terrorist attacks, the U.S. government moved to capture suspected terrorists and interrogate them in efforts to prevent further terrorist attacks. In December 2014, the Senate Committee on Intelligence released the declassified version of its “Study on CIA Detention and Interrogation Program.”<sup>16</sup> The report was damning, concluding that among other things: “[t]he CIA’s use of its enhanced interrogation techniques was not an effective means of acquiring intelligence or gaining cooperation from detainees”; “[t]he interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers . . .”; and that the CIA misled Department of Justice (“DOJ”) attorneys and willfully avoided oversight efforts of Congress, the President, and the CIA’s Office of Inspector General.<sup>17</sup> In other words, despite having the eyes of the White House, Congress, DOJ’s Office of

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<sup>13</sup> Brian Fung, *Sen. Feinstein unveils her own bill to reform the NSA’s Spying Practices*, WASH. POST (Sept. 26, 2013), [https://www.washingtonpost.com/?utm\\_term=.34adf1b07a43](https://www.washingtonpost.com/?utm_term=.34adf1b07a43).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See S. SELECT COMM. ON INTELLIGENCE, 113TH CONG., SENATE INTELLIGENCE COMMITTEE STUDY ON CIA DETENTION AND INTERROGATION PROGRAM, <https://www.feinstein.senate.gov/public/index.cfm/senate-intelligence-committee-study-on-cia-detention-and-interrogation-program> (last visited Apr. 27, 2017).

<sup>17</sup> *Id.*

Legal Counsel (“OLC”) and DOJ’s Office of the Inspector General (“OIG”) upon it, the SSCI report found that CIA was able to illegally mistreat its prisoners.<sup>18</sup> Perhaps the most direct effort to counter the SSCI report, authored and joined only by the Democratic Party committee members in the majority, was the report by the Republican members of the committee.<sup>19</sup> The “Minority Report” argues vehemently that SSCI report attacks “the CIA’s integrity and credibility” based on “flawed analytical methodology.”<sup>20</sup> Moreover, “these problematic claims . . . create the false impression that the CIA was actively misleading policy makers and impeding the counterterrorism efforts of other government agencies during the Program’s operation.”<sup>21</sup> Even when oversight exists, partisan disagreement and the need for political punch lines to drive a news story can often lead to contradictory oversight; effectively increasing the number of overseers, confusing the intelligence community, and creating a binary committee as opposed to a unitary one.<sup>22</sup>

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<sup>18</sup> *Id. But see*, MICHAEL HAYDEN, PLAYING TO THE EDGE: AMERICAN INTELLIGENCE IN THE AGE OF TERRORISM 396-402 (2016) (quoting former Deputy Director of CIA John McLaughlin, that the report was “a one-sided study marred by errors of fact and interpretation”); *see* REBUTTAL: THE CIA RESPONDS TO THE SENATE INTELLIGENCE COMMITTEE’S STUDY OF ITS DETENTION AND INTERROGATION PROGRAM 33 (Bill Harlow ed. 2015) [*hereinafter* “REBUTTAL”] (quoting the wrongly maligned former CIA attorney John Rizzo, who finds the report “galling” when it accuses the CIA of making “inaccurate claims” regarding the enhanced interrogation program to the institutions charged with oversight of the program). *Id.*

<sup>19</sup> S. SELECT COMM. ON INTELLIGENCE, 113<sup>TH</sup> CONG., SENATE INTELLIGENCE COMMITTEE STUDY ON CIA DETENTION AND INTERROGATION PROGRAM: MINORITY VIEWS (Apr. 27, 2017), <https://www.intelligence.senate.gov/sites/default/files/press/minority-views.pdf> (having been signed by Republican SSCI members Saxby Chambliss, Richard Burr, James Risch, Dan Coats, Marco Rubio and Tom Coburn). Former Senator Coats serves as Director of National Intelligence in the Trump administration.

<sup>20</sup> REBUTTAL, *supra* note 18, at 187.

<sup>21</sup> *Id.*

<sup>22</sup> *See* Marvin C. Ott, *Partisanship and the Decline of Intelligence Oversight*, 16 INT’L J. OF INTEL. AND COUNTER INTEL. 69, 85 (2003) (“Even more than the congressional norm, the SSCI reflects its chairman. Unlike most other committees, no subcommittee chairmen share the load with the chairman or act as a counterweight to his views. Moreover, the SSCI’s rules effectively give the chairman full power over the hiring, firing, and organization of the staff. All

All of these intelligence scandals have at least two commonalities: each happened under the “watchful” eyes of multiple overseers and the response to each shortcoming was to increase the number oversight mechanisms. But what if the multiplicity of overseers enabled the scandals to occur? Does adding more eyes increase the effectiveness of the scrutiny? As detailed below, this article argues that too many overseers can have disastrous effects on the intelligence community and the country as a whole.

Part I discusses the capabilities and roles of the national government’s branches in oversight of the intelligence community. Using Principal Agency Theory—used commonly in the economic and political science literatures, and increasingly in the legal literature—the following section begins to explore the shortcomings of the complex legal, legislative, and regulatory framework of the intelligence oversight system the government currently employs. The article then discusses the impact of the shortcoming and provides suggestions to improve the effectiveness and efficiency of the intelligence community. Finally, the article calls for congressional action to remedy the problem of multiplicity of principals in the administration of oversight of the intelligence community.

## I. INTELLIGENCE OVERSIGHT BY BRANCH<sup>23</sup>

### A. *The President*

Most scholars consider the President to play the most important role in the oversight of the IC.<sup>24</sup> The oversight tools

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staff members are under the control of the staff director selected by the chairman. This means, among other things, that *bipartisanship can exist only as a gift from the chairman and the majority.*”) (emphasis added).

<sup>23</sup> This section is an adapted, edited, expanded and updated version of Tobias T. Gibson, *A Guide to Intelligence Oversight Design*, in AFIO’s GUIDE TO THE STUDY OF INTELLIGENCE 545, 545-553 (Peter C. Oleson, ed., 2016). Format and wording similarities remain.

<sup>24</sup> James A. Baker, *Intelligence Oversight*, 45 HARV. J. ON LEGIS. 199, 204 (2008) (stating that “. . . the President’s control over the creation of—and access to—classified information provides him with an important advantage in conducting oversight. This enhances the President’s oversight role relative to other actors

that the President possesses are vast, including many powers enumerated in the Constitution.<sup>25</sup> As head of the executive branch, the President plays an unparalleled role in the functioning of agencies in the IC. For example, President Obama reorganized the intelligence community with the creation of Cyber Command early in his administration. The President also wields tremendous influence over the Department of Defense (“DoD”). For example, through federal funding, as much as 80 percent of the intelligence budget is allocated to the DoD.<sup>26</sup> Half of the nation’s 16 independent intelligence agencies are found in the DoD, including an intelligence group in each branch of the military, the National Geospatial-Intelligence Agency (“NGA”) and the Defense Intelligence Agency (“DIA”).<sup>27</sup>

The President is also able to oversee agency functions by nominating favored heads of departments and agencies, as well as firing those who do not properly implement the executive agenda.<sup>28</sup> The Secretaries of Defense, State, Treasury, Homeland

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...”); *see generally* Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633 (2016).

<sup>25</sup> U.S. CONST. art. II, § 2; *see generally* John Yoo, *Lincoln at War*, 38 VT. L. REV. 3 (2013); John Yoo, *Jefferson and Executive Power*, 88 B.U. L. REV. 421 (2008).

<sup>26</sup> Eloise Pasascoff, *The President’s Budget As A Source Of Agency Policy Control*, 125 YALE L. J. 2182, 2186 (stating that the [P]resident, primarily through the Office of Management and Budget, impacts the executive branch agencies through the budget. Indeed, “[t]he budget itself . . . is a key tool for controlling agencies.”); ANNE DAUGHERTY MILES, CONG. RESEARCH SERV., R44381, INTELLIGENCE COMMUNITY SPENDING: TRENDS AND ISSUES 1 (2016), <https://fas.org/sgp/crs/intel/R44381.pdf> (indicating that there are, in essence, two intelligence budget lines: “[T]he National Intelligence Program (NIP), which covers the programs, projects, and activities of the intelligence community oriented towards the strategic needs of decision-makers, and . . . the Military Intelligence Program (MIP), which funds defense intelligence activities intended to support tactical military operations and priorities.”).

<sup>27</sup> ANNE DAUGHERTY MILES, CONG. RESEARCH SERV., R44381, INTELLIGENCE COMMUNITY SPENDING: TRENDS AND ISSUES 1 (2016), <https://fas.org/sgp/crs/intel/R44381.pdf>.

<sup>28</sup> Josh Gerstein, *Ex-DNI rips Obama White House*, POLITICO (July 29, 2011), <http://www.politico.com/story/2011/07/ex-dni-rips-obama-white-house-060199>; *Only One US President has ever Fired an FBI Director and that President’s Name Was Clinton*, DAILYKOS: LEFTOFYOU BLOG (Oct. 31, 2016, 4:01 PM), <https://www.dailykos>



Security, the Director of National Intelligence (“DNI”), and the heads of individual agencies, such as the CIA and the NSA, are all nominated by the President, and serve at the behest of the President.<sup>29</sup> Several heads of intelligence agencies, including CIA’s Allen Dulles, DNI Dennis Blair, and FBI’s James Comey were either fired or forced to resign.

Executive orders can also be effective tools for oversight. President Ronald Reagan used Executive Order (“EO”) 12,333 to increase the “analytical competition” between intelligence agencies to improve the analysis produced for executive branch policymakers.<sup>30</sup> EO 12,333 allowed the CIA, with the permission of the President, to covertly operate domestically. Although the CIA was prohibited from gathering intelligence on purely domestic activities, the agency was allowed to operate domestically to support foreign intelligence collection.<sup>31</sup> President George W. Bush altered EO 12,333 to establish a DNI to be the primary intelligence advisor for the President and the National Security Council, replacing the Director of Central Intelligence (“DCI”) in this role.<sup>32</sup>

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.com/stories/2016/10/31/1589230/-Only-One-US-President-has-ever-Fired-an-FBI-Director-and-that-President-s-Name-Was-Clinton; Caroline Linton, “*I Will Be Fine*,” *James Comey says in email to FBI after being fired*, CBS News (May 10, 2017), <http://www.cbsnews.com/news/james-comey-fired-fbi-email-i-will-be-fine/>.

<sup>29</sup> VIVIAN S. CHU & HENRY B. HOGUE, CONG. RESEARCH SERV., R41850, FBI DIRECTOR: APPOINTMENT AND TENURE 1 (Feb. 19, 2014), <https://fas.org/sgp/crs/misc/R41850.pdf> (stating that the Director of the FBI is also nominated by the president and confirmed by the Senate but that the Director has a statutory term of ten years). This is widely construed to be a source of independence; however, it was intended as a constraint after the directorship of J. Edgar Hoover spanned nearly five decades. *Id.*; Saikrishna Prakash & Aditya Bamzai, *The somewhat independent FBI director*, L.A. TIMES (November 2, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-prakash-bamzai-how-independent-is-the-fbi-director-20161102-story.html>; Linton, *supra* note 28 (stating that the Director of the FBI can be fired by the President, apparently for “any reason or for no reason at all” and without warning).

<sup>30</sup> Exec. Order No. 12,333, 46 Fed. Reg. 59941, 59942 (Dec. 4, 1981).

<sup>31</sup> JEFFREY T. RICHELSON, THE US INTELLIGENCE COMMUNITY 19 (7th ed. 2016).

<sup>32</sup> *Id.* at 492.

The President also influences the IC with less public tools. For example, according to President Lyndon Johnson, National Security Directives (“NSD”)<sup>33</sup> are used as “ . . . formal notification[s] to the head of a department or other government agency informing him of a presidential decision in the field of national security affairs and generally requiring follow-up action by the department or agency addressed.”<sup>34</sup> The Ronald Reagan Presidential Library describes President Reagan’s use of NSDs (National Security Decision Directives in the parlance of his administration) to “set forth official national security policy for the guidance of the defense, intelligence, and foreign policy establishments of the United States Government.”<sup>35</sup> NSDs are more secretive than EOs,<sup>36</sup> and the lack of publicity arguably makes NSD’s a greater exertion of executive power and oversight.<sup>37</sup>

### *B. Non-Presidential Oversight by Executive Branch Officials*

Many other intelligence oversight positions exist in the executive branch. However, the effectiveness of these positions over the IC depend greatly on the governing statute, EOs, and

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<sup>33</sup> PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE & ABUSE OF EXECUTIVE DIRECT ACTION 144 (2d ed. 2014). National Security Directives is a general term for the tool. Individual presidents may call the directives by another name. George W. Bush referred to them as “National Security Presidential Directives” while President Barack Obama preferred the term “Presidential Policy Directives.” *Id.*; Steven Aftergood, *Trump Broadcasts His National Security Directives*, SECRECY NEWS (January 30, 2017), <https://fas.org/blogs/secrecy/2017/01/trump-nspm/> (explaining that President Donald J. Trump refers to his directives as “National Security Presidential Memoranda” (“NSPMs”)).

<sup>34</sup> COOPER, *supra* note 33, at 144.

<sup>35</sup> RONALD REAGAN PRESIDENTIAL LIBRARY AND MUSEUM, *National Security Decision Directives, 1981-1989*.

<sup>36</sup> COOPER, *supra* note 33, at 190-96. Some NSDs are made public by discretion of the president. However, a look at President Reagan’s NSDD list indicates the importance of secrecy, as several of his NSDDs have yet to be made public. *Id.*

<sup>37</sup> See COOPER, *supra* note 33, at 190-96 (explaining that some NSDs are made public by discretion of the President; however, a look at President Reagan’s NSDD list indicates the importance of secrecy, as several of his NSDDs have yet to be made public).

other presidential directives.<sup>38</sup> Secretaries of departments affiliated with the IC, including those in the Department of State, Department of Homeland Security (“DHS”), and Department of the Treasury, oversee intelligence gathering—at least indirectly—within their departments.<sup>39</sup> However, it is the Secretary of Defense that plays a particularly important role in overseeing member agencies of the IC because of the number of intelligence agencies that share the DoD’s budget.<sup>40</sup>

The DNI, created in the wake of the 9/11 terrorist attacks on the United States, was tasked with oversight and implementation of the intelligence budget. Although intelligence agency directors were obligated to “provide all programmatic and budgetary information necessary to support the Director in developing the National Intelligence Program,”<sup>41</sup> the weaknesses of the DNI was evident in its institutional design, which is described as “limited by ambiguity, ambivalence, and

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<sup>38</sup> Alexandra Jaffe, *Former Defense Secretary Robert Gates: ‘Big Mistake’ for Trump to Exclude Members of National Security Council*, NBC NEWS (Jan. 29, 2017), <http://www.nbcnews.com/politics/politics-news/former-defense-secretary-robert-gates-big-mistake-trump-remove-members-n713781>. Early in the Trump administration, President Trump—who ran for president in part by opposing many components of the intelligence community—removed the DNI from the National Security Council. *Id.*

<sup>39</sup> *Terrorism and Financial Intelligence*, U.S. DEP’T OF TREASURY, <https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Terrorism-and-Financial-Intelligence.aspx> (last updated Sept. 12, 2017) (showing that the heads of the agencies within the departments, in turn, delegate organizations to directly oversee the IC components). For example, the Treasury’s Office of Terrorism and Financial Intelligence (TFI) has its own undersecretary, to whom it reports directly. *Id.*

<sup>40</sup> Frederick C. Smith & Franklin C. Miller, *The Office of the Secretary of Defense: Civilian Masters?*, in *THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH* 97, 100 (Roger Z. George & Harvey Rishikof, eds., 2010).

<sup>41</sup> RICHELSON, *supra* note 31, at 493. Despite the intention, however, the reality for the DNI has proven to be very different. For example, President Obama removed DNI Dennis Blair because he tried “to exert too much operational control over CIA.” Roger Z. George, *Central Intelligence Agency: The President’s Own*, in *THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH* 165 (Roger Z. George & Harvey Rishikof, eds., 2010). The rocky relationship between Obama and Blair illustrates how the influence of the position is partially dependent on the relationship between principals. *Id.*

animosity.”<sup>42</sup> Although Congress recognized the need to give the DNI power, then-Secretary of Defense Donald Rumsfeld “made a personnel move that was interpreted by some as a means of censuring information reaching the DNI: he directed his undersecretary for defense intelligence to ‘synchronize’ intelligence reform within the department.”<sup>43</sup> Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004,<sup>44</sup> granting the ODNI more power than the DCI had ever possessed. However, the Act fell short of providing the DNI substantial tools to serve as an effective director of the entirety of the IC, as the ODNI was limited in the manner and amount of control it could implement changes in the individual intelligence agencies,<sup>45</sup> which proved to be the “Achilles heel” of early DNIs.<sup>46</sup> Additionally, there are oversight mechanisms found within the IC agencies, including several Offices of General Counsel (“OGC”)<sup>47</sup>

<sup>42</sup> Thomas Fingar, *Office of The Director of National Intelligence: Promising Start Despite Ambiguity, Ambivalence, and Animosity*, in *THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABYRINTH* 139 (Roger Z. George & Harvey Rishikof, eds., 2011).

<sup>43</sup> Richard S. Conley, *Reform, Reorganization, and the Renaissance of the Managerial Presidency: The Impact of 9/11 on the Executive Establishment*, 34 *POL. & POL’Y* 304, 325-26.

<sup>44</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of 50 U.S.C. §§ 1001-8404))

<sup>45</sup> *Id.* at § 1018.

<sup>46</sup> John D. Negroponte & Edward M. Wittenstein, *Urgency, Opportunity, and Frustration: Implementing the Intelligence Reform and Terrorism Prevention Act of 2004*, 28 *YALE L. & POL’Y REV.* 379, 413-14 (2010). In early 2008, then DNI Mike McConnell testified to the Senate Select Committee on Intelligence that “[A]s a practical matter, I’m in a situation where it’s someone in a department with a different set of personnel standards and a different set of hiring and firing policies and so on. *So it’s not that I can give direct orders to someone else’s organization. There’s a cabinet secretary between me and the process.*” *Id.* at 405 (emphasis added).

<sup>47</sup> OGCs are the group of lawyers tasked both with allowing the agencies of the IC to perform their duties to the maximum allowed by law, and to ensure that the agencies do not exceed their legal limits. For example, the CIA’s OGC describes itself, in part, as follows:

The General Counsel is the chief legal officer of the CIA. The General Counsel serves as the legal advisor to the Director of the Central Intelligence Agency and is responsible for the sound and efficient management of the legal affairs of the CIA[.] On behalf of the General Counsel, OGC provides legal advice and guidance to the Agency and to the Director of the CIA. OGC is responsible for advising the Director on all legal matters relating to his

and Inspectors General (“IGs”).<sup>48</sup> The role of the General Counsel is broad, but includes providing “legal and binding” opinions for the department or agency and “contribut[ing] to the interagency process supporting presidential decision making in matters of national security.”<sup>49</sup> IGs can influence oversight, which is especially important when the judicial and legislative branches are either unable or unwilling to check the executive branch. Indeed, IGs can play a “[a]t their strongest, IG reviews provided impressive transparency on national security practices, identified violations of the law that had escaped judicial review, and even challenged government conduct where existing law was ambiguous or undeveloped. For instance, the Department of Justice IG . . . exposed the FBI’s widespread abuse of a covert investigative tool known as ‘exigent letters’ at a time when no private person would have had the knowledge, standing, and

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statutory responsibilities and his role as head of the CIA . . . *General Counsel*, CENTRAL INTELLIGENCE AGENCY (May 11, 2007, 11:50 PM), <https://www.cia.gov/offices-of-cia/general-counsel>.

*See generally* JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGEMENT INSIDE THE BUSH ADMINISTRATION* (2007) and *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* 208 (2012), (arguing that government and private interest lawyers, among other actors, have created a legal environment such that “never before has the Commander in Chief been so influenced, and constrained, by law”).

<sup>48</sup> Inspectors General also have oversight capabilities within the particular agency. The Office of the Intelligence Community Inspector General, housed within the ODNI, “is responsible for conducting IC-wide audits, investigations, inspections, and reviews that identify and address systemic risks, vulnerabilities, and deficiencies that cut across IC agency missions, in order to positively impact IC-wide economies and efficiencies. *Office of The Intelligence Community Inspector General - Who We Are*, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, <https://www.dni.gov/index.php/ic-legal-reference-book/executive-order-13587?id=434> (last visited September 4, 2017). Similarly, the NGA’s IG “provides the Director with independent assessments and oversight of NGA programs, operations and processes through audits, inspections, investigations and other reviews.”

*Inspector General*, NATIONAL GEOSPATIAL INTELLIGENCE AGENCY, <https://www.nga.mil/About/Pages/InspectorGeneral.aspx> (last visited September 4, 2017).

<sup>49</sup> Stephen W. Preston, *Reflections of a Wartime General Counsel*, 48 TEX. TECH L. REV. 375, 378 (2015).

incentive to sue over the practice; the investigation led the FBI to terminate the practice altogether.”<sup>50</sup>

The President’s Intelligence Advisory Board (“PIAB”) “provides the president with nonpartisan intelligence advice,” and played a role in every presidential administration since Eisenhower, with the exception of the Carter administration.<sup>51</sup> While created with additional oversight in mind, the effectiveness of the PIAB is in question. The PIAB administers oversight at the behest of the President. Indeed, the PIAB has been “dormant” under President Trump.<sup>52</sup> Further, because its members serve without pay, save travel reimbursement and per diems, the members have “limited incentives to proactively perform the oversight function.”<sup>53</sup>

The Privacy and Civil Liberties Oversight Board (“PCLOB”) is much more independent than the PIAB, and has the statutory design that, in theory, would allow for robust and effective oversight.<sup>54</sup> Yet, concerns for PCLOB oversight exist, too. Historically, it has been difficult for the President to fill the five-member PCLOB.<sup>55</sup> At the beginning of the current administration, the five-member board was three shy of capacity;<sup>56</sup> since President Trump moved into the White House,

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<sup>50</sup> Shirin Sinnar, *Protecting Rights From Within? Inspectors General and National Security Oversight*, 65 Stan. L. Rev. 1027, 1031 (2013).

<sup>51</sup> Gibson, *supra* note 23, at 548.

<sup>52</sup> *The President’s Intelligence Advisory Board*, <https://www.whitehouse.gov/piab> (last visited Jan. 28, 2018). The limited role the PIAB may play in the role of intelligence is on display on its White House website, which more than a year into the Trump administration returns a 404 – Page Not Found error. *Id.*

<sup>53</sup> Benjamin S. Mishkin, *Filling the Oversight Gap: The Case for Local Intelligence Oversight*, 88 N.Y.U. L. REV. 1414, 1436 (2013).

<sup>54</sup> The institutional design includes Senate confirmation, ensuring that presidential cronies are not appointed, compensation in return for service, and have oversight over a focused policy space. *Id.* at 1436-1438.

<sup>55</sup> *Id.* at 1438 (noting that President Obama was unable to get his nominated chair of PCLOB, David Medine, confirmed by the Senate).

<sup>56</sup> Tami Abdollah, *Weeks before Trump takes office, this U.S. civil liberties board is in disarray*, PBS (Dec. 26, 2016, 4:06 PM) <http://www.pbs.org/newshour/rundown/us-privacy-board-disarray-trump-takes-office/>.

one of the remaining members left after her term expired, leaving the PCLOB “comatose.”<sup>57</sup>

The Joint Intelligence Community Council (“JICC”)—which is chaired by the DNI and includes secretaries of departments with IC components, including DoD, Department of the Treasury, and Department of State—also plays a role in oversight of the IC.<sup>58</sup> Designed to ease interagency cooperation, JICC was given advisory roles in matters of finance and budget, as well as oversight and evaluation of the IC.<sup>59</sup> The Office of Management and Budget (“OMB”) plays a major role in intelligence budgeting, including often being involved in discussions of covert actions. OMB provides an initial budget estimate and oversees the IC’s budgeting process.<sup>60</sup>

The DOJ’s OLC plays a major, if understated, role in intelligence oversight.<sup>61</sup> OLC reviews executive orders prior to issuance for “form and legality.”<sup>62</sup> Second, OLC serves as a

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<sup>57</sup> Tim Johnson, *Watchdog board that keeps eye on U.S. intelligence agencies barely functions*, McCLATCHY D.C. BUREAU (Mar. 7, 2017, 4:42 PM), <http://www.mcclatchydc.com/news/nation-world/national/national-security/article136960048.html> (quoting Gregory Nojeim).

<sup>58</sup> Intelligence Reform and Terrorism Prevention Act of 2004, at § 3022.

<sup>59</sup> RICHELSON, *supra* note 31, at 500.

<sup>60</sup> Stephen J. Flanagan. *Managing the Intelligence Community*, 10 INT’L SEC. 58, 72 (1985).

<sup>61</sup> See generally Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SEC. L. & POL’Y 455 (2005) (discussing the DOJ’s OLC major role).

<sup>62</sup> The importance of the role recently became evident when President Trump issued an executive order preventing travel from several countries in the Middle East and North Africa, the now infamous “travel ban.” Reportedly, the Trump Administration reportedly failed to follow established statutory rules about the OLC’s preview of executive orders, which I’ve argued elsewhere likely led to the issuing of a legally faulty Executive Order. Tobias T. Gibson, *Executive Orders give Trump lots of power, but there are limits*, HILL: PUNDITS BLOG (Feb. 3, 2017, 6:40 PM), <http://thehill.com/blogs/pundits-blog/the-administration/317878-executive-orders-give-trump-lots-of-power-but-there-are>. This refusal to submit the proposed executive order banning travel likely came from the realization that “OLC can require alterations to ensure that an executive order is legal” and that “OLC can, and has, prevented executive orders from being issued . . .” *Id.*

primary legal advisor for the President on the legality of actions contemplated by the executive branch.<sup>63</sup> For example, the impactful role of the OLC is seen with the Hughes-Ryan Amendment of 1974, which required the President to inform Congress of covert actions “in timely fashion,”<sup>64</sup> a legally amorphous phrase left to the executive branch, hence the OLC, to interpret. As with the legal interpretation of Hughes-Ryan, OLC has been oft-asked to provide legal guidance to the executive branch regarding the legal fetters of the War Powers Resolution.<sup>65</sup> More recently, after the War on Terror began in the early 2000s, opinions issued by the OLC gave legal permission and protection to controversial interrogation methods employed by members of the intelligence community, such as waterboarding.<sup>66</sup>

### C. Congress

Congress is comprised of 535 voting members,<sup>67</sup> with decision making dispersed among two chambers and two

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<sup>63</sup> Tobias T. Gibson *Office of Legal Counsel: Inner Workings and Impact*. 18 L. & Cts. 7, 7-10 (2008).

<sup>64</sup> See George R. Berdes and Robert T. Huber, *Making the War Powers Resolution Work: The View from the Trench (A Response to Professor Glennon)*, 17 LOY. L.A. L. REV. 671, 676 n. 17 (1984).

<sup>65</sup> See, e.g., U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL OPINIONS: OVERVIEW OF THE WAR POWERS RESOLUTION (Oct. 30, 1984), [https://www.justice.gov/olc/opinions?field\\_opinion\\_post\\_date\\_value%5Bmin%5D%5Byear%5D=&field\\_opinion\\_post\\_date\\_value%5Bmax%5D%5Byear%5D=&title=Overview+of+the+War+Powers+Resolution&headnotes=&items\\_per\\_page=10](https://www.justice.gov/olc/opinions?field_opinion_post_date_value%5Bmin%5D%5Byear%5D=&field_opinion_post_date_value%5Bmax%5D%5Byear%5D=&title=Overview+of+the+War+Powers+Resolution&headnotes=&items_per_page=10).

<sup>66</sup> CLARK, *supra* note 61, at 458-62. These memos, often referred to as the “Torture Memos” were authored by Jay Bybee and John Yoo, both of whom were political appointees to the OLC. *Id.* The impetus behind the CIA’s legal request of OLC opinion on matters of enhanced interrogation, and the eventual writing of these memos can be found in John Rizzo’s book, *Company Man*. JOHN RIZZO, *COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA* 187, 188 (2014)). Rizzo states that although he was acting General Counsel of CIA, his was not the final legal opinion in the executive branch. Because he was unable to decide if the proposed techniques “legally constitute[d] torture”, he asked OLC for a definitive opinion. *Id.*

<sup>67</sup> The U.S. Senate, *House of Representatives*, [https://www.senate.gov/reference/reference\\_index\\_subjects/House\\_of\\_Representatives\\_vrd.htm](https://www.senate.gov/reference/reference_index_subjects/House_of_Representatives_vrd.htm) (last visited Jan. 29, 2018). In addition to the voting members of Congress—100 senators and



parties, organized into dozens of committees and subcommittees, and disseminated amongst Congressmen representing all 50 states and 435 congressional districts with an incredible diversity of constituencies. Despite the comparative collective action problem of Congress compared to the President, Congress possesses many oversight tools. The utility of these tools, however, is often questioned.

The budget, or “power of the Purse,”<sup>68</sup> is Congress’s most powerful tool for oversight. While the President may propose a budget to Congress, Congress retains the sole authority to pass the budget.<sup>69</sup> If an organization is non-responsive to Congress’s preferences and attempts at oversight, Congress can cut its budget in retaliation.<sup>70</sup>

Two congressional committees, the SSCI and the House Permanent Select Committee on Intelligence, are primarily responsible for congressional oversight of the IC.<sup>71</sup> Because of the breadth across policies and departments that make up the IC, there are several other committees with indirect oversight ability. Due to the intelligence budget allotted in DoD’s budget, the House and Senate Appropriations subcommittees in charge

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435 representatives from the states—there are five delegates and one resident commissioner who represent U.S. territories. While these members can participate in House debate, they may not vote on legislation and resolutions. *Id.*

<sup>68</sup> THE FEDERALIST NO. 78 (Alexander Hamilton).

<sup>69</sup> U.S. CONST. art. I, § 7, 9. The General Accounting Act of 1921 required the President to submit a proposed budget to Congress in February of each year; Congress has the final say. 31 U.S.C. § 1105 (2012).

<sup>70</sup> James S. Van Wagenen, *A Review of Congressional Oversight: Critics and Defenders*, CIA (Apr. 14, 2007, 4:51 PM), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/97unclass/wagenen.html>.

<sup>71</sup> LOCH K. JOHNSON, *Governing in the Absence of Angels, in WHO’S WATCHING THE SPIES?: ESTABLISHING INTELLIGENCE SERVICE ACCOUNTABILITY* 57-78 (Hans Born et al. eds. Potomac Books 2005). As noted above, the select committees were established in the immediate wake of the Watergate investigations, when the Pike and Church committees discovered widespread disregard for civil liberties protections and other illegal activities perpetrated by agencies in the Nixon administration. *Id.* at 71. As Johnson notes, “[t]he purpose of oversight is not to stifle vital work of the intelligence agencies, but rather to preserve civil liberties [and] maintain budget discipline . . .” *Id.* at 71.

of defense spending play important oversight roles as well. Additional oversight roles are found within the House and Senate Armed Services Committees, and various committees in both chambers with jurisdiction over Departments, such as Homeland Security and Energy,<sup>72</sup> courts and justice,<sup>73</sup> and other related policy spaces that have overlapping jurisdiction with the select intelligence committees.<sup>74</sup>

Congress can use hearings and investigations to oversee a recalcitrant agency or to gather information on particular actions or inactions taken by intelligence agencies.<sup>75</sup> Because much of the work done by the IC is classified, limits are placed on the type of answers members of the intelligence community are able to provide during testimony—especially when testifying about policy.<sup>76</sup> Nonetheless, history has shown the public

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<sup>72</sup> See, e.g., Jerry Markon, *Department of Homeland Security has 120 reasons to want streamlined oversight*, WASH. POST. (Sept. 25, 2014), [https://www.washingtonpost.com/news/federal-eye/wp/2014/09/25/outsized-congressional-oversight-weighing-down-department-of-homeland-security/?utm\\_term=.dc7a4bde5ee](https://www.washingtonpost.com/news/federal-eye/wp/2014/09/25/outsized-congressional-oversight-weighing-down-department-of-homeland-security/?utm_term=.dc7a4bde5ee).

In addition to the House Homeland Security Committee, the Department of Homeland Security is subject to oversight by more than 100 committees and subcommittees. *Id.*

<sup>73</sup> Thus, when issues such as privacy invasions are alleged, the Senate Judiciary Committee also has oversight jurisdiction in intelligence affairs. See SENATE COMMITTEE ON THE JUDICIARY, *Committee Jurisdiction*, <https://www.judiciary.senate.gov/about/jurisdiction> (noting that jurisdiction of the Senate Judiciary Committee has oversight jurisdiction over the FBI and DHS, and nominations for some members of DHS) (last visited May 31, 2017).

<sup>74</sup> This point is substantiated in the introduction of this paper. Note the committee assignments of the senators calling for increased oversight of the NSA. Sen. Inhofe is the ranking member on the Armed Services Committee, Sen. Leahy chairs the Judiciary Committee, while Sen. Toomey is a member of the Budget Committee.

<sup>75</sup> See, e.g., U.S. SENATE SELECT COMMITTEE ON INTELLIGENCE, *Open Hearings*, <https://www.intelligence.senate.gov/hearings/open> (last visited on May 31, 2017); U.S. HOUSE PERMANENT SELECT COMMITTEE ON INTELLIGENCE, *Hearings*, <https://intelligence.house.gov/calendar/?EventTypeID=215&CategoryID=0> (last visited on May 31, 2017).

<sup>76</sup> Note that the SSCI link in footnote 75 only includes open hearings. HPSCI's calendar includes open and closed hearings, but no information about who testified, transcripts or other classified information is available for the closed hearings.

acrimony towards the IC that can arise during these congressional hearings, for example, throughout the post-Watergate Church Committee investigations, and more recently in the wake of the intelligence leaks by Edward Snowden.<sup>77</sup>

#### D. Courts

Historically, the Supreme Court and other Article III federal courts have largely deferred to the executive branch on matters of war and intelligence.<sup>78</sup> However, since terrorist attacks on September 11, 2001, the federal judiciary has become increasingly involved in intelligence community oversight matters as it relates to litigation.<sup>79</sup> For example, the Supreme

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<sup>77</sup> The Church Committee held 21 public hearings, at least some of which televised “[t]o educate the public about the misdeeds of national intelligence agencies.” Church Committee Created, U. S. SENATE, [https://www.senate.gov/artandhistory/history/minute/Church\\_Committee\\_Created.htm](https://www.senate.gov/artandhistory/history/minute/Church_Committee_Created.htm) (last visited June 1, 2017); *Church Committee Hearings on FBI Intelligence Activities*, CSPAN, <https://www.c-span.org/video/?409117-1/church-committee-hearings-fbi-intelligence-activities> (last visited June 1, 2017). Edward Snowden, in addition to being a front page story on countless newspapers around the world was Time Magazine’s runner-up for person of the year in 2013. Michael Scherer, *Edward Snowden, The Dark Prophet*, TIME (Dec. 11, 2013), <http://poy.time.com/2013/12/11/runner-up-edward-snowden-the-dark-prophet/>. Snowden was the focus of main story on HBO’s *Last Week Tonight with John Oliver*. John Oliver, *Government Surveillance: Last Week Tonight with John Oliver*, YOUTUBE, (Apr. 5, 2015), [https://www.youtube.com/watch?v=XEVlyP4\\_11M](https://www.youtube.com/watch?v=XEVlyP4_11M). Snowden is the subject of at least two movies, *Citizen Four* and *Snowden*. *CITIZEN FOUR* (HBO Films 2014); *SNOWDEN* (Open Road Films 2016).

<sup>78</sup> DAVID RUDENSTINE, *THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER 3* (2016) (positing that “the Supreme Court—has generally betrayed for over seven decades its responsibilities to hold the executive meaningfully accountable in cases the executive claims implicates national security”). *But see generally* ARTHUR H. GARRISON, *SUPREME COURT JURISPRUDENCE IN TIMES OF NATIONAL CRISES, TERRORISM, AND WAR* (2011) (arguing that “in times of war and national crisis the judiciary maintains boundaries on presidential power”).

<sup>79</sup> While there are several theories why the Supreme Court may be less deferential to the President in matters of national security than in years past, one of the most simple—and compelling—reasons is that the pool of candidates without prior judicial experience has been minimized, leading to a “confident—perhaps even arrogant—streak of independence exhibited by the modern

Court has answered questions on the rights of detainees captured in the War on Terror right to habeus corpus in *Hamdi v. Rumsfeld*,<sup>80</sup> *Rasul v. Bush*,<sup>81</sup> and *Hamdan v. Rumsfeld*.<sup>82</sup> Each of these decisions had ramifications that impacted the U.S. government's confinement of "unlawful combatants."<sup>83</sup> *Hamdi* was perhaps the most important of these cases, in part because it was path-breaking, and in part because Justice Sandra Day O'Connor wrote in the opinion of the Court that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."<sup>84</sup> This decision represented a stark contrast to the judiciary's traditional deference to the executive branch in times of war.<sup>85</sup> *Ex parte Quirin*,<sup>86</sup> for example, involved Nazi saboteurs who were tried by a military tribunal, on the order of President Franklin Roosevelt, and the U.S. Supreme Court unanimously held that Congress had instituted the tribunals for the very purpose of trying "unlawful combatants"<sup>87</sup> and that the trials did not limit the rights of the prisoners. The *Hamdi* decision was also significant because the Court's opinion recognized that Yaser Hamdi, a U.S. citizen, had a Fifth

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[Supreme] Court." DAVID A. YALOF, *The Presidency and the Judiciary, in THE PRESIDENCY AND THE POLITICAL SYSTEM* 504 (7<sup>th</sup> ed., Michael Nelson & CQ Press).

<sup>80</sup> See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>81</sup> See generally *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>82</sup> See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>83</sup> The Military Commissions Act of 2006 defines "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or "(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense." Military Commissions Act, 10 U.S.C.A. § 948(a)(1) (2006) (amended 2009).

<sup>84</sup> *Hamdi*, 542 U.S. at 536.

<sup>85</sup> See RUDENSTINE, *supra* note 78, at 79.

<sup>86</sup> See generally *Ex Parte Quirin*, 317 U.S. 1 (1942).

<sup>87</sup> Note that this terminology became a key legal definition for the detention of prisoners in the post-9/11 War on Terror. *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949*, 26, Op. O.L.C. 1 (2002),

<https://fas.org/irp>

[/agency/doj/olc/taliban.pdf](https://fas.org/irp/agency/doj/olc/taliban.pdf); *Legality of the Use of Military Commissions to Try Terrorists*, 25 Op. O.L.C. 238 (2001).

Amendment right to have his case heard by a neutral magistrate.<sup>88</sup> Four months after the Supreme Court said that Hamdi could have his day in court, the United States freed him, returning him to Saudi Arabia.<sup>89</sup>

The *Rasul* decision made a broader legal argument. The Court, in a decision penned by Justice John Paul Stevens, argued that despite the Bush administration's decision to place a detention center in Guantanamo Bay, Cuba—well beyond the borders of the United States—the U.S. holding was not so distant that the administration could restrict habeas corpus, even to non-citizens.<sup>90</sup>

Salim Ahmed Hamdan, Osama bin Laden's chauffeur who was also detained in Guantanamo Bay, also sought a writ of habeas corpus, but had a hearing in a military commission formed by the Bush administration under its understanding of the 2001 Authorization of the Use of Military Force ("AUMF"). The Bush administration argued the military commissions were designed to prevent detainees such as Hamdan from having a hearing in civilian courts, where norms of secrecy are much more relaxed than in military commissions and where the Government might be forced into invoking the state secrets privilege which could cause protracted litigation over what meets the standard.<sup>91</sup> The opinion, written by World War II veteran Justice John Paul Stevens, stated that President Bush had once again overstepped his legal tethers.<sup>92</sup> In the wake of this decision, Congress passed the Military Commissions Act of 2006, expressly granting the President the power to establish commissions, and presumably ensuring that federal civilian

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<sup>88</sup> *Hamdi*, 542 U.S. at 533.

<sup>89</sup> Terence Neilan, *U.S. Returns Detainee to Saudi Arabia After 3 Years*, N.Y. TIMES (Oct. 11, 2004), <http://www.nytimes.com/2004/10/11/international/middleeast/us-returns-detainee-to-saudi-arabia-after-3-years.html>.

<sup>90</sup> *Rasul*, 542 U.S. at 475.

<sup>91</sup> *Hamdan*, 548 U.S. at 568.

<sup>92</sup> *Id.* at 593-94.

courts would lack jurisdiction to hear habeas corpus cases brought by non-citizen detainees.<sup>93</sup>

However, in 2008, the Court again showed its displeasure with the breadth of detention program and the political branches' continued efforts to remove habeas corpus rights from detainees when it overturned the removal of habeas jurisdiction in *Boumediene v. Bush*.<sup>94</sup> The Supreme Court consistently believed that the Bush administration had overstepped its legal bounds related to detention and its scaling back the rights of those detained.<sup>95</sup>

While the federal courts play an important role in oversight of the IC, the FISC also has a significant oversight position.<sup>96</sup> The FISC was created in the wake of Nixon-era intelligence scandals, and was intended to increase the direct oversight roles the judiciary plays over IC surveillance of American citizens. The FISC provides intelligence agencies with surveillance warrants while allowing the intelligence activities to remain classified, so that the methods of successful operations

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<sup>93</sup> Military Commissions Act, 10 U.S.C.A. § 948(a)(1) (2006) (amended 2009).

<sup>94</sup> *Boumediene v. Bush*, 553 U.S. 723, 793 (2008).

<sup>95</sup> RUDENSTINE, *supra* note 78, at 51 (noting that “. . . it [the Supreme Court] will not, on occasion, shy away from a showdown with the executive during wartime.”). However, this does not undermine his central thesis, which is that the High Bench has deferred to the executive consistently regarding national security, writ large, for seven decades. *See id.*

<sup>96</sup> The FISC was created by the Foreign Intelligence Surveillance Act (FISA) of 1978 and amended in the 2001 Patriot Act. 50 U.S.C. §§ 1801-1813 (2012). One consistent response to intelligence scandals is the call for increased oversight of the IC. In the wake of Watergate, the Church committee, chaired by Senator Frank Church, called for legislation, which became FISA, which would increase oversight by both Congress—hence, the creation of the intelligence committees in both chambers of Congress—and the judiciary—hence the creation of the FISC, and its appellate court, the Foreign Intelligence Surveillance Court of Review (FISCR). ANDREW NOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43362, REFORM OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURTS: PROCEDURAL AND OPERATIONAL CHANGES 1 (2014)

remain classified.<sup>97</sup> FISC judges are appointed to the court by the Chief Justice.<sup>98</sup>

A common criticism of the FISC, particularly in light of its purpose to serve as a check on surveillance, is that the FISC overwhelmingly grants IC warrant requests.<sup>99</sup> Between 1979 and 2013, the FISC only denied a small fraction of warrant applications, though several applications required alteration prior to being granted.<sup>100</sup> Although the FISC was “rubber stamping” the requested warrants, the Bush administration decided that it need not request surveillance warrants from the FISA Court, and opted to begin a wiretap program of American citizens without telling the court.<sup>101</sup> In August, 2013, reports that the NSA had misled the FISC about the breadth of its surveillance programs were made public. Brian Fung of the Washington Post opined that the “FISA court is not the rigorous check on NSA abuses that the Obama administration has claimed it is.”<sup>102</sup> If recent news stories are correct, the NSA either

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<sup>97</sup> Gibson, *supra* note 22, at 551; RUDENSTINE, *supra* note 78, at 131-150.

<sup>98</sup> Nicolas R. Seabrook & Nicholas C. Cole, *Secret Law: The Politics of Appointments to the U.S. Foreign Intelligence Surveillance Court*, 37 JUST. SYS. J. 259, 260 (2016). There are critics who suggest that FISC judges, because only Republican-appointed Chief Justices—Warren Burger, William Rehnquist and John Roberts—have served, and hence appointed judges to the FISC since its creation, there may be ideological biases inherent with court. *Id.* at 262.

<sup>99</sup> Gibson, *supra* note 22, at 551; RUDENSTINE, *supra* note 78, at 140-143.

<sup>100</sup> The secrecy of the court is evident, in that Leonning and Rudenstine’s numbers of applications approved and denied do not equate. Carol D. Leonning, *Secret Court’s Judges Were Warned About NSA Spy Data*, WASH. POST Feb. 9, 2006, at A1; RUDENSTINE *supra* note 78, at 141-142 (showing 35,434 warrant applications were approved, twelve warrant applications denied between 1979 and 2013, and another 528 that were the FISC required be altered prior to issuing a warrant); *see also* RUDENSTINE *supra* note 78, at 140 (joining a chorus of critics, arguing that the willingness of the to issue surveillance warrants indicates that the FISC was a “rubber stamp” and that it “abdicated its judicial independence by being unduly deferential” to the intelligence agencies).

<sup>101</sup> Leonning, *supra* note 100, at A1.

<sup>102</sup> The sentiment that the FISA Court warrant process is lax is not universally shared. One high profile counter to Fung’s assessment is Timothy Edgar, who went from serving as the ACLU’s national security litigation counsel, to working in ODNI during the Bush administration, to serving as director of privacy and civil liberties for President Obama’s White House National Security Staff. Evan Perez, of the *Wall Street Journal*, quoted Edgar as saying: “The reason so many

purposefully or unwittingly surveilled American citizens for years beyond the Snowden revelations, without the FISC being advised of this surveillance.<sup>103</sup>

The recent presidential administrations' misleading of the FISA court illustrates the relative weakness of the judiciary. The federal judiciary depends largely on executive branch cooperation with constitutional and statutory compliance regulations.<sup>104</sup> When a President fails to comply, whatever the reason, the oversight capabilities of the judiciary are severely compromised.

## II. THE PROBLEM OF MULTIPLE PRINCIPALS

The common understanding of oversight suggests that the more eyes that watch the intelligence agency, the better the oversight will be. However, using the rationale of principal agency theory ("PAT"), this article suggests just the opposite.

For the purpose of this article, an entity with oversight capabilities is a "principal" and an agency, office, or organization

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orders are approved, is that the Justice Department office that manages the process vets the applications rigorously . . . [S]o getting the order approved by the Justice Department lawyers is perhaps the biggest hurdle to approval." Evan Perez, *Secret Court's Oversight Gets Scrutiny*, WALL ST. J. (June 9, 2013), <https://www.wsj.com/articles/SB10001424127887324904004578535670310514616>.

<sup>103</sup> Tim Johnson, *Secret court rebukes NSA for 5-year illegal surveillance of U.S. citizens*, McCLATCHY D.C. BUREAU (May 26, 2017), <http://www.mcclatchydc.com/news/nation-world/national/national-security/article152947909.html#storylink=cpy>; John Solomon & Sara Carter, *Declassified memos show FBI illegally shared spy data on Americans with private parties*, CIRCA (May 26, 2017, 7:30 PM), <http://circa.com/politics/declassified-memos-show-fbi-illegally-shared-spy-data-on-americans-with-private-parties> ("The criticism is in a lengthy secret ruling that lays bare some of the frictions between the Foreign Intelligence Surveillance Court and U.S. intelligence agencies obligated to obtain the court's approval for surveillance activities.").

<sup>104</sup> LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 144 (1998) (making the point that often, Supreme Court justices account for the preferences of the elected branches when deciding how to decide cases, in part, at least because "government actors can refuse . . . to implement particular constitutional decisions, thereby decreasing the Court's ability to create efficacious policy").



that the principal oversees is an “agent.”<sup>105</sup> The agent is hired to complete a task for the principal, but assuring the outcome serves the interests of the principal is difficult.<sup>106</sup>

This theory assumes that the principal and agent or agents have divergent goals.<sup>107</sup> For example, because the President has a national constituency, his goals must be broad in an effort to appeal to a wide-ranging audience, while agencies within the IC have much narrower focuses.<sup>108</sup> A second assumption, called information asymmetry, is also important in understanding the problems of bureaucratic oversight.<sup>109</sup> With information asymmetry, the principal is unaware of many of the bureaucracy’s actions or preferences, making successful monitoring a difficult, if not impossible, task.<sup>110</sup> The unobserved actions result in moral hazard or risk-taking on the part of the agent that observed action would likely prevent.<sup>111</sup> This issue is only compounded by the fact that by their very nature,

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<sup>105</sup> Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control: Regulatory Policymaking by the FTC*, 91 J. OF POL. ECON. 765, 767 n. 2 (Oct. 1983).

<sup>106</sup> Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203, 204 (2005) (noting that “. . . the question is whether the principal can induce the more expert agent to take those actions that the principal would take if the principal had the same information as the agent. By manipulating the agent’s incentives, the principal seeks to minimize shirking, or agency costs—the losses imposed on the principal by an inability to align the agent’s self-interest with that of the principal.”).

<sup>107</sup> *Id.* at 207.

<sup>108</sup> MARK LOWENTHAL, *INTELLIGENCE: FROM SECRETS TO POLICY* 49-58 (6th ed. 2015).

<sup>109</sup> Miller, *supra* note 106, at 207.

<sup>110</sup> *Id.* at 204-205.

<sup>111</sup> Another common problem associated with principal agency is that of “adverse selection.” Robert W. Ruachhaus, *Principal-Agent Problems in Humanitarian Intervention: Moral Hazards, Adverse Selection, and the Commitment Dilemma*, 51 INT’L STUD. QUARTERLY 871, 875 (2009) (describing adverse selection as “the result of asymmetric information prior to entering into a contract . . . uncertainty stems . . . from a lack of information about the agent’s preferences over outcomes”). Because an information asymmetry exists between a prospective agent and prospective principal, the possibility exists that the principal can “hire” an agent who is a very bad fit. Again, Edward Snowden seemingly would be an example of this. That being said, a deep discussion of this issue is beyond the scope of this paper.

intelligence agencies are even more secretive than other types of national bureaucratic agencies.

Multiple principals in a relationship enable the agents to function independently from the principals' goals. There exists a "venerable canon of hierarchy which says that no man shall serve two masters: to do so is inevitably to suffer the need to resolve the differences between them."<sup>112</sup> As political scientist Gary J. Miller notes, "separation of powers . . . guarantee that bureaucratic agencies will be in a contentious environment of warring principals."<sup>113</sup> Stanford professor Barry Weingast makes an even stronger argument, stating that "[a]s long as the agency moves in a way that makes at least one of these principal actors—the House, the Senate, or the President—better off, then corrective legislation cannot take place."<sup>114</sup> He continues by noting that although the agency is satisfying one of the principals, this is problematic because it is the *agency* making the choice rather than the principals charged with mandating agency policy.<sup>115</sup>

For example, a reported 108 congressional committees or sub-committees oversee the DHS.<sup>116</sup> Paul Rosenzweig, former Deputy Assistant Secretary for Policy in DHS, stated:

We were subjected to repetitive, incessant, annoying and ineffectual oversight from Congress. In fact, *the disaggregation of responsibility in Congress had, in my judgment, the effect of actually giving DHS greater*

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<sup>112</sup> EUGENE LEWIS, PUBLIC ENTREPRENEURSHIP: TOWARD A THEORY OF BUREAUCRATIC POLITICAL POWER 55 (1980).

<sup>113</sup> Miller, *supra* note 106, at 211.

<sup>114</sup> BARRY R. WEINGAST, CAUGHT IN THE MIDDLE: THE PRESIDENT, CONGRESS, AND THE POLITICAL-BUREAUCRATIC SYSTEM, IN THE EXECUTIVE BRANCH AND AMERICAN DEMOCRACY 319 (Joel Aberbach & Mark Peterson eds., 2005).

<sup>115</sup> *Id.*

<sup>116</sup> *Who Oversees Homeland Security? Um, Who Doesn't?*, NPR (Sept. 2, 2017, 7:07 PM),

<https://www.npr.org/templates/story/story.php?storyId=128642876> (noting that there is some discrepancy between reports about the total number of congressional committees DHS reports to, and that although there is a Homeland Security Committee charged with oversight of DHS, DHS reports to dozens of committees and subcommittees); *see also* Markon, *supra* note 72.

*independence.* A person with twelve bosses really has none. *You could forum shop until you got the answer you wanted.* So, it was a large resource suck, requiring an immense amount of time to prepare for and then do, but it was in the end, highly ineffectual.<sup>117</sup>

Furthermore, multiple principals may lead to a collective action problem in which principals shirk their oversight duties with an assumption that other principals will continue to oversee agents' actions.<sup>118</sup> Thus, "[b]ecause oversight is costly, increasing the number of principals can decrease the incentive for any one of the institutions to actually perform an oversight role, because each prefers the others to bear the cost of auditing the agent."<sup>119</sup>

This is not a hypothetical situation. In 2013, after the Snowden NSA leaks, Journalist Brad Heath reported that the DOJ's Office of Professional Responsibility ("OPR") failed to probe FISA court allegations that DOJ and NSA officials misrepresented surveillance programs to the FISC.<sup>120</sup> Judge Reggie Walton asserted that the FISC could hold federal officials in contempt for their actions. Having misled the FISC, NSA surveilled much more broadly than the judges believed proper.<sup>121</sup> Consequently, courts upheld the legality of only 10 percent of the phone numbers collected by the NSA.<sup>122</sup>

While there are many potential reasons that the OPR failed to act diligently, might it be because of finite resources and its trust that multiple (other) principals would check the

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<sup>117</sup> Telephone Interview with Paul Rosenzweig (Sept. 4, 2013).

<sup>118</sup> Sean Gailmard, *Multiple Principals and Oversight of Bureaucratic Policy-Making*, 21 J. THEORETICAL POL. 161, 182 (2009).

<sup>119</sup> Tobias T. Gibson, *The Oversight of too Much Oversight*, MONKEY CAGE (June 14, 2013), <http://themonkeycage.org/2013/06/14/the-oversight-of-too-much-oversight/>.

<sup>120</sup> Brad Heath, *Watchdog Never Probed Complaints on NSA*, USA TODAY, (Sept. 19, 2013, 3:34 PM), <https://www.usatoday.com/story/news/nation/2013/09/19/nsa-surveillance-justice-opr-investigation/2805867/>.

<sup>121</sup> *Id.*

<sup>122</sup> Matt Apuzzo, *NSA's Data-Gathering is Unwieldy, Growing*, ST. LOUIS POST-DISPATCH, Sept. 12, 2013, at A012.

surveillance programs? Predictably, this failure has led to calls for additional oversight,<sup>123</sup> despite the fact that the Obama administration argued that the NSA's overreach was due to "a lack of shared understanding among the key [surveillance program] stakeholders."<sup>124</sup> In other words, there are already so many principals, a culture and norm of non- or miscommunication exists. Why increase the number of overseers?

In short, having too many principals will not lead to more effective oversight. Instead, such a situation is fraught with potential pitfalls in which principals may conflict with each other, or which allow shirking of oversight duties. Both situations lead to ineffective oversight which allows agents "greater independence" to ignore the preferences of the principals.<sup>125</sup> This problem of a multiplicity of principals must be addressed to halt the damaging effect of the self-perpetuating cycle of unsuccessful increased oversight of the intelligence community.

### III. CONCEPTUALIZING A MODERN SCENARIO

A concern within the principal agent theory is that too many principals will allow for nominal overseers to shirk on their oversight duties, perhaps with the inclination to allow other oversight mechanisms to effectively oversee the agents. However, the danger here is that due to competing incentives and/or poor oversight design, there will be a lack of effective oversight.

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<sup>123</sup> Heath, *supra* note 120 (reporting that "privacy advocates said the misrepresentations — and the fact that the Justice Department did not fully investigate them — suggests a need for additional oversight").

<sup>124</sup> Apuzzo, *supra* note 122, at A012.

<sup>125</sup> Cf. Steven Aftergood, *To Fix U.S. Intelligence, Shrink It?*, FED'N OF AM. SCIENTISTS (Sept. 30, 2013), <https://fas.org/blogs/secrecy/2013/09/nctc-nolan/> (quoting Bridget Nolan, who argues that cutting the size of the IC is the key to managing its actions and that a smaller IC "would address the hindrances that come along with a bloated bureaucracy . . . It would also help with what they perceived to be excessive redundancy . . .").

If, as Political Scientist David Mayhew argues, members of Congress are “single minded seekers of reelection”<sup>126</sup> it is not hard to conceive of a scenario in which the legislative branch is effectively undermining its oversight capacity. For example, due to electoral incentives, congressional members of one party, whether in the majority or minority, will often have reason to undermine oversight based on partisan preferences. Secondly, because of differing constituencies, even members of the same party may not have the same electoral preferences or incentives. Third, members of Congress who are up for reelection may have reasons to act differently than those who are farther removed from the pressures of election.<sup>127</sup> Fourth, members of Congress are often distracted from their official duties due to fundraisers, meetings with constituents, seeking the attentions of national network and print news outlets, and other such diversions.<sup>128</sup> Fifth, many Congressmen sit on multiple committees, many of which do not focus on intelligence oversight.<sup>129</sup> Sixth, members who seek credit for the work they do may undermine each other, even within the same party, by offering competing bills.<sup>130</sup> In

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<sup>126</sup> DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 5 (Yale Univ. Press 2d ed. 2004).

<sup>127</sup> Recognition of this is among the important features of the Senate’s six-year term and rotating elections. *See also* THE FEDERALIST NO. 62 (James Madison) (“The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies, to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions.”).

<sup>128</sup> *See, e.g.*, CONG. MGMT. FOUND., *LIFE IN CONGRESS: THE MEMBER PERSPECTIVE* 18 (2013),

[http://www.congressfoundation.org/storage/documents/CMF\\_Pubs/life-in-congress-the-member-perspective.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/life-in-congress-the-member-perspective.pdf) (reporting that House members spend about a third of their time on “legislative/policy work” during their time in Washington, D.C., and that this number drops dramatically when they are in their home districts). Also, even in the capital, the combined “constituent work” and “political/campaign work” gets comparable attention. *Id.*

<sup>129</sup> *Accord* Amy Zegart, *The Roots of Weak Congressional Intelligence Oversight*, HOOVER INST. 10 (2011), <https://www.hoover.org/sites/default/files/research/docs/future-challenges-zegart.pdf> (noting that members of Congress on the SSCI or HPSCI “. . . cannot talk about their committee work with constituents”).

<sup>130</sup> *See* the above discussion of Senators Diane Feinstein and Ron Wyden, both of whom are Democrats and serve on the SSCI, who offered competing reform bills in the wake of the Snowden leaks.

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light of the foregoing, Congress appears ill-equipped to provide effective oversight of the intelligence community.<sup>131</sup>

All of this suggests that Congress may depend on other branches of government to oversee intelligence activities. However, reliance on the executive branch, particularly concerning activities involving national security where Congress is largely kept secret, makes effective oversight exceptionally difficult at times.<sup>132</sup> Moreover, because of overlapping jurisdictions within the executive branch, there are multiple principal problems regarding oversight within that branch that bares some semblance to those within Congress. The executive needs to give its attention to the competing interests, missions and budget incentives of every component of the IC, including the heads of the sixteen agencies, the DNI, and the lawyers within each department. In short, there is a convoluted and complex oversight structure within the executive branch as well as within Congress.

Finally, the judiciary is often relied upon to provide oversight of the other branches. However, many argue that the court system, including the Supreme Court, is a hamstrung overseer, whether due to intentional deference to the executive, constitutional constraints on the oversight mechanisms, or a lack

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<sup>131</sup> Zegart, *supra* note 129 at 19-20 (suggesting that “the very mechanisms intended to hold legislators accountable to citizens have created an oversight system that cannot hold the executive branch accountable to Congress. Rational self-interest has led legislators across parties, committees, and eras to sabotage Congress’s collective oversight capabilities in intelligence”). While the general situation in described in this section is hypothetical, it does have a current real-world example that serves as an illustration of the difficulty that Congress might face. The so-called “Russia Probe” of the Trump campaign activities has seen the former Secretary of the Department of Homeland Security, the former Director of the FBI, the former Director of National Intelligence and the former Deputy Director of the NSA—as well as the current Attorney General and Deputy AG testify to intelligence oversight committees. The sheer number of departments and component members of the intelligence community directly involved in this real situation suggests that a hypothetical situation as the one I propose, involving civil liberties, criminal activity and federalism issue may be all the more complex.

<sup>132</sup> See RUDENSTINE, *supra* note 78, at 19; Zegart, *supra* note 129, at 13.

of information provided by the executive to the judiciary.<sup>133</sup> Even with a judiciary more inclined to check the executive,<sup>134</sup> constitutional limits constrain the courts from exercising jurisdiction over political questions or noncontroversial matters. When the judiciary does hear the cases, the process takes a long time (see timeline in *Hamdi*), or a change of law renders the judgment effectively null.<sup>135</sup> In this situation, the judiciary is likely to be effectively eliminated from an oversight role. First, the speed with which a decision would be needed from a court likely means that no aggrieved actor would take a case to court. Secondly, as discussed above, judges tend to defer in instances of national security, especially in cases where they lack knowledge and background; thus, even where a case is brought before a court, it seems unlikely there would be a final decision made willingly by the judiciary.

#### IV. DISCUSSION AND SUGGESTIONS TO IMPROVE OVERSIGHT

Making matters worse for the principals charged with oversight who seek information, legitimate secrecy concerns often means that intelligence briefings to Congress may be restricted to the leadership of the House and Senate, leadership of chambers and the chambers' select intelligence committees.<sup>136</sup> While secrecy is important, keeping information from the rank and file members of the intelligence committees exacerbates the problem of inefficient oversight.

Amy Zegart, co-director of Stanford University's Center for International Security and Cooperation, notes that the information asymmetry between the legislative committees and agencies of the IC is compounded further by other congressional rules and norms.<sup>137</sup> Zegart identifies a particular problem with

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<sup>133</sup> See THE FEDERALIST NO. 78 (Alexander Hamilton); Rudenstine, *supra* note 78 at 3.

<sup>134</sup> Garrison suggests such an arrangement between the judiciary and the executive. GARRISON, *supra* note 78, at 78.

<sup>135</sup> See generally William N. Eskridge, Jr. *Overriding Supreme Court Statutory Interpretation Decisions*. 101 YALE L.J. 331 (1991).

<sup>136</sup> LOWENTHAL, *supra* note 109, at 298.

<sup>137</sup> Zegart, *supra* note 129, at 3.

congressional oversight of the IC: a lack of policy expertise, even of many members of the select intelligence committees.<sup>138</sup> This shortcoming is the result of term limits on the intelligence committees, unlike that of other congressional committees, which truncate the ability of the members to accumulate policy knowledge.<sup>139</sup> It is also due to the realities of American politics: few members of the intelligence committees have prior experience in the IC;<sup>140</sup> voters, usually, have little interest in IC policy, which means that few members of the oversight committees have electoral incentives to prioritize becoming an expert in intelligence policy. The IC also garners little attention from interest groups who make the sizeable campaign donations necessary for most members of Congress to run for reelection.<sup>141</sup>

A possible avenue to expertise is to empower the oversight committees' staffs. Yet, compared to many other committees, the intelligence committees employ few staffers. For example, Zegart reports that since 1977, the staff of the Senate intelligence committee has been reduced by about 15 percent.<sup>142</sup> Additionally, few staffers have the security clearances to see much of the data gathered by the IC, and therefore are unable to obtain the information requisite to provide the committee members with policy options and other information.<sup>143</sup>

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<sup>138</sup> *Id.* at 6.

<sup>139</sup> *Id.* (statement of former Senate Intelligence Committee Chairman Bob Graham) (“[S]imply learning the basics usually ‘exhausts half’ of a member’s eight-year term on the intelligence committee.”).

<sup>140</sup> *Id.* (noting only two members of the 111<sup>th</sup> Congress served in an intelligence agency). As a comparison, nearly one third of the Armed Services Committees have prior experience in the military). *Id.*

<sup>141</sup> DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (1974) (stating that a congressional member is a “single minded seeker of reelection”). Since intelligence agencies are by nature secretive enterprises, which does not allow a member of Congress, who is a “single minded seeker of reelection” to be able to claim much credit with policy successes to interest groups who might support a reelection effort or the voting constituents in the member’s home state or district. *See id.*; Zegart, *supra* note 129, at 6-8.

<sup>142</sup> Zegart, *supra* note 129, at 11.

<sup>143</sup> Phillip Lohaus, Daniel Schuman & Mandy Smithberger, *Improving Congress’s oversight of the intelligence community*, HILL (Jan. 24, 2017), 5:25



Second, although Congress holds the power of the purse, budget cuts to intelligence agencies are difficult and imprecise. Because of the secrecy of much of the intelligence budget, cuts at particular recalcitrant agencies are unlikely. In yet another instance of the problem of multiple principals, calling something the “intelligence budget” could be a misnomer, as about 25% or more of the total intelligence budget is administered not by the ODNI, but by DoD.<sup>144</sup> Further, although the 9/11 Commission recommended combining the budgets, Congress has explicitly refused to do so.<sup>145</sup> Steven Aftergood, of the Federation of American Scientists, suggests the refusal is based at least in part on the desires of the military oversight committees not to cede jurisdictional power and influence to the intelligence committees.<sup>146</sup>

In a system of separated powers, consolidation of intelligence oversight into one branch is impossible. That said, reduction of the number of principals with jurisdiction over

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PM), <http://origin-nyi.thehill.com/blogs/congress-blog/politics/315956-improving-congress-oversight-of-the-intelligence-community> (discussing the weakness of the House Permanent Select Committee of Intelligence (HPSCI), limiting its oversight function, and that a starting point toward stronger oversight would be to grant “*Committee members . . . a dedicated staffer—with the necessary clearances—working on intelligence matters*) (emphasis in original).

This simple idea already is in place in the Senate, where individual members of the Senate Intelligence Committee have the benefit of committee staff (whose loyalties are to the committee’s leadership) and a personal staffer who works at that member’s direction. It would have the additional benefit of significantly expanding the number of House staffers dedicated to overseeing intelligence matters. The current system stymies the agency of individual members of Congress, reduces transparency, and decreases the likelihood that whistleblowers will bring concerns to the attention of key members. Expanding oversight duties to include the perspectives of all committee Members will mitigate these risks. *Id.*

<sup>144</sup> Miles, *supra* note 26, at 10.

<sup>145</sup> Steven Aftergood, *Congress Bars Removal of Intelligence Spending from DoD Budget*, FED’N OF AM. SCIENTISTS (Mar. 7, 2013), <https://fas.org/sgp/news/secrecy/2013/03/030713.html>.

<sup>146</sup> *Id.* (“[G]iving additional authority to the intelligence committees meant taking authority away from defense appropriators, and it seems that was too much to swallow.”).

intelligence would likely improve oversight. This reduction could be done in several ways, particularly within the executive and legislative branches. For example, giving the DNI organizational tools to administer effective, centralized oversight should be done immediately, and would likely have a positive impact on the IC. Because the DNI was designed with the intention to head and *direct* the IC, the budgetary role of the IC should be coalesced under the banner of ODNI, and not include the role of the Undersecretary of Defense for Intelligence.<sup>147</sup> Moreover, Congress should take steps to ensure the primary role of the DNI in the coordination of the IC, and its collection, analysis, and informational roles to the elected branches of government. While the ODNI under James Clapper made inroads toward becoming a “managing partner,”<sup>148</sup> the tenuous relationship between Presidents and the ODNI<sup>149</sup> was illustrated when President Trump removed the DNI from the National Security Council.<sup>150</sup> It should be noted that some believe that the information-sharing component in the IC may be better off with no DNI. Indeed, Scholars Joshua Rovner and Austin Long suggest that “rather than facilitating coordination, the additional layer of bureaucracy can create friction. It is entirely possible that the

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<sup>147</sup> RICHELSON, *supra* note 31, at 44.

<sup>148</sup> Thomas Fingar, *Office of the Director of National Intelligence: From Pariah and Piñata to Managing Partner*, in *THE NATIONAL SECURITY ENTERPRISE: NAVIGATING THE LABRINTH* 185-203 (Roger Z. George & Harvey Rishikof, eds., 2nd ed. 2017).

<sup>149</sup> Jaffe, *supra* note 38.

<sup>150</sup> Cf. Jessica Taylor, *White House Press Secretary Says Trump Fired Flynn As National Security Adviser*, NPR (Feb. 14, 2017, 1:42 PM), <http://www.npr.org/2017/02/14/515215088/white-house-press-secretary-says-trump-fired-flynn-as-national-security-adviser> (noting President Trump has had a contentious relationship with the IC, writ large). In addition to firing Comey, he has fired his National Security Adviser Michael Flynn; *see also* Christopher R. Moran and Richard J. Aldrich, *Trump and the CIA: Borrowing From Nixon's Playbook*, FOREIGN AFF. (Apr. 24, 2017), <https://www.foreignaffairs.com/articles/2017-04-24/trump-and-cia> (describing the situation colorfully, suggesting that “. . . Trump regards the CIA as a political enemy determined to undermine his credibility in the eyes of the American people”).

centers would perform at least as well — and perhaps even better — without ODNI.”<sup>151</sup>

Congress should adopt at a minimum the following measures: streamline the intelligence oversight to include fewer committees of jurisdiction, which would at least minimize the problem of multiple principals by reducing the masters the IC serves and allowing fewer opportunities to forum shop<sup>152</sup> until they find a principal willing to provide umbrage for an ill-conceived policy; heed the advice of the 9/11 Committee and make the “intelligence budget,” rather than keeping the lion’s share of the IC’s budget within the DoD; and establish norms that allow the requisite committees to participate effectively in the oversight process by solving the problems Zegart illustrates above. In particular, ending the term limits on the intelligence committees and empowering the committees by adequately staffing them with knowledgeable and talented candidates dedicated to the intelligence committee rather than shared among committees. Moreover, providing the committees with intelligence data that is necessary to minimize the information asymmetry between principal and agent is also incredibly important to solving the problem. The final recommendation may be the easiest to implement, as it does not require jurisdictional battle to play out in an already gridlocked Congress.

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<sup>151</sup> Joshua Rovner and Austin Long, *Did the New Spooks on the Block Really Fix U.S Intelligence?*, FOREIGN POL’Y (April 27, 2015, 11:45 AM), <http://foreignpolicy.com/2015/04/27/did-the-new-spooks-on-the-block-really-fix-u-s-intelligence/>.

<sup>152</sup> See Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES (June 20, 2011), <http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html> (explaining how in 2011, when President Obama was seeking legal backing for intervention in Libya, he was able to ignore legal advice by his Office of Legal Counsel and the DoD’s Office of General Counsel which were unsupportive of the powers of the President, in favor of State’s Legal Adviser, who saw presidential powers broadly); see also Fingar, *supra* note 148, at 189 (“... Adm. (ret.) Mike McConnell, who served as DNI from 2007-2009, frequently characterized his position as ‘coordinator of national intelligence’ because of his limited ability to direct the activities of the IC agencies other than the CIA.”).

Additionally, the executive branch should consider strengthening its reliance on the OLC's advice. There are several reasons why this might positively impact the legal advice provided to the President and the entire branch. First, according to Professor Bruce Ackerman, legal forum shopping may set a troubling example:

If the precedent Mr. Obama has created is allowed to stand, future presidents who do not like what the Justice Department is telling them could simply cite the example of Mr. Obama's war in Libya and instruct the White House counsel to organize a supportive "coalition of the willing" made up of the administration's top lawyers. Even if just one or two agreed, this would be enough to push ahead and claim that the law was on the president's side.<sup>153</sup>

Second, OLC historically has been the source of official, singular legal advice for the executive branch, including solving legal disputes within the branch.<sup>154</sup> Third, "[g]roup lawyering results in greater ambiguity in the executive's legal rationale . . ."<sup>155</sup> OLC offers a definitive answer to a legal question, and if in writing, that opinion has precedential value within the executive branch.<sup>156</sup>

Finally, the judicial branch can take steps to play a more definitive oversight role with the IC. Some of this improved oversight might require Congress to budget additional resources, such as offering a clerkship dedicated to national security matters to the Chief Justice to add some expertise to the Court similar to that proposed above for Congress.<sup>157</sup> Secondly, while

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<sup>153</sup> Ackerman, *supra* note 152.

<sup>154</sup> Tobias T. Gibson, *Office of Legal Counsel: Inner Workings and Impact*, 18 L. & CTS. 7, 9-10 (2008).

<sup>155</sup> Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, 110 AM. J. INT'L L. 680, 695 (2016) (offering several additional reasons about the weakness of group lawyering).

<sup>156</sup> *Id.* at 690 (noting that the OLC's "advice will often 'be the final word on the controlling law'"); see also Gibson, *supra* note 154, at 9-10.

<sup>157</sup> See generally Conor Clarke, *Is the Foreign Intelligence Surveillance Court Really a Rubber Stamp?; Ex Parte Proceedings and the FISC Win Rate*, 66 STAN. L. REV. ONLINE 125 (2014) (noting that the Chief Justice places the judges on the

the Court clearly has an oversight role over intelligence activities, as seen in the active role it played in deciding the Guantanamo Bay detention cases, the Supreme Court should stop according undue deference to the Executive on issues of national security.<sup>158</sup> Particularly when civil rights and civil liberties, including privacy rights, warrant protections, trial rights conflict with intelligence community actions, the federal courts *should* play an active role in interpreting the impact of executive branch actions when national security issues seem to collide with rights recognized in the Bill of Rights. And, since Congress took steps to create the FISC, precisely to play an active and direct oversight role of surveillance, perhaps it should pass legislation to empower it further in an effort to prevent the executive branch, whether intentionally or unintentionally, from providing it with the information required by FISA. Continued sidestepping of the FISC should not be tolerated.

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FISC). The Chief Justice is particularly important in this respect because of its role in creating a “discuss list” for the Supreme Court to review when it is creating its docket. Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L.R. 1665, 1671 (2006).

<sup>158</sup> Cf. John G. Malcolm, *Overreaching Judges Imperil National Security and Weaken the Constitution*, SCOTUS BLOG (July 11, 2017, 1:45 PM)

[http://www.scotusblog](http://www.scotusblog.com/2017/07/symposium-overreaching-judges-imperil-national-security-weaken-constitution/)

[.com/2017/07/symposium-overreaching-judges-imperil-national-security-weaken-constitution/](http://www.scotusblog.com/2017/07/symposium-overreaching-judges-imperil-national-security-weaken-constitution/) (quoting Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (arguing that “when it comes to collecting evidence and drawing factual inferences in the area of national security, ‘the lack of competence on the part of the courts is marked, and respect for the Government’s conclusions is appropriate.’”)). There are two important considerations here: first, in some instances national security concerns may be important enough that the information asymmetry between the executive and judicial branches does not serve the nation’s best interests. In these instances, maximizing the ability of the Court to make an informed decision may provide the best option, overall. Secondly, the idea that the Supreme Court cannot make a decision because it lacks complete information and/or a basic understanding of the key components of the case at hand does not prevent it from stepping into controversies in other areas of law. See Selina MacLaren, *The Supreme Court’s Baffling Tech Illiteracy is Becoming a Problem*, SALON (June 28, 2014, 12:15 PM),

[http://www.salon.com/2014/06/28/the\\_supreme\\_courts\\_baffling\\_tech\\_illiteracy\\_is\\_becoming\\_a\\_big\\_problem/](http://www.salon.com/2014/06/28/the_supreme_courts_baffling_tech_illiteracy_is_becoming_a_big_problem/).

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V. CONCLUSION

Institutional design matters. Haphazard design of intelligence oversight, principals without the tools of oversight, turf wars of ego between the political branches, and the distrust and tension between the judiciary and the executive branches further complicate the administration of oversight of the IC and its component parts. Redesign is overdue; it is time Congress acts in the national interest.

A streamlined oversight process would not only place more pressure among the principals to ensure their agents are furthering policy initiatives, but also create the tools necessary for the principals to oversee agency functions effectively. The resulting increase of transparency would also lessen confusion and promote efficiency among the intelligence agencies. While the focus is largely on agency output and agency accountability, remedying the problems stemming from a multiplicity of *principals* may be the answer to an efficient and accountable administration.

