

Evaluating Congressional Oversight of Intelligence

Written by Glenn Hastedt

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GLENN HASTEDT, AUG 23 2013

On 6 June 2013, The Manchester *Guardian* and *Washington Post* began running a series of stories on warrantless electronic surveillance by the National Security Agency (NSA) that involved the collection of meta data with the aid of traditional communication companies such as Verizon and internet providers like Apple, Facebook, Google Microsoft, Yahoo, and Skype. Edward Snowden, a former NSA employee working for the Booz Allen consulting firm was identified as the source of the leaked information.

A starting point to deciphering how effectively Congress has handled its intelligence oversight responsibility here is to look to existing studies of congressional oversight. They depict a weak oversight system marked by two characteristics. First, it is overwhelmingly reactive, rather than anticipatory: it acts as a fireman responding to a problem rather than as police officers on patrol looking for problems. Congressional oversight is thus sporadic. It occurs when a fire breaks out and ceases when the fire is extinguished, to return again should smoldering embers produce another fire.

This pattern is very much in evidence in intelligence community oversight. Four major intelligence fires have been put out. In the mid-1970s the fire was widespread illegal Central Intelligence Agency (CIA) activity within the United States including wiretapping and mail openings. In the mid-1980s controversy centered on the Reagan administration's covert action program in Latin America. The 9/11 terrorist attacks on the United States brought forward the third congressional wave of intelligence community oversight.

Most recently we have witnessed a rapid series of fire alarms set off by disputes over the conduct of the Global War on Terrorism. Collectively they can be seen as constituting a fourth major fire. The first involved a secret warrantless surveillance program authorized by President George W. Bush in October 2001 giving the NSA the authority to "intercept communications between individuals on American soil and individuals abroad without judicial approval," in essence circumventing the Foreign Intelligence Surveillance (FISA) Court. The second centered on the nature of the techniques used to interrogate suspected terrorists at the Guantanamo Naval Base. The third involved the increased use of drone aircraft to kill suspected terrorists, especially Americans. The NSA revelations are the most current fire alarm to be set off.

The second major insight from this broader literature is that police patrol oversight tends to be rooted in the actions of individuals rather than Congress as an institution. In some cases they are motivated by political conviction as to what is right and wrong, in other cases by expectations of personal political gain, or a mixture of the two. Committees tend to become partners and protectors of those they are intended to oversee. Intelligence oversight committees are no different. Committee members routinely become cheerleaders or ostriches rather than skeptics and guardians.[1]

A final historical perspective of value in making judgments about the future shape of intelligence community oversight is the manner in which Congress seeks to put out fires. Solutions to organizational problems tend to be sought for from the vantage point of classical administrative theory that stresses the principles of efficiency and effectiveness. Organizations are viewed as machines lacking in any political dimension. The centralization of authority and functions along with heightened legal procedures are standard remedies for deficiencies of decentralized bureaucratic structures.

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This trend is every much evident in the history of congressional oversight of the intelligence community. The 1975 Church Committee hearings put forward two major reform efforts designed to improve the efficiency of intelligence oversight. First, where once intelligence oversight was carried out by a number of different House and Senate committees, there would now be one for each chamber. Second, the FISA Court was established to provide approval of surveillance activities in the United States.

The standard operating procedures of each have limited the effectiveness of oversight. In the case of congressional committees these rules largely transformed oversight hearings into the category of oversight briefings. Committee members are only permitted to read key documents in specified areas and they must leave their notes behind. Limits are also placed on their ability to discuss sensitive intelligence matters with their fellow members of Congress, staffers, or outside experts. It is not unusual to have sessions in which only intelligence agencies or government representatives present their case. Rep. James Sensenbrenner Jr. who helped draft the law authorizing bulk data surveillance and is now skeptical of it described briefings as “rope-a-dope” sessions.[2]

The FISA Court, likewise, has found itself severely handicapped by the lack of information in its oversight efforts. According to its chief judge, the FISA Court is “forced to rely upon the accuracy of the information provided to the Court” and lacks the tools to independently verify how often the government’s actions violate the court’s rules.[3] In 2012, 1,856 Surveillance applications were presented to the FISA Court and 1,855 were approved.

The FISA court has also moved from rendering case-by-case judgments about wiretapping requests to issuing opinions and establishing legal principles on what qualifies as permissible. Judge James Robertson, who was appointed by President Bill Clinton, observed that “in my experience, there weren’t any opinions...you approved a warrant application or you didn’t—period.”[4] Among the most notable are applying and expanding the “special needs” doctrine to fighting terrorism and using the “third party disclosure” doctrine to legitimize the collection of data. Most controversial has been the interpretation given to section 215 of the USA Patriot act which was reaffirmed by a vote of Congress in 2011, and that has been cited as the legal basis for secret collection of meta data via electronic surveillance. It authorizes the government to collect “tangible things” to protect against terrorism or clandestine intelligence activities. It is not to be used to collect information concerning a U.S. citizen.

The Iran-Contra oversight episode ended with a Congress passing legislation that would have required presidents to inform Congress of the start of any covert action undertaking within 48 hours. President George H.W. Bush successfully vetoed the bill. The culmination of the 9/11 oversight episode was the establishment of a Director of National Intelligence (DNI). The verdict is still out as to whether the DNI represents a unifying connecting force within the intelligence community or just another bureaucratic layer.

Bush argued that two forms of oversight for his secret Terrorist Surveillance Program (TSP) existed: he reviewed the program about every 45 days in consultation with NSA and Department of Justice officials, and that he had briefed “the Gang of Eight,” a group of congressional leaders more than 12 times. With controversy over the legality of the program continuing and Democrats regaining control of Congress, the Bush administration announced in January 2007 that it was placing the TSP under the purview of the FISA Court.

The NSA oversight episode fits comfortably into the pattern described above. It is reactive, firefighting, oversight that has been pushed most vigorously by a few members of Congress and resisted by most on the committee, with the solutions advanced consisting largely of administrative and legal quick fix solutions to promote privacy safeguards that downplay the underlying political dimension to the problem.

In the House Sensenbrenner, along with Justin Amash, John Conyers Jr., and Zoe Lofgren have taken the lead in arguing for deep reforms on intelligence gathering, a coalition forces described by a defender of NSA’s program as the “wing nut coalition.”[5] They are joined in the Senate by Mark Udall, Rand Paul, and Ron Wyden. Support for the NSA programs came from Republican and Democratic House and Senate leadership as well as the majority and minority leadership of the respective intelligence committees. Rep. Jerold Nadler, a member of the Judiciary Committee, spoke to the difficulty of mounting an opposition to the NSA noting that classification rules prohibited him from making a coherent case for curbing the NSA’s powers: “even if members know about it, they can’t say it, who

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how do you change it?...how do you get political support when you can't say a reason?" [6]

Indicative of the position initially taken by NSA supporters was the title of a House Permanent Intelligence Committee's hearing on Snowden's leaks: "How Disclosed National Security Agency Programs Protect Americans, and Why Disclosure Aids Our Adversaries." Subsequent disclosures of unreported NSA collections violations said to number 2,776 in a one year period were characterized by NSA as "miniscule" and the result of unintentional human or technical errors.

President Obama argued against passing an amendment to a House Defense Appropriations Bill that would block NSA's phone record collection program and force greater reporting by the FISA Court to Congress and the public by saying that Congress had received 35 briefings on the program, including several all-Senate and all-House meetings. Supportive congressional leaders argued that few committee members took advantage of quarterly staff briefings on counterterrorism operations. A contrasting view is presented by Rep. Rush Holt who observed that agency officials sought to ingratiate themselves with committee members by letting them introducing them to tools of spy trade and shooting weapons at a CIA firing range. With respect to the information presented to committees he noted "even in a game of 20 questions, they give us an answer that is precisely correct, they often delight in obfuscating behind a flurry of tech speak." [7] An example occurred in June 2013 when a NSA official asked about listening to phone calls or reading emails and text messages of American citizens stated, "we don't target the content of U.S. person communications without a specific warrant." But, there is a difference between intentionally targeting someone for surveillance and obtaining information on someone in the course of investigating other individuals.

After the amendment to the Defense Appropriations Bill was defeated by a vote of 217-205 Obama sought to mollify NSA critics by proposing a series of largely undefined reforms to Section 215 of the Patriot Act, and the operations of the FISA Court, including greater transparency and establishing an independent review panel. Diane Feinstein who chairs the Senate Intelligence Committee also reached out to NSA opponents calling for reforms to increase FISA transparency and improve privacy protections. They centered on increased data collection, making FISA opinions and reports made available to members of Congress, and increasing the ideological diversity of the FISA Court.

Oversight of intelligence is consistent with the more general pattern of reactive and limited congressional oversight, a pattern that has led some to identify intelligence oversight as a failure.[8] Yet, voluntarily changing the nature of intelligence oversight would seem to require a broader change in the practice of congressional oversight. While that is unlikely there are signs that simply continuing in this fashion may prove counterproductive and create a future intelligence oversight crisis. Perhaps most obvious is the problem presented to congressional oversight by a seemingly ever expanding stock of presidential powers surrounded in secrecy. Obama came into office promising to curb the Bush administration's excesses in fighting the war on terror, but in the use of drones and warrantless surveillance has come to embrace and expand upon them. A second change is the identity of the NSA. Oversight of secret governmental intelligence gathering is one thing. Oversight of a secret public-private partnership in intelligence gathering involving private contractors and cutting edge communications companies is quite another. Firefighting may be increasingly ineffective as a means of oversight here, but how does one engage in police patrolling in this context? Finally, where Snowden's revelations have fixated public and policy maker attention on the need to place limits on data collection, the bureaucratic reality for the NSA is that they are under pressure from other intelligence agencies to share their information and intelligence gathering tools. Rather than being a self-contained problem, Congress may be looking at only the tip of a potentially large ice berg.[9]

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Glenn Hastedt holds a PhD. in political science from Indiana University. He was professor and chair of the political science department at James Madison University from 1999-2005 and since then has chaired the justice studies department. His recent publications include: "The Politicization of Intelligence," *Intelligence and National Security* (2013); *American Foreign Policy*, 9th edition (New York: Pearson, 2011); "The President and the Making of American Foreign Policy," in Chris Jones and Steven Hook (eds.) *The Handbook of American Foreign Policy* (New York: Routledge, 2011); "Investigative Oversight of the American Intelligence Community: Promise and Performance," in Stuart Farson and Mark Phythian (eds.) *Commissions of Inquiry and National*

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Security: Comparative Approaches, (Santa Barbara: ABC-CLIO, 2010). His most recent publication is "Civic Education: The Overlooked Narrative of 9/11 Intelligence Community Reorganization," forthcoming in the *Journal of Intelligence History*.

[1] Loch Johnson, "Ostriches, Cheerleaders, Skeptics and Guardians: Role Selection by Congressional Intelligence Officials," *SAIS Review* 28 (2008), 93-107. Johnson's analysis, it should be noted, shows that individuals can change their oversight role orientation over time; and Jennifer Kibbe, "Congressional Oversight of Intelligence: Is the Solution Part of the Problem," *Intelligence and National Security*, 25 (2010), 24-49..

[2] http://www.washingtonpost.com/politics/lawmakers-say-obstacles-limited-oversight-of-nsas-telephone-surveillance-program/2013/08/10/bee87394-004d-11e3-9a3e-916de805f65d_story.html

[3] http://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html?pagewanted=all&_r=0

[4] <http://www.nytimes.com/2013/07/26/us/politics/robertss-picks-reshaping-secret-surveillance-court.html?pagewanted=all>

[5] <http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/25/who-voted-for-and-against-stopping-the-nsa-phone-tracking-program/>

[6] http://www.washingtonpost.com/politics/lawmakers-say-obstacles-limited-oversight-of-nsas-telephone-surveillance-program/2013/08/10/bee87394-004d-11e3-9a3e-916de805f65d_story.html

[7] http://www.washingtonpost.com/politics/lawmakers-say-obstacles-limited-oversight-of-nsas-telephone-surveillance-program/2013/08/10/bee87394-004d-11e3-9a3e-916de805f65d_story.html

[8] Kibbe, "Congressional Oversight of Intelligence."

[9] <http://www.nytimes.com/2013/08/04/us/other-agencies-clamor-for-data-nsa-compiles.html?pagewanted=all>

About the author:

Glenn Hastedt holds the rank of professor and is chair of the Justice Studies Department at James Madison University. He received his PhD in political science from Indiana University. He is author of *American Foreign Policy*, 9th edition (Pearson, 2012) as well as numerous articles on intelligence failures and more broadly the politics of intelligence policy.