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978-1-107-04247-6 - When Should State Secrets Stay Secret?: Accountability, Democratic Governance, and Intelligence

Genevieve Lester

Excerpt

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AN ANALYTICAL APPROACH: INTELLIGENCE, ACCOUNTABILITY, AND OVERSIGHT

For decades Congress and the courts as well as the press and the public have accepted the notion that the control of intelligence activities was the exclusive prerogative of the Chief Executive and his surrogates. The exercise of this power was not questioned or even inquired into by outsiders. Indeed, at times the power was seen as flowing not from the law, but as inherent in the Presidency. Whatever the theory, the fact was that intelligence activities were essentially exempted from the normal system of checks and balances.¹

This quotation from the final report of the Church Committee – the Senate committee created in 1975 to investigate intelligence abuses – is indicative of the complex position that intelligence continues to hold in the American democracy. Intelligence comes laden with fiction, myths, and mysteries, as befits its unique status in the government and in the public mind. Intelligence activities exacerbate the information asymmetry issues inherent in representative government. The nature of the secret and technical work creates a unique culture distant from the regulatory mechanisms of conventional democratic governance. The problem of overcoming this information asymmetry is the core of accountability and oversight. Mechanisms have developed over several decades to rebalance this relationship and have had varying degrees of success. Total equilibrium, of course, between intelligence

¹ *Intelligence Activities and the Rights of Americans*, Book II, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities (Church Committee) United States Senate, Section IV. Conclusions and Recommendations, April 26, 1976, section (a).

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actors and overseers will never be achieved due to the nature of the work, its inherent secrecy, and the traditional executive ownership and control of it.

In June 2013, Edward Snowden, a contractor working for the National Security Agency (NSA), leaked a trove of classified documents to which his position gave him access. The leaked documents outlined a range of programs in which the NSA had been engaged that were aimed at the domestic public. The stories first published in the British newspaper *The Guardian* told readers about massive programs that collected bulk metadata and Internet communications within the United States. Further reports described how the NSA was wiretapping the phones of foreign leaders and that gag orders were placed on companies ordered to provide the information. The response among both the public and, outwardly at least, policy makers was deep shock. Even many who had been aware of the nature of the programs were surprised at the breadth and depth of the NSA's activities. One of the outcomes of Snowden's leaks was a demand for the NSA to be reined in and for increased oversight to be put in place to monitor its activities. Legislators argued over new proposals to change legislation governing the NSA's activities, and the director of National Intelligence (DNI) was pressured to release court decisions regarding domestic intelligence collection. Subsequently, heavily redacted decisions issued by the Foreign Intelligence Surveillance Court were released to the public. While a good faith – and unprecedented – effort on the part of the administration was made to increase transparency, the results were inconclusive for outsiders trying to understand the extent of domestic surveillance for the first time.

To take another example of recent events regarding intelligence that have captured the public eye, in March 2014 Senator Dianne Feinstein, chair of the Senate's Select Committee on Intelligence, confronted Director of the CIA John Brennan about several incidents related to the committee's report on enhanced interrogation techniques (EITs). At root, the controversy surrounded the CIA Detention and Interrogation Program, a program that emerged quickly in the aftermath of the attacks on 9/11 and used techniques such as waterboarding, shackling, stress positions, and culture-based humiliation in order to extract information from suspects. The program itself pressed the boundaries of prior post-Watergate CIA responsibilities, including

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detention in “black sites,” or unacknowledged sites located in foreign countries, and interrogation methods that – it has been argued – can be considered torture. Reacting to CIA briefings on the program, the Senate Select Committee on Intelligence commissioned a report investigating the program. Taking three years to complete and ending up at about 6,300 pages, the report remains classified as of this writing. In the words of Senator Feinstein, the report “uncovers startling details about the CIA detention and interrogation program and raises critical questions about intelligence operations and oversight [T]he creation of long-term, clandestine ‘black sites’ and the use of so-called ‘enhanced-interrogation techniques’ were terrible mistakes.”²

Why is the issue of this report so fraught? To begin, opinions vary on the use of these methods on alleged terrorism suspects. Some, such as former acting general counsel of the CIA John Rizzo argue that any tool should be used to defend the country.³ Mr. Rizzo was acting counsel when the earliest decisions regarding the program were being taken and has let it be known that he could have stopped the program altogether. Along these lines, it is argued that is acceptable to treat an individual harshly to protect the greater number – the ticking bomb argument. Some suggested that the methods were not that extreme, as they are regularly used to train U.S. soldiers to resist their captors should they be taken prisoner. U.S. military Survival, Evasion, Resistance, and Escape (SERE) training includes extreme measures, such as waterboarding, to prepare soldiers to resist potential captors by acclimating them to the stress of the methods.⁴ Former CIA director General Michael Hayden argues that the measures used against detainees were not as extreme as some have depicted them and had only been done a limited number of times against select individuals.⁵

² Feinstein Statement on CIA Detention, Interrogation Report, December 13, 2012, available at www.feinstein.senate.gov/.

³ See John Rizzo, *Company Man: Thirty Years of Controversy and Crisis in the CIA* (New York: Scribner, 2014), for a discussion of these issues.

⁴ Interview with Charles E. Allen, February 4, 2010.

⁵ Interview with General Michael Hayden, April 7, 2010. General Hayden demonstrated one technique – walling – on himself to convince me that the methods were not egregious.

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On the other side of the debate, critics argue that torture “degrades a society.”⁶ Some assert that it is operationally ineffective, although this again is a controversial claim, with senior CIA officials arguing that the program was an “irreplaceable tool” for the purposes of counter-terrorism.⁷ This is, of course, a line of argument that is impossible to verify one way or the other. Others have more recently defended the program by stating that information elicited from detainees led to the eventual killing of Osama bin Laden. The methods used, as described by former detainees in journalistic accounts, break international law, violate human rights, and previously would have been considered war crimes.⁸ Internally, CIA officers were concerned about the legality of the program and were anxious lest they be held personally liable for actions conducted according to its mandates. This extended to tapes recording the procedures, all of which were destroyed to protect the identities of the CIA officers involved in the interrogations.⁹

First, while there are ranging opinions on the value of the information gathered from the detainees, it is certain that these activities not only stretched the mission of the CIA but were also conducted with minimal accountability. Few within the intelligence community knew about the program or the locations of the sites, and even fewer still know exactly what occurred in these locations. In terms of mandated reporting to oversight mechanisms, there are many questions regarding how the program was reported to Congress. For example, there remains ambiguity as to whether the interrogation techniques were included in the original finding; second, there are concerns that the program was briefed to a limited number of individuals; and third,

⁶ Richard A. Posner, “Torture, Terrorism, and Interrogation,” in *Torture: A Collection*, ed. Sanford Levinson (Oxford: Oxford University Press, 2004), 292.

⁷ Jane Mayer, “The Black Sites: A Rare Look Inside the CIA’s Secret Interrogation Program,” available at http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer?currentPage=all (as of January 24, 2012).

⁸ According to Mayer, soldiers were court-martialed for waterboarding until as recently as the Vietnam War.

⁹ See Rizzo, *Company Man*, for a discussion of the inception of the programs as well as the furor surrounding the destruction of the tapes. See Jose Rodriguez, Jr., and Bill Harlow, *Hard Measures: How Aggressive CIA Actions after 9/11 Saved American Lives* (New York: Threshold, 2013) for a self-exculpatory explanation of the use of the techniques as well as the destruction of the tapes cataloging their use.

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the timing of the briefing was also ambiguous, with legislators stating that they were not sure whether the activities had already commenced when they were briefed, or whether the briefings occurred before the program started. There is also variation among individuals on how they were briefed and how detailed the information provided them was.

Beyond these arguments, public support for more extreme techniques tends to wane as the immediacy and uncertainty of the threat recede. As the United States assesses what security in a “post-post-9/11” threat environment should look like, the appropriateness of the more extreme methods chosen directly after the attacks is necessarily being scrutinized, even though the program was closed down by the Obama administration. The enhanced interrogation issue highlights both the weakness of current oversight mechanisms and the limitations on oversight practice. This issue of timeliness and its relationship to oversight impact will be a theme that runs throughout this book. When did the oversight committees know about the program? Did the members briefed have any recourse to change the program if they objected to it? How? Finally, the issue of the use of torture in this country is of monumental importance. It tests national values and ethics and challenges American adherence to international conventions. How can it occur without public accountability, and how can those charged with the oversight of all intelligence activities deny responsibility for the programs they are charged to supervise?

While conflict between the branches is built into the structure of the governmental separation of powers, conflict with regard to intelligence oversight is unique. It is one area where government goals are *seen* to be diametrically opposed, with the executive wanting – and *needing* – to maintain secrecy, while the legislative branch demands information, transparency, and relative openness. I explore whether this apparent mismatch – at least regarding transparency – is in fact the case. To understand this issue, I pose and explore a series of questions. How do the interbranch dynamics involved in oppositional oversight contribute to the incremental development of congressional oversight? How does internal executive control over intelligence operations interact with congressional oversight? Given that the major impetus for oversight change has been competition between the branches, how and

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why do congressional overseers weaken their own efficacy and authority? Above all, do oversight mechanisms serve to expand public access to intelligence information or, rather, do they increase the control over intelligence activities through the development of a closed system? The core argument of this book is how the entire mosaic of oversight mechanisms works together to create an environment in which secrets are actually easier to keep rather than, as one would assume, more difficult.

Prior to these recent events regarding intelligence, the Obama administration's targeted killing program using unmanned aerial vehicles (UAVs), popularly known as drones, to target suspected terrorists and terrorist affiliates brought issues of accountability and control to the forefront of debate. In terms of the targeted killing program, the administration has semiacknowledged the program to the public – that is, although it is widely known to be a major pillar of the administration's counterterrorism platform, it was not acknowledged openly. Government officials (John Brennan and others) spoke to various aspects of the program in a series of speeches, but the rationale behind the program was divulged only haltingly.

The complexities of modern governance require that mechanisms serve as proxies for the public at least partially because of the inherent asymmetry of information on intelligence and security matters, but also because of operational and classification imperatives that limit the transparency of intelligence activities and the agencies that conduct them. The conundrum in terms of intelligence and accountability is how to meet the transparency and governance responsibilities of democratic government to the public when the domain is secret, highly technical, and heavily defended. This is also not just an academic matter. Operational requirements mandate that the services support the entire range of government activities at all times. Aside from academic concern over the balance of transparency and security, concrete security – in terms of understanding emergent plans, terrorist groups, threats to infrastructure, threats to overseas citizens and assets, and threats to the economy and public health – must be maintained constantly. Oversight mechanisms in the judiciary and legislative branches of government serve as proxies

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for the role of the public in controlling and supervising intelligence activities, while control mechanisms in the executive maintain internal control of the programs according to the requirements of internal accountability.

Very few interest groups or private citizens have access to the intelligence agencies, leaving the agencies relatively opaque, apart from the apertures created by oversight mechanisms and, every now and then, a media break.¹⁰ Because of the complexity and variety of intelligence tasks and the composite nature of legal guidance on intelligence matters, a range of mechanisms are charged with the duty of investigating and supervising how these activities are conducted. It is through these mechanisms that the intelligence services are integrated into a chain of accountability that connects the three branches of government horizontally to each other and vertically to individual agency leadership and to the public. Over the course of time, we discover that while internal accountability remains relatively strong and stable, external accountability is challenged at particular inflection points.

The development and process of the mechanisms that have been created to maintain accountability support broader expectations of governance. By thinking of accountability as the end objective of government activity, we can define it, observe the causal mechanisms that lead to it, and evaluate its efficacy. Further, without understanding how the branches engage with each other on these matters, and without considering the distinct limitations placed on both the judiciary and legislative branches by law, custom, and executive process, it is impossible to get a grasp on why intelligence oversight operates the way it does. The components of intelligence, oversight mechanisms, government agencies, the media, and the public are all linked together in chains of accountability. Taking an artificially narrow perspective that does not engage with the relational dynamics of accountability limits the explanatory power of any theory advanced on the issue. Finally, an understanding of the internal culture and process of the

¹⁰ Loch Johnson, "The U.S. Congress and the CIA: Monitoring the Dark Side of Government," *Legislative Studies Quarterly* 5 (1980): 489, 495.

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agency being assessed by external oversight mechanisms provides valuable insight into where and why these external mechanisms may face challenges.

The three examples that introduced this chapter will be discussed in much greater detail later in the book. They serve to illustrate the complexity of the problems that intelligence agencies and their overseers face when trying to balance necessary operational secrecy with the openness and transparency expected in a democracy. They all also raise questions core to the theme of this book – intelligence and accountability. There are many assumptions embedded within the concept of accountability, and this book explores as many as possible. Among them is the assumption that accountability results in greater transparency to the outside world. A second one is that forcing accountability on agencies slows down their work and hinders operational efficacy. A further assumption found in most of the conventional literature views oversight and accountability as punitive and driven by sanction and an eagerness to find fault. It also views the intelligence agencies as eager to avoid this supervision.¹¹ This perspective is built into the old trope about the intelligence agencies being “rogue” and also ignores the other side of the equation – that intelligence agencies may view external mechanisms as legitimizing forces that corroborate the appropriateness of decisions and programs. Oversight in this case could be *fault sharing* rather than fault finding. Intelligence officers assert, fairly in many cases, that overseers simply did not want the information or refused to take responsibility for having been briefed once a story about a program broke publicly.

This positive view of the credibility that can stem from active external involvement is supported by a series of theoretical points regarding institutional isomorphism made by scholars of organization theory, who assert that: “(a) [organizations] incorporate elements which are legitimated externally, rather than in terms of efficiency; (b) they

¹¹ For some examples of this approach, see John Diamond, *The CIA and the Culture of Failure: US Intelligence from the End of the Cold War to the Invasion of Iraq* (Stanford, CA: Stanford University Press, 2008); Tim Weiner, *Legacy of Ashes: The History of the CIA* (New York: Doubleday, 2007); and Amy B. Zegart, *Flawed by Design: The Evolution of the CIA, JCS, and NSC* (Stanford, CA: Stanford University Press, 1999).

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employ external or ceremonial assessment criteria to define the value of structural elements; and (c) dependence on externally fixed institutions reduces turbulence and maintains stability.”¹² These authors conclude in a comment that should be kept in mind as the reader peruses the empirical chapters here: “... [T]he use of external assessment criteria – that is, moving toward the status in society of a subunit rather than an independent system – can enable an organization to remain successful by social definition, buffering it from failure.”¹³ A final assumption is driven by competing arguments: on the one hand, that demands for accountability and oversight mechanisms themselves are too meddlesome and demanding; and on the other, that the mechanisms are weak and overseers too disengaged to be effective.

The core argument driving this book derives particularly from one of these assumptions – the expectation of transparency. I argue that contrary to popular assumption, oversight accountability through the development of stronger oversight mechanisms actually leads to greater secrecy rather than less.¹⁴ This is by no means to argue that those involved in intelligence oversight are malevolent or intending to hide information unnecessarily from the public, but merely that the mechanisms themselves provide an inside system that, when joined with intelligence activities, can limit the apertures available to outside observers. This will be demonstrated through an examination of how the oversight mechanisms developed within each separate branch, how they interact with each other, and what types of historical pivot points have driven change among them. I disaggregate the concept of accountability into a series of specified criteria in order to grapple with these pivot points. I finish the book with a discussion of a series of normative questions followed by suggestions to improve oversight mechanisms based on the analytical criteria laid out in the analysis.

¹² John W. Meyer and Brian Rowan, “Institutionalized Organizations: Formal Structure as Myth and Ceremony,” in *The New Institutionalism in Organizational Analysis*, eds. Walter W. Powell and Paul J. DiMaggio (Chicago: University of Chicago Press, 1991), 49.

¹³ Meyer and Rowan, “Formal Structure,” 49.

¹⁴ I owe sincere thanks to Timothy Naftali for helping me tighten my argument around this core point. In addition to his helpful comments on my work, his book, *Blind Spot: The Secret History of American Counterterrorism*, was an excellent resource both in terms of its detail and powerful historical narrative.

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Accountability requires complex government activities to be subject to review, monitoring, and correction by mechanisms charged with the responsibility of supervision. By convention, accountability is taken to assume an external control over an agent – that is, accountability is maintained through external means, through a calling to account by an external supervisory body invested with authority. This external body is empowered with the ability to control the behavior of the supervised through consequences and sanction.

While most scholars point to the vagueness, abstractness, or all-inclusiveness of the term *accountability*, I would argue that the breadth of the term itself reflects the manifold understandings and uses to which accountability is regularly put.¹⁵ I also argue that the concept can be salvaged and analytical promise restored. The core of the concept that transcends all applications is that it is *relational*. Accountability links one organization to another either through formal organized institutions, such as oversight mechanisms, governing bodies, or trustee groups, or through institutionalized processes, such as reporting requirements and regular review. The key characteristic of this relationship, wherever it occurs, and however its process is defined, is that it involves inequality; the supervisor has authority and the right of sanction over the supervised.

Two scholars define accountability as implying:

... [T]hat some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not

¹⁵ See Mark Bovens, “Analysing and Assessing Accountability: A Conceptual Framework,” *European Law Journal* 13 (2007); Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Power in World Politics,” *American Political Science Review* 99 (2005); Richard Mulgan, “‘Accountability’: An Ever-Expanding Concept?,” *Public Administration* 78 (2000); and Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave, 2003), for wide-ranging discussions of the definition and complexity of the term “accountability.”