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Democracy and Security: The Current Debate on Reforming U.S. Intelligence

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THOMAS BRUNEAU, FEB 13 2014

The revelations of Booz Allen Hamilton contractor Edward Snowden regarding the activities of the National Security Agency (NSA) at home and abroad have focused more attention on the issue of reforming intelligence in the U.S. than at any time since the last major reforms of the 1970s. Whereas in the 1970s the focus was mainly on the Central Intelligence Agency and the Federal Bureau of Investigation, this time it is the NSA, which, due to a high level of secrecy, was until recently commonly known as “No Such Agency”. Snowden’s revelations have received both praise, with appeals in the U.S. and abroad for him to be granted amnesty, or even be awarded the Nobel Peace prize, and condemnation with him being characterized as a traitor and spy. In order for the reader to understand the general issue of reform of U.S. intelligence, I will first call attention to three key characteristics of the intelligence process in any democracy, and then analyze reform in terms of the institutions and processes that would be central to any reform.

Three Key Characteristics

A common refrain of intelligence professionals is “those who say don’t know, and those who know don’t say”. While this phrase may be self-serving, in the current issue there is much truth to it. There is not really much of a debate, but rather a great outpouring of facts and opinions in the mainline news media and innumerable reports and interviews with members of the American Civil Liberties Union, Federation of American Scientists, and other think tanks and non-governmental organizations (NGOs) promoting transparency. Meanwhile, the Intelligence Community (IC), including the NSA, cannot defend itself in public. [1] This leads us to the second characteristic of intelligence in democracies: the constant tension between secrecy and transparency. Any democracy requires transparency; otherwise, how can the populace be expected to vote in an informed manner and the governors be accountable to the governed? However, all countries require some degree of secrecy in order to have security, and certainly this is the case in the U.S. today with so many state and non-state actors declared enemies. This is a paradox, and has no solution. There will always be tension between those who demand transparency, and who currently dominate the public discussion in the U.S., and those who are responsible for security. Third, and last, is the lopsided nature of intelligence disclosures in public debates. While there is ample literature and knowledge on intelligence failures, there is very little information on intelligence successes. [2] The IC cannot claim success, for to do so would provide information on the elements of success to enemies. Any publicly available document that deals with success or failure cannot be taken seriously. These three characteristics are present in the current debate generated by Snowden’s exposé.

Democracies have developed institutions and processes whereby they attempt to balance the contradictory demands of transparency and secrecy. The contradiction between transparency and secrecy, as befits a paradox, never disappears; at best democracies achieve a balance that is broadly acceptable to the competing demands for transparency and security. In our research, publications, and teaching we have sought to develop a framework for the analysis of intelligence reform mainly, but not exclusively, in newer democracies. The framework grows out of our analysis of civil – military relations, and emphasizes the creation of institutions and the development of civilian expertise. In our co-edited book, *Reforming Intelligence: Obstacles to Democratic Control and Effectiveness*, we seek to compare established democracies, including the United States, with new democracies including Brazil,

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Romania, and South Africa.

Reform in intelligence is reform in terms of the following five institutions and processes. We look at control or oversight as exercised by the executive, legislature, judiciary, internally to the IC itself, and externally including media, think tanks, and NGOs. I will consider the current situation regarding the NSA with references to other democracies in employing these categories. [3] The legislature is crucial, by virtue of its extensive powers in the U.S. to any reform; it will receive the most attention in the following discussion, and will be analyzed last.

Executive Control

In all democracies, and for that matter, non-democracies, the IC is under the control of the executive. In the best of circumstances the IC provides information – intelligence – to the executive who has the responsibility for the security of the nation. In our comparative study of ten countries we found that executive control was high in all but three (France, Russia, and Philippines). In the U.S., leaders face a tremendous challenge in exercising executive control of a huge intelligence apparatus with seventeen separate agencies and a fiscal year (FY) 2012 budget of \$78 billion, much of which is classified, and therefore not open to public debate. [4]

President Obama's speech on January 17, 2014 regarding NSA reforms, and his Policy Directive PPD-28, are clear evidence of him assuming this responsibility. [5] The latter is telling. For example, in Section 6, "General Provisions", the President states:

Nothing in this directive shall be construed to prevent me from exercising my constitutional authority, including as Commander in Chief, Chief Executive, and in the conduct of foreign affairs, as well as my statutory authority.

While suggesting some reforms, the main theme in President Obama's speech was the importance of intelligence in defense of the nation. The editorial in the *New York Times* the next day is typical of those who want more explicit controls on the IC. As the subtitle of the editorial reads: "Restoring trust requires more than a few good restrictions on collecting personal data". [6]

Judicial Oversight

We found judicial oversight medium in the U.S. and two other countries (Brazil and South Africa), and low in the other seven. By medium we mean some relevance of this oversight mechanism, and low means virtually no relevance at all. This evaluation holds in the current debate regarding the NSA. On the one hand Judge Richard J. Leon of the Federal District Court in Washington, D. C. ruled that the program was "almost Orwellian" and probably unconstitutional. One week later Judge William H. Pauley III, of the Federal District Court in New York, reached an opposite conclusion, upholding the NSA's program in part by noting that the founders of the nation approved of secrecy. In our book we have a chapter specifically on the U.S. IC by a lawyer who was general counsel for both the CIA and NSA. [7]

There are two main reasons why we should expect little from the judicial system in the U.S. regarding intelligence reform. First, interpreting Article III (Judicial Powers) of the U.S. Constitution narrowly, the courts have not created investigative bodies or reviewed security policies outside of a trial. They have historically deferred to the political branches – executive and legislature – in issues involving national security. Second, in the U.S. the judicial system is based on trials, and trials must be open. Neither the executive, nor the IC, want to bring any issue involving secrecy to an open trial. On balance, it seems unlikely that the U.S. judicial system will become much more involved in the issues raised by the NSA's domestic activities.

Internal Controls

In our co-edited book, *Reforming Intelligence: Obstacles to Democratic Control and Effectiveness*, the thirteen contributing authors found internal control over intelligence high in the U.S. and G.B. and either medium or low in the other eight countries. Internal controls refer to institutions and processes whereby the IC controls itself. None of the

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current major reports found any problems of NSA personnel breaking any laws. As stated in the Privacy and Civil Liberties Oversight Board's Report on the Telephone Records Program Conducted under Section 215 of the USA Patriot Act and on the Operations of the Foreign Intelligence Surveillance Court of January 23, 2014,

However, none of these compliance issues involved significant intentional misuse of the system. Nor has the Board seen any evidence of bad faith or misconduct on the part of any government officials or agents involved with the program. [8]

And, in the Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies, Liberty and Security in a Changing World of December 12, 2013 they state

Significantly, and in stark contrast to the pre-FISA era, the Review Group found no evidence of illegality or other abuse of authority for the purpose of targeting domestic political activity. This is of central importance, because one of the greatest dangers of government surveillance is the potential to use what is learned to undermine democratic governance. [9]

Nor in President Obama's speech did he suggest any wrongdoing on the part of intelligence professionals. Much to the contrary as he states:

...the men and women of the intelligence community, including the NSA, consistently follow protocols designed to protect the privacy of ordinary people. They are not abusing authorities in order to listen to your private phone calls or read your emails. [10]

The U.S. has in place a very robust system of internal controls including inspectors general and general counsels. Then too, in contrast to many other countries, recruitment, education & training, and promotion are generally based on professional vs. personal characteristics. The main problem, however, is the very heavy reliance on contractors who are not recruited nor supervised in a manner similar to U.S. Government employees. This has been the topic of sensationalist reporting and some serious scholarship. [11] It should be noted that Edward Snowden was a contractor, and had been vetted by the private contracting firm, USIS that has been sued by the government for pushing through clearances without sufficient investigation. [12]

External Oversight

In our comparative study we found external oversight medium to high in the US, high in Great Britain, and low only in Russia and the Philippines. By external control we mean the activities of the media, think tanks, and NGOs, which of course have been extremely active in the current NSA issue. There are, however, two major observations that must be made. First, the external oversight only works insofar as the executive, or more likely in the U.S., the Congress take action. Second, the U.S. public, generally approve of NSA. For example, in an early Pew Research poll on this topic, published July 26, 2013, 50% of the 1,480 adults interviewed approved of the government's collection of telephone and Internet data, while 44% disapproved.[13] These data might be surprising if one was not aware of the massive dissemination of personal data via social media such as Facebook, Twitter, and the like. Facebook alone has reportedly 1.11 billion users per month.[14]

Legislative Control and Oversight

In our comparative study, legislative control and oversight was high only in the U.S. and low to medium in the other nine countries. Comparatively, the U.S. Congress is extremely powerful due to its ability to pass laws, determine the budget, and conduct oversight. The last major reform of intelligence in the U.S., which took place in the 1970s, was a result of two investigating committees: The Pike Committee in the House of Representatives and the Church Committee in the Senate. The investigations resulted in legislation limiting the secrecy and power of the executive in all matters concerning intelligence.

Probably the most important result was the creation of two select committees, which are almost "standing

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committees” since they can report out legislation. These are the House Permanent Select Committee on Intelligence (HPSCI) and the Senate Select Committee on Intelligence (SSCI). These two **select** committees have full access to all possible tools of the U.S. Congress, including law-making, budget authority, and oversight. [15] It is no surprise, then, that President Obama, in his speech of January 17, 2014 stated he would consult with the relevant committees in Congress. By the fall of 2013 the Congress already had before it a minimum of twenty-two (22) laws regarding the NSA and by January 2014 they were considering major changes to FISA. [16]

While the U.S. Congress has, relative to all other countries we are familiar with, extensive powers of control and oversight of intelligence, including its reform, there are not surprisingly some limits on its ability to fully exercise these powers. As one of the most knowledgeable experts on the U.S. Congress told me: “Laws are not self-enforcing.” [17] Experts have noted that these limitations include the following: a lack of expertise in the myriad of topics the IC deals with; limited political incentives; unclear or shared jurisdiction with the executive; and cooptation by the IC.[18] Therefore, while the powers of the U.S. Congress are extremely robust, one should not look to the Congress to resolve all of the issues brought up by the exposé of Mr. Snowden.

Conclusion

Compared to other countries, and particularly to new democracies, control and oversight over the IC in the U.S. is elaborate and robust. It is, however, always “a work in progress” in that there is an inherent contradiction between the needs for transparency and for secrecy. There will always be a constant tug-of-war between these two ends. The current situation arising from the exposé of Mr. Snowden has highlighted this contradiction. If, on the one hand, the IC can point to the publication of *Statement for the Record to the Senate Select Committee on Intelligence Worldwide Threat Assessment of the US Intelligence Community* of James R. Clapper, Director of National Intelligence of January 29, 2014, as important proof of transparency, critics can point to secret NSA metadata programs under Section 215 of the USA PATRIOT Act which, in their view at least, violate Americans’ right to privacy.

The observations here are the author’s alone and do not necessarily represent the views of the U.S. Navy nor the U.S. Department of Defense

[1] The only “pro-NSA” articles I have seen are published by the avowedly conservative Center for Security Policy. See, for example, Michelle Van Cleve, “Myth, Paradox & The Obligation of Leadership: Edward Snowden, Bradley Manning and the Next Leak” Center for *Security Policy Occasional Paper Series* September 13, 2013 and Fred Fleitz and Clare Lopez, “A Critique of the Recommendations by the President’s Review Group on Intelligence and Communication Technologies,” *A Center for Security Policy Analysis* January 13, 2014 Available at <http://www.centerforsecuritypolicy.org/> last accessed January 31, 2014.

[2] I say very little since there is material available on the killing of Osama bin Laden that was publicly hailed in the U.S. due to the symbolism of his life, and death. See, for example, John Rollins, “Osama bin Laden’s Death: Implications and Considerations” *Congressional Research Service Report for Congress* May 5, 2011 R41809.

[3] Thomas C. Bruneau and Steven C. Boraz, eds., *Reforming Intelligence: Obstacles to Democratic Control and Effectiveness* (Austin: University of Texas Press, 2007). Our authors analyze control and oversight in ten countries: U.S., Great Britain, France, Russia, Romania, South Africa, Argentina, Brazil, Taiwan, and the Philippines. For rankings on the five dimensions see page 332.

[4] Data from Marshall C. Erwin and Amy Belasco, “Intelligence Spending and Appropriations: Issues for Congress,” *Congressional Research Service Report for Congress* September 18, 2013 R42601, p. 2.

[5] “Transcript of President Obama’s Jan. 17 speech on NSA reforms,” *The Washington Post* January 17, 2014. http://www.washingtonpost.com/politics/full-text-of-president-obamas-jan-17-speech-on-nsa-reforms/2014/01/17/fa33590a-7f8c-11e3-9556-4a4bf7bcdb84_story.html last accessed January 18, 2014. The PPD-28 is attached here, and is available at <http://www.whitehouse.gov/the-press-office/2014/01/17/presidential->

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policy-directive-signals-intelligence-activities last accessed January 31, 2014.

[6] *New York Times*, January 18, 2014, page A 16, "The President on Mass Surveillance: Restoring trust requires more than a few good restrictions on collecting personal data".

[7] Elizabeth Rindskopf Parker and Bryan Pate, "Rethinking Judicial Oversight of Intelligence," in Bruneau and Boraz, pp. 51- 72.

[8] Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court* p. 9 available at <http://www.scribd.com/doc/201740642/Final-Report-1-23-14> last accessed January 31, 2014.

[9] *Liberty and Security in a Changing World* report and Recommendations of The President's Review Group on Intelligence and Communications Technologies December 12, 2013, p. 76 available at www.whitehouse.gov/sites/.../2013-12-12_rg_final_report last accessed January 31, 2014.

[10] *The Washington Post* January 17, 2014.

[11] The sensationalist book is Tim Shorrock, *Spies for Hire: The Secret World of Intelligence Outsourcing* (N.Y.: Simon & Schuster, 2008). See also Patrick R. Keefe, "Privatized Spying: The Emerging Intelligence Industry" In Loch K. Johnson, (ed.) *The Oxford Handbook of National Security Intelligence*. (New York: Oxford University Press, 2010), pp. 296-309.

[12] See http://www.washingtonpost.com/business/the-federal-outsourcing-boom-and-why-its-failing-americans/2014/01/31/21d03c40-8914-11e3-833c-33098f9e5267_story.html?wpisrc=emailtoafriend. Last accessed January 31, 2014. The author has published on contracting – out. See Thomas C. Bruneau, *Patriots for Profit: Contractors and the Military in U.S. National Security* (Stanford: Stanford University Press, 2011)

[13] Pew Research Center for the People & the Press, "Few See Adequate Limits on NSA Surveillance Program" July 26, 2013 available at <http://www.people-press.org/2013/07/26/few-see-adequate-limits-on-nsa-surveillance-program> last accessed January 31, 2014.

[14] It should be noted that the issue of NSA intercepts is particularly sensitive in former dictatorships. Thus the strong reactions to Snowden's exposé of NSA's intercepts of the personal phones of Chancellor Angela Merkel, who was raised in the former German Democratic Republic, where the pervasive role of the Stasi in surveillance of the population is so well captured in the movie *The Lives of Others* or of President Dilma Roussef of Brazil, who was a member of a group actively opposing the military regime of 1964-85, where the successor to the dictatorship's Serviço Nacional de Informação, the Agência Brasileira de Inteligência (ABIN) is prohibited from doing intercepts.

[15] I am drawing heavily on my colleague's work on Congressional Oversight in the U.S. See Florina Cristiana Matei, "Congressional Oversight Committees", in Greg Moore ed., *Encyclopedia of U.S. Intelligence*, New York: Taylor and Francis, forthcoming, 2014. With permission of the author.

[16] John W. Rollins and Edward C. Liu, "NSA Surveillance Leaks: Background and Issues for Congress," *Congressional Research Service Report for Congress*, September 4, 2013 R43134, pp. 16 – 18. Andrew Nolan and Richard M. Thompson II, "Reform of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes," *Congressional Research Service Report for Congress* January 16, 2014 R43362.

[17] Arch Barrett, the main author in the House on the Goldwater-Nichols Defense Reorganization Act of 1986. An excellent example of non-implementation is the requirement that the U.S. Executive issue annual national security strategy documents. During 8 years of the George W. Bush Administration there were 2 and so far President Obama has published one with another promised for early 2014. On this topic see Catherine Dale, "National Security Strategy: Mandates, Execution to Date, and Issues for Congress," *Congressional Research Service Report for*

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Congress August 6, 2013 R43174.

[18] Matei, 2014, forthcoming, for details on these limitations.

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