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Urgency, Opportunity, and Frustration: Implementing the Intelligence Reform and Terrorism Prevention Act of 2004

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INTRODUCTION

A terrorist organization targets America's airlines, igniting domestic panic and finger-pointing in Washington. The plot is hatched in a distant Muslim-majority nation—a country with which the United States has maintained a historically volatile relationship and in which multiple attacks against U.S. citizens originated in the past decade. A key perpetrator hails from another country where Islamic extremism is known to thrive, and he traveled to other countries en route to the United States, evading airport security. With the benefit of hindsight, the plot now appears crystal clear. Prior to the incident, multiple U.S. and foreign government agencies possessed bits and pieces of relevant information. There was no “smoking gun” that in itself could have

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foiled the attack. But if the disparate intelligence¹ had been integrated properly into a coherent picture, perhaps the terrorist attempt could have been thwarted at an earlier stage.

The above scenario sounds eerily familiar. When framed at that level of generality, it could just as easily describe the terrorist attacks of September 11, 2001, as it could the attempted Christmas Day airplane bombing over Detroit on December 25, 2009. Yet the attacks also differ in critical ways, which reflect the evolving nature of the terrorist threat and the U.S. intelligence community's² continued struggle to respond. Al-Qaeda launched 9/11 from the ungoverned tribal areas of Afghanistan and Pakistan using Saudi Arabian and Egyptian operatives;³ an affiliated branch of al-Qaeda launched the Christmas Day attack from the ungoverned tribal areas of Yemen using a Nigerian operative.⁴ Thankfully, for reasons reportedly involving human and technical error, the attempted Christmas bombing did not succeed.⁵ The Christmas Day attempt, however, occurred more than eight years after 9/11; five years after the Iraq weapons of mass destruction (WMD) intelligence debacle; and after countless commission reports, new congressional legislation, presidential executive orders, and other directives that diagnosed and sought to prevent such intelligence "failures" through widespread organizational, legal, policy, and tradecraft⁶ reforms. These disturbing facts beg the question: Have the post-9/11 reforms to the U.S. intelligence community accomplished anything at all?

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1. While definitions vary, as used in this Essay, "intelligence" refers to "the process by which specific types of information important to national security are requested, collected, analyzed, and provided to policymakers; the products of that process; [and] the safeguarding of these processes and this information by counterintelligence activities." MARK M. LOWENTHAL, *INTELLIGENCE: FROM SECRETS TO POLICY* 8 (2d ed. 2002).
 2. The "intelligence community" refers to the U.S. government agencies that conduct intelligence activities. *See infra* note 8.
 3. *See, e.g.,* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES* 145-60, 231-41 (2004) [hereinafter 9/11 COMMISSION REPORT].
 4. *See, e.g.,* *Flight 253: Learning Lessons from an Averted Tragedy: Hearing Before the H. Comm. on Homeland Security*, 111th Cong. (2010) (statement of Michael E. Leiter, Director, National Counterterrorism Center), *available at* <http://hsc.house.gov/SiteDocuments/20100127100923-82356.pdf>.
 5. The technical details of the attack have not been disclosed publicly, but according to the Department of Justice, when detonated the bomb caused a fire, not an explosion. *See, e.g.,* Press Release, Dep't of Justice, Umar Farouk Abdulmutallab Indicted for Attempted Bombing of Flight 253 on Christmas Day (Jan. 6, 2010), *available at* <http://www.justice.gov/opa/pr/2010/January/10-nsd-004.html>.
 6. "Tradecraft" refers to the techniques used to collect, analyze, produce, and disseminate intelligence. Elements of tradecraft include, for example, the ways in which an operative vets a human source for reliability and how an analyst

At the heart of the matter lies the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA),⁷ the landmark legislation that established the Office of the Director of National Intelligence (ODNI) to coordinate better the now 17 agencies, approximately 200,000 personnel, and about \$75 billion in annual expenditures that comprise the sprawling U.S. intelligence community.⁸ Did the IRTPA outline a sound strategy for intelligence reform to remedy the failures identified with respect to 9/11 and Iraq WMD? Five years later, how has the ODNI fared in implementing this legislation and realizing the vision of an integrated and agile intelligence community?

The answers to these questions are pertinent and pressing. Like President George W. Bush after 9/11, President Obama has confronted an unexpected challenge to American counterterrorism⁹ and intelligence capabilities. Amid bureaucratic sniping and partisan calls for resignations and investigations, President Obama has acknowledged “systemic failure,” demanded accountability, and vowed corrective action.¹⁰ The challenge now lies in preventing another potentially catastrophic security breach without further disrupting the ongoing work of U.S. intelligence, law enforcement, military, and

characterizes the certainty and supporting evidence underpinning an analytic judgment.

7. Pub. L. No. 108-458, 118 Stat. 3638 (2004).
8. With the creation of the ODNI, there are seventeen agencies in the intelligence community: (1) the Office of the Director of National Intelligence; (2) the Central Intelligence Agency; (3) the National Security Agency; (4) the Defense Intelligence Agency; (5) the National Geospatial-Intelligence Agency; (6) the National Reconnaissance Office; the intelligence elements of (7) the Army, (8) the Navy, (9) the Air Force, and (10) the Marine Corps; (11) the Federal Bureau of Investigation; (12) the Department of Energy; (13) the Bureau of Intelligence and Research of the Department of State; (14) the Office of Intelligence and Analysis of the Department of the Treasury; (15) the elements of the Department of Homeland Security concerned with the analysis of intelligence information; (16) the Office of Intelligence of the Coast Guard; and (17) the Office of National Security Intelligence of the Drug Enforcement Administration. See 50 U.S.C. § 401(a) (2006); OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, ODNI NEWS RELEASE NO. 6-06, DRUG ENFORCEMENT ADMINISTRATION ELEMENT BECOMES 16TH INTELLIGENCE COMMUNITY MEMBER (2006), available at http://www.odni.gov/press_releases/printer_friendly/20060217_release_print.htm. Intelligence budget and personnel figures are normally classified but Director of National Intelligence Dennis Blair disclosed them in September 2009. See Walter Pincus, *DNI Cites \$75 Billion Intelligence Tab*, WASH. POST, Sept. 17, 2009, at A07.
9. “Counterterrorism” refers to a government’s political, economic, diplomatic, military, intelligence, and law enforcement efforts to neutralize terrorist threats. Although intelligence is critical to any successful counterterrorism strategy, it is only one element of the overall approach.
10. President Barack Obama, Remarks by the President on Strengthening Intelligence and Aviation Security (Jan. 7, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-intelligence-and-aviation-security>.

homeland security personnel around the world. Evaluating the strengths and weaknesses of the U.S. intelligence community is once again a top priority.

The picture that emerges is mixed. Today's intelligence community is composed of thousands of talented individuals who are focused intently on countering the evolving terrorist threat, helping our military fight two wars, and assessing the multitude of global challenges to our national security and interests abroad. Since 9/11, numerous plots have been disrupted, countless lives have been saved, and critical discoveries made beyond the terrorism realm have shed light on the plans and intentions of our most reclusive adversaries. Yet the collaboration and unity of effort so commonplace in the field has not always translated to the corridors of Washington. The intelligence community under the Director of National Intelligence (DNI) leadership structure still is struggling to overcome entrenched bureaucratic mindsets, enforce vague authorities, demonstrate added value, and rapidly adapt to the diffuse threat environment of the post-9/11 world. The demand for current intelligence on top-priority targets overwhelms analysts and collectors, detracting from long-term planning and efforts to think critically about future threats. And the polarized political environment of media leaks and recriminations does not encourage our intelligence officials to be any less turf-conscious and risk-averse.

This Essay examines how the challenges confronting the intelligence community today stem from the peculiar circumstances under which the DNI position was created and the inherent weaknesses in the IRTPA legislation that have led to bureaucratic tensions ever since. We first review the intelligence failures associated with 9/11 and Iraq WMD and describe how the political pressures of the 2004 presidential campaign led to the establishment of a DNI position with broad responsibilities but only vague authority. In particular, the IRTPA legislation granted the DNI ambiguous budgetary and personnel authorities with respect to the other intelligence community agencies, overlapping operational authorities with the Central Intelligence Agency, and uncertain control over terrorism analysis via the National Counterterrorism Center.

We next turn to the challenges that we confronted in implementing the IRTPA legislation and establishing the DNI's office. Bureaucratic inertia was significant as we assumed a broad intelligence reform mandate with limited initial capabilities to bring about change. Beyond the basic difficulties associated with creating a new government agency, we sought to assert control over skeptical elements of the intelligence community while fostering a collaborative atmosphere. As we set about articulating a vision for intelligence reform and developing community-wide policy directives, the vagaries in the IRTPA legislation provided opportunities for agencies to try to limit the DNI's authorities. All of this took place against the backdrop of an evolving terrorist threat to the homeland and the rise of sectarian violence in Iraq. The deaths of key al-Qaeda leaders and the disruption of the transatlantic airplane plot of August 2006 demonstrated the intelligence community's potential to function as a truly integrated enterprise. Yet pressing day-to-day national security matters detracted from long-term intelligence reform issues, and key

disagreements regarding the scope of the IRTPA legislation remained unresolved.

We then analyze how bureaucratic disagreements over the DNI's authority under the IRTPA continued after our time in the ODNI. Despite a variety of bold and creative new policy initiatives, the ODNI continued to encounter difficulty in implementing directives concerning personnel, information sharing, and analytical standards. Congress also sought to limit the ODNI's resources, despite the increasingly diffuse terrorist threat and the broad intelligence reform responsibilities that Congress expected the ODNI to maintain. When the Obama Administration inherited these problems, some intelligence agencies sought to revive previous bureaucratic grievances regarding the IRTPA legislation. At the same time, al-Qaeda and its affiliates initiated another series of attacks against the U.S. homeland. Many plots originating from the Afghanistan-Pakistan border area were disrupted, while others with a nexus in Yemen were more successful, culminating in the Christmas Day bombing attempt.

Even though the IRTPA legislation contains significant flaws, the Obama Administration cannot turn back the clock on the intelligence reform effort. Further reorganization (or de-organization) of the intelligence community would be as disruptive as it would be politically infeasible. Nor can the Obama Administration afford to overcompensate for recent intelligence failures by concentrating counterterrorism resources on new priority countries or focusing solely on counterterrorism at the expense of other emerging threats. The intelligence reform debate needs to focus less on organizational turf, policies, and plans, and more on people, relationships, and technology. Consistent presidential and congressional leadership is essential to fostering a stable, collaborative, and nonpoliticized atmosphere so the DNI system can work. To this end, the intelligence community needs to be run by nonpartisan, career professionals. Along the lines of President Obama's 2008 campaign proposal to create a fixed term for the DNI, we recommend making the positions of Director of National Intelligence and Director of the Central Intelligence Agency ten-year nonpolitical appointments similar to the position of Director of the Federal Bureau of Investigation.

This Essay was written prior to the May 2010 arrest of naturalized U.S. citizen Faisal Shahzad for attempting to detonate a car bomb in New York's Times Square, as well as the resignation of DNI Dennis Blair in July 2010. Although we do not address either of these matters in great detail, we believe that both developments are consistent with our analysis and recommendations. President Obama's nomination of retired Lieutenant General James Clapper to be the next DNI presents yet another opportunity to ensure that the intelligence community is properly equipped to anticipate and respond to evolving threats.

I. INTELLIGENCE FAILURES AND PROPOSED REFORMS

President Obama has inherited an intelligence community in flux, still reeling from the failures associated with 9/11 and Iraq WMD and adjusting to

the large-scale organizational reforms that followed. Perhaps the intelligence community has received an unfair portion of the public blame, given that those crises arguably stemmed from *policy* failures by both the Clinton and Bush Administrations: the failure to react more aggressively to al-Qaeda's threat despite a succession of attacks and warnings prior to 9/11¹¹ and the decision to invade Iraq without adequately questioning the widespread assumption that it possessed WMD.¹² In evaluating the intelligence community's performance, we must always be cognizant of its limits. Intelligence is not a substitute for sound diplomatic and defense policy. Moreover, history tells us that there always will be intelligence "failures" given the inherent unpredictability of human nature and strategic surprise. Nonetheless, while intelligence is but one element of national security decision-making, the errors of the recent past are worth reconsidering in order to appreciate the challenges confronting the intelligence community today.

The National Commission on Terrorist Attacks upon the United States (9/11 Commission) extensively documented the cultural, legal, and policy obstacles that prevented the Central Intelligence Agency (CIA), the Federal Bureau of Investigation (FBI), and other elements of the intelligence community from possibly thwarting the 9/11 attacks. The failure to "connect the dots" resulted in part from an inability to collect valuable intelligence on al-Qaeda¹³ but also from a failure of imagination to anticipate this type of homeland attack¹⁴ and a failure to share the information that did exist, both within and between agencies.¹⁵ This lack of coordination across the "foreign-

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11. The 9/11 Commission documented the extensive interagency discussions that both the Clinton and Bush Administrations engaged in about attacking al-Qaeda before 9/11. See 9/11 COMMISSION REPORT, *supra* note 3, at 108-45, 198-214. The 9/11 Commission also described continued frustration in the intelligence community that White House officials in the Clinton and Bush Administrations would not approve lethal military and intelligence action against al-Qaeda following the bombing of the U.S.S. Cole in 2000. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., NATIONAL POLICY COORDINATION: STAFF STATEMENT NO. 8 (2004), available at http://govinfo.library.unt.edu/911/staff_statements/staff_statement_8.pdf. In reviewing these efforts, the 9/11 Commission's staff concluded that "[b]efore 9/11 no agency did more to attack [al-Qaeda], working day and night, than did the CIA." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., INTELLIGENCE POLICY: STAFF STATEMENT NO. 7, at 10 (2004), available at http://govinfo.library.unt.edu/911/staff_statements/staff_statement_7.pdf.
 12. For example, former career CIA official Paul Pillar has argued that the Bush Administration used Iraq WMD intelligence "not to inform decision-making, but to justify a decision already made." Paul Pillar, *Intelligence, Policy, and the War in Iraq*, FOREIGN AFF., Mar.-Apr. 2006, at 15, 18; see also Madeline Albright, *Bridges, Bombs, or Bluster?*, FOREIGN AFF., Sept.-Oct. 2003, at 2.
 13. See 9/11 COMMISSION REPORT, *supra* note 3, at 77, 90, 328, 358.
 14. *Id.* at 345-47.
 15. *Id.* at 267, 328.

domestic divide”¹⁶ was attributed to selfish bureaucratic rivalries, the infamous “wall” that discouraged the FBI from collecting intelligence that could not be used for criminal prosecutions,¹⁷ and “stovepipes” where certain types of intelligence were collected within different agencies but not disseminated further.¹⁸

The 9/11 Commission attributed these failures primarily to a lack of central leadership and management of the intelligence community. The Commission concluded that the then Director of Central Intelligence (DCI) had “too many jobs.”¹⁹ As outlined in Executive Order 12,333 under President Reagan, the DCI had three key responsibilities: (1) Director of the CIA; (2) principal intelligence advisor to the President; and (3) head of the intelligence community at large.²⁰ In reality, however, just running the CIA and briefing the President was more than a full-time job, and the DCI’s authorities over other intelligence community elements were limited and rarely exercised.²¹ The 9/11 Commission proposed stripping the DCI of his under-utilized community management responsibilities and transferring them to a new National Intelligence Director with strengthened budgetary and personnel authorities.²² To break down stovepipes through increased information sharing, the Commission also proposed establishing national centers that synthesized all intelligence across agencies on key priorities, such as terrorism, weapons proliferation, and even state actors like China.²³

Although previous blue-ribbon commissions had leveled similar criticisms against the intelligence community,²⁴ the scale of the 9/11 tragedy, the public nature of the ensuing inquiry, the invasion of Iraq, and the politics of the 2004 presidential election combined to make large-scale reform inevitable. While the 9/11 Commission deliberated from November 2002 to July 2004, the intelligence community rushed to stave off congressionally mandated institutional change. The FBI launched a new effort to strengthen its intelligence capabilities,²⁵ while

16. *Id.* at 400-02.

17. *Id.* at 78-80.

18. *Id.* at 403.

19. *Id.* at 409.

20. Exec. Order No. 12,333, 3 C.F.R. 200, 202-04 (1982).

21. See 9/11 COMMISSION REPORT, *supra* note 3, at 409-10.

22. *Id.* at 411-15.

23. *Id.* at 403-06, 413.

24. See, e.g., COMM’N ON THE ROLES AND CAPABILITIES OF THE U.S INTELLIGENCE CMTY., PREPARING FOR THE 21ST CENTURY: AN APPRAISAL OF U.S. INTELLIGENCE (1996); see also IC21: *The Intelligence Community in the 21st Century: Hearings Before the H. Permanent Select Comm. on Intelligence*, 104th Cong. (1995).

25. *Progress Report on the Reorganization and Refocus of the FBI: Hearing Before the H. Subcomm. on the Departments of Commerce, Justice, and State of the H. Comm. on*

in January 2003 President Bush announced the creation of a Terrorist Threat Integration Center to analyze and merge threat information from the CIA, FBI, Department of Defense, and the newly created Department of Homeland Security.²⁶ The capture of key al-Qaeda operatives overseas who were responsible for the 9/11 attacks led to the disruption of further plots and arrests within the United States.²⁷ Yet al-Qaeda and its affiliates remained a deadly force, as evidenced by the 2004 train bombings in Madrid, as well as the discoveries of other terrorist activities based in the United States.²⁸

Meanwhile, the 2003 invasion of Iraq led by the United States and coalition forces had failed to uncover evidence of WMD, which was a key element of the Bush Administration's stated rationale for the war. As postwar violence escalated in Iraq, and evidence mounted that the intelligence community had erred in its prewar assessments of Iraq's WMD programs, congressional calls for intelligence reform intensified. In February 2004, President Bush established the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (WMD Commission).²⁹ This bipartisan commission was charged with examining the intelligence community's assessments of the WMD programs in Iraq, Libya, and Afghanistan, as well as

Appropriations, 108th Cong. 6-7 (2003) (statement of Robert S. Mueller, III, Director of the FBI).

26. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union, (Jan. 28, 2003), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2003_presidential_documents&docid=p03fe03_txt-6.pdf.
27. Publicly available information indicates that the March 2002 capture of al-Qaeda operative Abu Zubaydah in Pakistan led to the May 2002 arrest of al-Qaeda operative Jose Padilla in Chicago. Padilla was accused of conspiring with al-Qaeda to bomb apartment buildings in the United States, and he was later convicted of providing material support to terrorism. While there is significant debate over whether the use of so-called CIA "enhanced interrogation techniques" led to the identification and subsequent arrest of Padilla, there is no debate that Abu Zubaydah did in fact identify Padilla during questioning. See, e.g., Joby Warrick & Peter Finn, *Internal Rifts on Road to Torment: Interviews Offer More Nuanced Look at Roles of CIA Contractors, Concerns of Officials During Interrogations*, WASH. POST, July 19, 2009, at A01; Ali Soufan, Op-Ed., *My Tortured Decision*, N.Y. TIMES, Apr. 22, 2009, at A27.
28. See, e.g., FED. BUREAU OF INVESTIGATION, *TERRORISM 2002-2005*, at 13 (2005). Although there were multiple domestic terrorist-related arrests in this period, two high-profile ones were the so-called "Lackawanna Six," who received al-Qaeda training in Afghanistan in the summer of 2001 and pled guilty to providing material support to al-Qaeda; and Iyman Faris, who cased a New York City bridge and provided information on other targets to al-Qaeda.
29. Exec. Order No. 13,328, 3 C.F.R. 139 (2005).

“other related threats of the 21st Century,” and recommending specific forward-looking reforms.³⁰

Another key moment in the intelligence reform debate was counterterrorism advisor Richard Clarke’s high-profile testimony before the 9/11 Commission in March 2004 and the release of his book, which offered a scathing critique of the Bush Administration’s response to al-Qaeda both before and after 9/11.³¹ Presidential candidate John Kerry then endorsed the 9/11 Commission’s recommendations the same day the final report was released in July 2004, injecting intelligence reform into the final months of the campaign debate.³² Reading the tea leaves, the Bush Administration reversed course and indicated its willingness to consider legislation that would implement the 9/11 Commission’s recommendations. Congress passed the Intelligence Reform and Terrorism Prevention Act, and President Bush signed it into law on December 17, 2004—just a few weeks after winning a second term.

A. *The Intelligence Reform and Terrorism Prevention Act: A New and Imperfect Law*

Like most legislation, the IRTPA struck an awkward balance between the political and substantive policy interests of affected parties. Since a political timeline drove the legislative process, Congress passed the IRTPA while the WMD Commission’s study was still ongoing. The WMD Commission later would note in its final report that the IRTPA “became a sort of *deus ex machina* in our deliberations” and suggested that, in the absence of the legislation, “we might have chosen a different solution.”³³ The debate over the IRTPA thus focused primarily on the advantages and disadvantages of the 9/11 Commission recommendations, which were grounded in lessons learned from the 9/11 attacks but not based on extensive analysis of the intelligence community beyond the terrorism sphere.

In particular, the type of tactical analysis required to “connect the dots” and track down terrorist threats is quite different from the type of strategic analysis required to decipher the intentions of state actors and anticipate future concerns. Tactical analysis, which was the focus of the 9/11 Commission,

30. *Id.*

31. *Testimony of Richard A. Clarke Before the Nat’l Comm’n on Terrorist Attacks upon the United States*, 108th Cong. (2004), available at http://govinfo.library.unt.edu/911/hearings/hearing8/clarke_statement.pdf; RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* (2004).

32. Philip Shenon, *President Calls for a Sweeping Overhaul of Intelligence*, N.Y. TIMES, July 23, 2004, at A1.

33. COMM’N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, *REPORT TO THE PRESIDENT OF THE UNITED STATES 6* (2005) [hereinafter WMD COMMISSION REPORT], available at http://www.gpoaccess.gov/wmd/pdf/full_wmd_report.pdf.

necessitates a centralized focus on information-sharing coupled with an ability to direct collection, analysis, and operations across the intelligence community. Hence, the 9/11 Commission's proposed to establish national centers that synthesized all intelligence across agencies on key priorities. Yet while such a center makes sense for a tactical challenge like tracking terrorist threats, it does not necessarily make sense for a traditional state actor challenge like Iraq or Iran. Strategic analysis, which was the focus of the WMD Commission, is more about the quality of the analysts themselves and necessitates a centralized focus on language training, foreign area studies, and the tradecraft of challenging preconceptions and communicating uncertainties. Congress likely could have benefited from a broader evaluation of the intelligence community before enacting sweeping organizational change.

The demand for political expediency at the expense of deliberation also afforded elements of the intelligence community maximum opportunity to resist legislative reforms they deemed contrary to their interests. Prior to the passage of the IRTPA, department and agency heads spoke openly about their desire to limit the DNI's authorities. The Defense Department did not want a Director of National Intelligence in complete control of its National Security Agency, National Reconnaissance Office, or Defense Intelligence Agency.³⁴ Likewise, neither the FBI nor the CIA wanted another entity controlling its law enforcement and intelligence operations.³⁵ The result was a consensus piece of legislation that created a DNI position with broad responsibilities but only vague authorities in critical respects.

The IRTPA assigned the new DNI two of the three functions previously performed by the DCI: principal intelligence advisor to the President and head

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34. Prior to the passage of the IRTPA, former Secretary of Defense Donald Rumsfeld publicly argued before Congress that consolidating these agencies outside the Department of Defense might "place new barriers or filters between the military Combatant Commanders and those agencies when they perform as combat support agencies." *Implications for the Department of Defense and Military Operations of Proposals To Reorganize the United States Intelligence Community, Hearing Before the S. Armed Services Committee*, 108th Cong. (2004), (statement of Donald Rumsfeld, Secretary of Defense), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB144/document%2022.pdf>.
35. Prior to the passage of the IRTPA, FBI Director Robert Mueller testified before Congress that the DNI "should not be directly responsible for the conduct of [FBI] operations." *FBI Views on Intelligence Reform: Hearing Before the S. Comm. on Governmental Affairs*, 108th Cong. (2004) (statement of Robert S. Mueller, III, Director, Federal Bureau of Investigation). Former Deputy Director of Central Intelligence John McLaughlin testified that "speed and agility are not promoted by complicated wiring diagrams" and "added layers of bureaucracy." *Implications for the Department of Defense and Military Operations of Proposals to Reorganize the United States Intelligence Community: Hearing Before the S. Armed Services Committee*, 108th Cong. (2004) (statement of John McLaughlin, Acting Director of Central Intelligence).

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of the intelligence community.³⁶ The Act then established the new position of Director of the Central Intelligence Agency (DCIA), who “shall report” to the DNI.³⁷ The IRTPA, however, stopped far short of creating a position akin to a Secretary of Intelligence. Instead, the other fifteen agencies in the intelligence community remained in their respective departments, reporting to the same superiors with the added stipulation that they now were jointly accountable to the DNI for certain functions. The DNI therefore needed to rely on vague authorities to effectuate change. For example, the IRTPA gave the DNI expanded appointment authority over the heads of other intelligence agencies. Although the DNI “recommends” someone for the DCIA position,³⁸ the DNI’s “concurrence” was required before the President nominates an individual to fill a vacancy in other agencies,³⁹ and for a few agencies only “consultation” with the DNI was required.⁴⁰ Moreover, the DNI was not granted authority to remove the appointed individual.

The IRTPA also left many questions unanswered with respect to budget and personnel authorities. The DNI was authorized to “develop and determine” the National Intelligence Program budget,⁴¹ in contrast to the old DCI, who was authorized only to “facilitate the development” of the budget.⁴² Yet significant portions of the resources for Defense Department intelligence agencies reside in different budgets, and the DNI only could “participate in the development” of

36. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 1011(a), 118 Stat. 3638.

37. *Id.*

38. *Id.* § 1014(a)(2)(B).

39. *Id.* § 1014(b)(2). These positions include the Director of the National Security Agency; the Director of the National Reconnaissance Office; the Director of the National Geospatial-Intelligence Agency; the Assistant Secretary of State for Intelligence and Research; the Director of the Office of Intelligence of the Department of Energy; the Director of the Office of Counterintelligence of the Department of Energy; the Assistant Secretary for Intelligence Analysis, Department of the Treasury; the Executive Assistant Director (EAD) for Intelligence, the Federal Bureau of Investigation or any successor to that position; and the Assistant Secretary of Homeland Security for Information Analysis. In 2006, the Department of Energy consolidated the Office of Intelligence and Office of Counterintelligence into the new Office of Intelligence and Counterintelligence under the control of the Department of Energy’s Senior Intelligence Officer. In 2005, the FBI consolidated the EAD for Counterterrorism and Counterintelligence and the EAD for Intelligence into a single EAD for National Security.

40. *Id.* § 1014(c)(2). These positions include the Director of the Defense Intelligence Agency and the Assistant Commandant of the Coast Guard for Intelligence.

41. *Id.* § 1011(a).

42. National Security Act, 50 U.S.C. § 403-3(c)(1)(A) (2000).

those other intelligence budgets with the Secretary of Defense.⁴³ Similarly, the DNI was authorized to transfer personnel within the intelligence community for periods not exceeding two years but only after developing procedures for these transfers with relevant department heads.⁴⁴ Since another provision of the IRTPA stipulated that the President must ensure the DNI “respects and does not abrogate the statutory responsibilities” of other departments,⁴⁵ department heads could object and thus stall personnel transfers and other forms of DNI intelligence community management.

The IRTPA also codified the authorities of the National Counterterrorism Center (NCTC), which had been established by an executive order to expand the aforementioned Terrorist Threat Integration Center.⁴⁶ The NCTC was designed to “serve as the primary organization in the United States Government for analyzing and integrating” terrorism intelligence, and it was authorized to disseminate that intelligence within the executive branch.⁴⁷ The NCTC was limited in its ability, however, to share terrorism intelligence with state and local law enforcement officials and only could “support” the Departments of Justice and Homeland Security in sharing such information.⁴⁸ Moreover, in addition to the NCTC’s information-sharing authorities, the IRTPA created a second position of “Program Manager for the Information Sharing Environment,” who would be responsible for terrorism information-sharing across the entire federal government.⁴⁹ The NCTC also was authorized to “conduct strategic operational planning for counterterrorism activities, integrating all instruments of national power” and could assign roles and responsibilities to lead agencies.⁵⁰ Yet strategic operational planning was a vague and ill-defined concept, and the IRTPA further stated that the NCTC Director “may not direct the execution of counterterrorism operations.”⁵¹ To make matters even more complex, the NCTC Director reported to the DNI on

43. In addition to the National Intelligence Program budget, the two main Defense Department intelligence budgets are the Joint Military Intelligence Program and the Tactical Intelligence and Related Activities Program. Intelligence Reform and Terrorism Prevention Act § 1011(a); *see also* WMD COMMISSION REPORT, *supra* note 33, at 349 n.5.

44. Intelligence Reform and Terrorism Prevention Act § 1011(a).

45. *Id.* § 1018.

46. Exec. Order No. 13,354, 3 C.F.R. 214 (2005).

47. Intelligence Reform and Terrorism Prevention Act § 1021.

48. *Id.*

49. *Id.* § 1016(f).

50. *Id.* § 1021.

51. *Id.* § 1021.

intelligence matters but directly to the President on strategic operational planning.⁵²

Even with respect to the CIA, where the DNI arguably was given the most authority under the IRTPA,⁵³ the authorities of the DNI and DCIA appeared to overlap if not conflict. This problem was most acute regarding oversight of foreign intelligence relationships and covert action. The IRTPA authorized the DNI to “oversee the coordination of the relationships between elements of the intelligence community and the intelligence or security services of foreign governments.”⁵⁴ The IRTPA, however, also gave the same authorities to the DCIA, who had identical foreign intelligence coordination authorities “under the direction of the Director of National Intelligence.”⁵⁵ The nature of such “direction” was not defined, and it was unclear whether direction was intended to be at the level of operations or high-level guidance.

Furthermore, the original National Security Act of 1947 did not refer to covert action specifically but authorized the CIA “to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct.”⁵⁶ The IRTPA used similar language with respect to CIA authorities but added the phrase, “as the President or the Director of National Intelligence may direct.”⁵⁷ Separately, the DNI is authorized to “perform such other *functions* as the President may direct,”⁵⁸ and the IRTPA mandates that the DNI “shall ensure the effective execution of the annual budget for intelligence and *intelligence-related activities*.”⁵⁹ Like most of the IRTPA, this statutory language was vague. It was unclear whether the DNI’s covert action authorities were limited to approving budgets or extended to the conduct of operations.

52. *Id.* § 1021.

53. The IRTPA stated that the DCIA “shall report” to the DNI. The DCIA was the only intelligence community head to receive this explicit stipulation. *See* text accompanying note 37.

54. Intelligence Reform and Terrorism Prevention Act § 1011(a).

55. *Id.*

56. National Security Act of 1947, Pub. L. No. 80-235, § 102(d)(5), 61 Stat. 495. The phrase “other functions” has traditionally been interpreted to refer to covert action. Since then, the National Security Act has been amended to define covert action to mean “an activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.” 50 U.S.C. § 413(a), (b) (2006). These sections also outline the procedures by which the President approves and notifies Congress of covert action. *Id.* § 413(c).

57. Intelligence Reform and Terrorism Prevention Act § 1011(a) (emphasis added).

58. *Id.* (emphasis added).

59. *Id.* (emphasis added).

In attempting to prevent the intelligence failures associated with 9/11, the IRTPA also created a whole set of new questions. Amid the politically driven rush to pass legislation, opponents of intelligence reform had succeeded in limiting the DNI's authorities, or at least in creating sufficient legal uncertainty for agencies to challenge these authorities over time. Contrary to what the 9/11 Commission proposed, the IRTPA granted the DNI ambiguous control over intelligence community elements with respect to budget, personnel, information-sharing, and operations. It remained to be seen whether a DNI with these authorities was capable of changing how the intelligence community collects, analyzes, and disseminates critical national security information and whether the DNI could balance and shift resources among priority topics, emerging threats, and longer-term concerns.

B. A More Detailed Blueprint for Reform

Although the IRTPA became law in December 2004 and thus preempted the WMD Commission's recommendations, the Act's existence enabled the WMD Commission to analyze the intelligence community in greater detail. Informed by its findings on Iraq and other case studies of WMD programs and terrorist threats, the WMD Commission sought to interpret the IRTPA and consider how the new DNI structure might be able to function as an effective enterprise.

In a rather blunt letter to President Bush accompanying its final report in March 2005, the WMD Commission concluded that the intelligence community was "*dead wrong in almost all of its pre-war judgments about Iraq's weapons of mass destruction.*"⁶⁰ The Commission criticized the intelligence community's inability to collect adequate information on Iraq's WMD programs, which it attributed in part to uncoordinated collection strategies across different agencies and disciplines.⁶¹ For human intelligence information that was collected—most notably the now infamous case of "Curveball," the discredited key source on Iraq's supposed biological weapons capabilities—serious tradecraft and interagency coordination errors prevented critical uncertainties from passing between collectors and analysts as well as to policymakers.⁶² Analysts were not informed sufficiently about how key pieces of information were collected,⁶³ and even when they were aware, their analysis was

60. COMM'N ON THE INTELLIGENCE CAPABILITIES OF THE U.S. REGARDING WEAPONS OF MASS DESTRUCTION, LETTER OF TRANSMITTAL OF THE REPORT TO THE PRESIDENT OF THE UNITED STATES (2005) [hereinafter WMD COMMISSION LETTER OF TRANSMITTAL], available at http://www.gpoaccess.gov/wmd/pdf/transmittal_letter.pdf (emphasis added).

61. WMD COMMISSION REPORT, *supra* note 33, at 158-59, 166-68.

62. *Id.* at 80-111, 175-79.

63. For example, with respect to chemical weapons, analysts did not realize that the increase in observed activity associated with "Samarra-type" trucks stemmed in

seriously flawed.⁶⁴ Though the 9/11 Commission found a lack of imagination leading to an *underestimation* of the terrorist threat, the WMD Commission found a lack of analytical rigor that led to an *overestimation* of Iraq's weapons capabilities. Specifically, analysts were too wedded to their past assumptions about Iraq's nefarious intentions and thus overlooked information that did not conform to their preconceptions.⁶⁵

Beyond Iraq, the WMD Commission found similar flaws across the intelligence community with respect to the WMD programs of other countries and terrorist threats.⁶⁶ The WMD Commission's description of the U.S. counterterrorism effort post-9/11 mirrored the 9/11 Commission's analysis in a number of troubling respects. Although 9/11 had instilled a sense of urgency, the FBI, CIA, and defense intelligence elements were engaged in significant turf battles over which agency was in charge of collecting human intelligence at home and abroad.⁶⁷ These agencies also were engaged in a protracted struggle with the entity now known as the NCTC over conflicting responsibilities for terrorist threat analysis and warning.⁶⁸ In addition, the WMD Commission raised serious concerns about the extent to which the FBI and Department of Justice had reoriented their missions to collect intelligence with the goal of preventing as opposed to prosecuting terrorist attacks.⁶⁹

The WMD Commission's March 2005 report recommended a number of ways to strengthen the DNI's management of the intelligence community within the confines of the IRTPA. Specifically, it proposed that the DNI create "Mission Managers" to focus the intelligence community's resources on key areas in order to bridge the gaps between analysis and collection so evident in the Iraq WMD debacle.⁷⁰ It also recommended clarifying the NCTC's role⁷¹ and

part from increased imagery *collection* at facilities associated with these trucks. *Id.* at 125-26.

64. For example, with respect to nuclear weapons, analysts incorrectly assessed that Iraq's procurement of high-strength aluminum tubes was for nuclear centrifuges, when sounder technical analysis would have shown that the tubes were far more suitable for conventional rockets. *Id.* at 66-73.

65. *Id.* at 168-75.

66. The WMD Commission's Iran and North Korea studies were classified, but the Commission noted that the findings were incorporated into its overall recommendations. *Id.* at 305. In addition, the Letter of Transmittal stated that "we still know disturbingly little about the weapons programs and even less about the intentions of many of our most dangerous adversaries." WMD COMMISSION LETTER OF TRANSMITTAL, *supra* note 60.

67. WMD COMMISSION REPORT, *supra* note 33, at 468-71.

68. *Id.* at 288-94.

69. *Id.* at 452-56, 471-73.

70. *Id.* at 317-20.

71. *Id.* at 292-95.

establishing a dedicated service within the FBI that would integrate intelligence, counterintelligence, and counterterrorism functions into a strengthened domestic capability.⁷² In the area of personnel authorities, the WMD Commission described how the new DNI could break down stovepipes by requiring intelligence community employees to work in different agencies and familiarize themselves with interagency best practices.⁷³ The WMD Commission also offered a number of detailed proposals on how to harmonize conflicting efforts to share classified information across agencies through a combination of standardized security clearance policies, privacy guidelines, and coordinated investment in compatible data systems.⁷⁴

Of the WMD Commission's seventy-four recommendations, President Bush accepted seventy, and it became partly the DNI's responsibility to manage implementation of these far-reaching reforms.⁷⁵ The nation's first DNI, of course, was one of this Essay's authors, who was the first U.S. Ambassador to postwar Iraq when President Bush called him back to Washington and nominated him for the new position.⁷⁶

II. LAYING THE FOUNDATION FOR REFORMS

It is difficult to describe the scope of the challenge confronting the intelligence community in early April 2005. It was a challenge that we, the authors of this Essay, experienced on a personal level. The nation was bogged down in two wars. U.S. intelligence resources were stretched thin, between a regrouping al-Qaeda along the Afghanistan-Pakistan border and an evolving Iraqi insurgency that had become increasingly affiliated with al-Qaeda. The nuclear programs of Iran and North Korea loomed large, as did strategic concerns regarding Russia's resurgence and China's rise. The trauma stemming from 9/11 and the Iraq WMD fiasco had depleted intelligence community morale. Amidst these myriad challenges, the United States had passed legislation that mandated the largest reform of the U.S. intelligence community since the National Security Act of 1947, the President had directed additional

72. *Id.* at 465-68. The Commission also proposed a similar realignment of intelligence, counterterrorism, and counterintelligence functions at the Department of Justice. *Id.* at 471-73.

73. *Id.* at 321-26.

74. *Id.* at 432-44.

75. See Press Release, The White House, Bush Administration Actions To Implement WMD Commission Recommendations (June 29, 2005), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2005/06/WMD-Commission-Matrix-6-29-05.pdf>.

76. President Bush nominated John Negroponte to be the first Director of National Intelligence on February 17, 2005. He was confirmed by the Senate on April 21, 2005.

reforms based on the WMD Commission's recommendations, and the ODNI had minimal staff in temporary office space. Where to begin?

The first task was to recruit a team of seasoned professionals from across the national security establishment—people who understood the IRTPA and WMD Commission recommendations and who had spent decades in the military, law enforcement, and intelligence communities. Forming a core leadership team of deputies, lawyers, and senior staff was absolutely essential. It was this group that helped identify additional key personnel, such as other statutorily required positions,⁷⁷ and Mission Managers to coordinate collection and analysis on key topics, including counterterrorism, counterproliferation, counterintelligence, Iran, and North Korea.⁷⁸

The next step was framing the mission and articulating a vision for reform. The challenge lay in asserting control over skeptical intelligence community agencies while fostering a collaborative atmosphere. In other words, we needed to clarify the DNI's formal authorities but do so in a way that emphasized the goals of integration, information-sharing, and collaboration across agencies, not the DNI's desire to enforce a unified command structure. The ODNI staff set out to work within the confines of the IRTPA and not rush to change the imperfect legislation. The aim was to direct the required changes in intelligence practices but to accomplish that goal by empowering the intelligence agencies themselves to help lead the reform agenda.

The devil, of course, is always in the details. The ODNI was eager to forge relationships with the heads of all the intelligence agencies and their senior staffs, but it needed a support staff to help compile a basic list of names and phone numbers. The ODNI strived to connect directly with the intelligence community workforce through frequent speeches and other messages, but it initially lacked the personnel resources to formulate these speeches, transmit the messages, and even develop a website. The ODNI needed to assure our foreign intelligence partners that the U.S. intelligence community was as strong as ever, but it had no process for acquiring basic background information before meetings with key allies. The ODNI was saddled with numerous congressional reporting requirements mandated by the IRTPA, but it lacked the staff to write them. Just getting off the ground in the most basic sense demanded significant effort and time.

77. The IRTPA required the creation of a number of specific positions in the ODNI, including a Director of Science and Technology, Inspector General, and Civil Liberties Protection Officer. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a), 1078, 118 Stat. 3638.

78. The WMD Commission recommended the creation of Mission Managers, which the President endorsed. *See supra* note 70 and accompanying text. This guidance was rescinded, and the roles and authorities of Mission Managers were articulated more fully in December 2006. *See* OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NO. 900: MISSION MANAGEMENT (2006), available at http://www.dni.gov/electronic_reading_room/ICD_900.pdf.

The ODNI management team therefore needed to expand the size of the overall staff in order to fulfill its broad legislative mandate. With the passage of the IRTPA, the ODNI inherited about 1000 personnel from other areas of the intelligence community. For example, the CIA's Community Management Staff of roughly 500 employees became part of the ODNI,⁷⁹ as did the terrorism analysts at the NCTC. However, as the 9/11 and WMD Commissions had illustrated, these existing employees lacked the capacity to manage the intelligence community effectively. The IRTPA had authorized the ODNI to hire 500 additional personnel billets,⁸⁰ and many of these employees were hired during the ODNI's first two years. Critics later would charge that the ODNI usurped existing agencies or that it represented another layer of bureaucracy that did not provide added value. The ODNI's approximately 1500 personnel, however, represented less than one percent of intelligence community employees—a figure smaller than the staffs of any of the Defense Department's regional combatant commands or the U.S. embassies in Iraq, Mexico, and the Philippines, where one of the authors of this Essay had served as ambassador. Furthermore, the debate over the ODNI's size pales in significance to the critical functions of terrorism analysis, information-sharing, management of a multibillion dollar budget, and the DNI's other vast responsibilities. When viewed from that perspective the ODNI was neither a radical reform nor another large government bureaucracy; though it had the inefficiencies associated with any government office, it was designed to try to implement the IRTPA's mandated reforms with limited authorities.

Given the DNI's role as principal intelligence advisor to the President, one of the easiest things to influence was the quality of analysis served to the Commander-in-Chief. The ODNI revamped the President's Daily Brief (PDB), in terms of both process and substance. The WMD Commission had offered a harsh critique of the PDB articles on Iraq delivered to President Bush in the prelude to the Iraq war, as well as a general critique of how the process placed a burdensome demand on the CIA to produce daily updates at the expense of long-range analysis.⁸¹ The ODNI changed the process to ensure multiple intelligence agencies contributed to the PDB, which fostered collaboration, distributed the daily production burden, and encouraged agencies not accustomed to writing for the Oval Office to improve the quality of their product. The ODNI also reoriented the PDB to include more strategic analysis and occasionally augmented the briefing with "deep dives," in which top analysts would discuss their views with President Bush. In addition, the ODNI initiated weekly sessions on homeland threats to discuss recent terrorist activity and the U.S. response. Lastly, the ODNI arranged for the CIA Director to join the presidential briefing once per week in order to discuss pressing operational

79. Intelligence Reform and Terrorism Prevention Act § 1091.

80. *Id.* § 1096(b)(1).

81. See WMD COMMISSION LETTER OF TRANSMITTAL, *supra* note 60; WMD COMMISSION REPORT, *supra* note 33, at 181-82.

issues. All of these meetings with the President reinforced and often drove the DNI's intelligence reform agenda.

The next key task was delineating DNI authorities and developing the intelligence coordination mechanisms, policies, and procedures as mandated by the IRTPA and WMD Commission recommendations. Doing so, however, required rolling back layers upon layers of existing directives and other agreements that were signed under the then-DCI but now required harmonization with the IRTPA's provisions. In the summer of 2006, the ODNI issued its first Intelligence Community Directive to rescind outdated guidance and outline the ODNI's overarching management, budgetary, and personnel authorities; responsibilities for ensuring information-sharing, collection, and analysis; and the office's basic organizational structure and responsibilities of key officials.⁸²

Yet intelligence reform on paper is quite different from intelligence reform in practice. Although we had no choice but to invest a great deal of time in issuing various memoranda, it was the implementation of those directives that ultimately would determine the scope and pace of intelligence reform. Time and again, this focus on policies and plans, while necessary, resulted in an under-emphasis on how to change the way the intelligence community actually collects and analyzes information, which is more about people and technology than it is about the contents of a directive. The process of developing community-wide policy guidance provided opportunities to obtain agency buy-in to key elements of the reform agenda, but this preference for consensus delayed reforms and provided opportunities to challenge the DNI's authorities.

Given the 9/11 and WMD Commissions' harsh criticisms of the FBI, the Bureau's leadership was enthusiastic to chart a new course. ODNI staff worked closely with the FBI, Justice Department, and the White House on President Bush's June 2005 directive to create a National Security Branch (NSB) within the FBI.⁸³ Per the WMD Commission's recommendations, the NSB fused the FBI's intelligence, counterterrorism, and counterintelligence capabilities under a single Executive Assistant Director with streamlined budgetary and operational control. As outlined in the IRTPA, the DNI had concurrence in the appointment of this individual as well as control over the NSB budget portions

82. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NO. 1: POLICY DIRECTIVE FOR INTELLIGENCE COMMUNITY LEADERSHIP (2006), *available at* http://www.dni.gov/electronic_reading_room/ICD_1.pdf.

83. Memorandum on Strengthening the Ability of the Department of Justice to Meet Challenges to the Security of the Nation, 41 WEEKLY COMP. PRES. DOC. 1086 (June 28, 2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pdo4jy05_txt-10.pdf. The National Security Branch was initially described as a "National Security Service." The NSB structure was formally put in place that September and the new Executive Assistant Director was announced in October 2005. In June 2006, the FBI received notification that Congress had approved this structure.

funded by the National Intelligence Program. Although significant challenges remained—particularly in terms of linking the NSB to the fifty-six Field Intelligence Groups and over 100 Joint Terrorism Task Forces that the FBI had established across the United States⁸⁴—the FBI seized the opportunity to move further into the intelligence community's domain. The FBI detailed personnel to the ODNI and its entities, participated actively in DNI-led interagency discussions, and regularly responded to DNI tasking.

At the outset of the intelligence reform process, many believed that the Secretary of Defense would pose the largest challenge to the DNI's authorities. We did not find this to be the case in the early years of the ODNI. In November 2005, a Department of Defense directive strengthened the authorities of the Under Secretary of Defense for Intelligence (USDI) to serve as the Secretary of Defense's primary representative to the DNI as well as to exercise the Secretary's authority relative to Defense Department intelligence community elements.⁸⁵ The ODNI and USDI collaborated effectively on our first major budgetary issue: the decision to cancel funding for a portion of an expensive and poorly managed satellite program known as the Future Imagery Architecture.⁸⁶ With respect to information-sharing, the ODNI worked with the Defense Department to provide secret-level classified computer access to British, Canadian, and Australian military officials in Iraq.⁸⁷ Although implementing this effort was a slow and often frustrating process, compounded by the security concerns of other agencies that possessed data on the Defense Department's network, the ultimate success of this initiative demonstrated that the ODNI and Defense Department could forge an effective partnership.

With respect to the CIA, the DNI's overlapping authorities with the DCIA regarding foreign intelligence relationships and covert action required deconfliction.⁸⁸ Given all of the challenges on the ODNI's plate, however, these issues remained largely unresolved. One of the WMD Commission's findings

84. Linking the FBI headquarters to field components has always been the FBI's greatest challenge, and that is particularly true for the NSB. *See, e.g., Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. (2007) (statement of Willie T. Hulon, Executive Assistant Director, National Security Branch, Federal Bureau of Investigation).

85. DEP'T OF DEFENSE, DIRECTIVE NO. 5143.01: UNDER SECRETARY OF DEFENSE FOR INTELLIGENCE (USD(I)) (2005), available at <http://www.dtic.mil/whs/directives/corres/pdf/514301p.pdf>.

86. The details of this satellite program remain largely classified, but for a public account see, for example, Philip Taubman, *Death of Spy Satellite Program*, N.Y. TIMES, Nov. 11, 2007, at A1.

87. This effort remains largely classified, but former CIA Director Michael Hayden has described portions of it in David Kaplan & Kevin Whitlow, *Remaking U.S. Intelligence – Part I: Introduction*, U.S. NEWS & WORLD REP., Nov. 3, 2006, <http://www.usnews.com/usnews/news/articles/061103/3dni.intro.htm>.

88. *See supra* notes 53-55 and accompanying text.

with respect to Iraq was that U.S. intelligence agencies failed to coordinate effectively in the field, both with each other and with foreign intelligence services.⁸⁹ An issue of intensive discussion was whether to designate CIA Chiefs of Station as DNI Representatives abroad in order to improve intelligence coordination overseas. The CIA was willing to rename its Station Chiefs as “DNI Representatives,” but an outstanding question under the IRTPA was whether these DNI Representatives could be non-CIA officials. This issue was a bit of a tempest in a teapot, given that most CIA Station Chiefs performed magnificently overseas, so we chose not to fight this battle in the early years of the ODNI. Yet the issue would continue to fester and resurface years later.

As for management of covert action, here too the ODNI sought to sidestep and thus not clarify the ambiguities under the IRTPA. We chose not to engage in extensive bureaucratic debate over whether the DNI’s authority was limited to approving budgets for covert action or whether effective oversight required more than mere awareness of covert activities. The ODNI and the CIA instead settled on an informal understanding, whereby the ODNI was kept informed regularly of covert action issues and participated with the CIA in related discussions at the White House. Again, since this issue remained unresolved it would resurface in subsequent years.

All too often, U.S. intelligence reform is considered the goal in itself, as opposed to the means of achieving more concrete national security objectives. In order to align the DNI’s reform agenda more closely with desired goals, the ODNI issued the first National Intelligence Strategy in October 2005.⁹⁰ This document was relatively novel for an intelligence community that a former senior official described to the WMD Commission as “not so much poorly managed as unmanaged.”⁹¹ The strategy outlined key desired outcomes, such as counterterrorism and counterproliferation, and assigned ODNI elements to develop implementation plans. The strategy also described the supporting means needed to achieve these objectives, such as improved interagency collaboration on collection and analysis, and assigned implementation plans for these areas as well. In a directive issued in the summer of 2006, we explicitly tied these implementation plans to the budget process, thus ensuring that intelligence resources were directed more effectively at specific priorities.⁹²

89. The case of “Curveball”—who was in the custody of a foreign intelligence service—is illustrative of the need for stronger management of foreign intelligence relationships. See WMD COMMISSION REPORT, *supra* note 33, at 88-111.

90. OFFICE OF THE DIR. FOR NAT’L INTELLIGENCE, NATIONAL INTELLIGENCE STRATEGY OF THE UNITED STATES OF AMERICA: TRANSFORMATION THROUGH INTEGRATION AND INNOVATION (2005), available at <http://www.dni.gov/publications/NISOctober2005.pdf>.

91. WMD COMMISSION REPORT, *supra* note 33, at 18.

92. OFFICE OF THE DIR. FOR NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NO. 104: BUDGETING FOR INTELLIGENCE PROGRAMS 2 (2006), available at http://www.dni.gov/electronic_reading_room/ICD_104.pdf.

A. *Overcoming Bureaucratic Obstacles*

The NCTC naturally was assigned the implementation plan for counterterrorism, which was folded into a larger interagency review that demonstrated the Center's utility but revealed interagency resistance to the NCTC and the ODNI. As the first real test of the NCTC's IRTPA-mandated strategic operational planning capability, the Center managed the most comprehensive internal review of U.S. counterterrorism strategy since 9/11. Analysis revealed an al-Qaeda leadership structure in the Afghanistan-Pakistan border area that had been dealt a severe blow through operations led by the United States, resulting in key commanders being captured or killed in May and December 2005.⁹³ Yet the London train bombings of July 2005 demonstrated al-Qaeda's continued lethality, particularly its ability to recruit and train Western operatives for attacks in Europe. Al-Qaeda's violent ideology had spread in Europe and, perhaps most importantly, in Iraq. A critical intelligence success was the interception of a letter between core al-Qaeda leader Ayman al-Zawahiri and al-Qaeda in Iraq leader Abu Musab al-Zarqawi.⁹⁴ The letter confirmed the centrality of Iraq to al-Qaeda's overall agenda and outlined plans to expel U.S. troops and launch additional attacks against neighboring countries from a new terrorist hub in the Middle East.⁹⁵ The letter also revealed al-Qaeda in Iraq's commitment to fomenting chaos by inciting ethnic and religious violence—a strategy with which core al-Qaeda expressed discomfort.⁹⁶ Nonetheless, the bombing of a venerated Shi'a mosque in Samarra, Iraq in February 2006, initiated a series of violent sectarian reprisals that advanced al-Qaeda in Iraq's agenda. These analytic insights formed the basis for a new National Intelligence Estimate on global terrorism, which the ODNI published

93. In May 2005, Abu Faraj al-Libbi, the third most senior member of al-Qaeda, was captured in Pakistan. The White House later acknowledged that he was taken into CIA custody. In December 2005, senior al-Qaeda external operations planner Hamza Rabia was killed in Pakistan. Press Release, The White House, Fact Sheet: Keeping America Safe from Attack (May 23, 2007), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070523.html>.

94. See OFFICE OF THE DIR OF NAT'L INTELLIGENCE, ODNI NEWS RELEASE NO. 2-05 (2005), http://www.dni.gov/press_releases/20051011_release.htm (citing letter from Ayman al-Zawahiri to Abu Musab al-Zarqawi (released Oct. 11, 2005)), available at http://fas.org/irp/news/2005/10/letter_in_english.pdf.

95. *Id.*

96. *Id.* Zawahiri expressed discomfort with Zarqawi's killing of Iraqi Shi'a, not because they were undeserving but because many other Muslims questioned this tactic. However, Zarqawi continued this campaign of ethno-sectarian violence in Iraq quite effectively until his death in June 2006.

and briefed to the President in April 2006.⁹⁷ That document was an insightful piece of collaborative analysis; it effectively communicated uncertainties and demonstrated how some analysts had internalized lessons learned from the Iraq WMD episode.

Despite the NCTC's facilitating refined analysis of the terrorist threat, its ability to dictate the intelligence community response was less certain. The interagency review had uncovered continued competition and redundancy across the intelligence community with respect to terrorism analysis. Even though alternative and competitive analyses can foster a healthy diversity of viewpoints, unnecessary redundancy wastes limited analytic resources.⁹⁸ In particular, analysts across agencies in the intelligence community were conducting strategic analysis on al-Qaeda's plans and intentions in the Afghanistan-Pakistan border area. But the NCTC needed to ensure both adequate coverage of key regions and a proper balance of analytic resources focused on strategic issues, specific tactical threat streams to enable overseas operations, and threats to the U.S. homeland. Under the DNI's direction and consistent with IRTPA authorities, the NCTC proposed detailing a number of terrorism analysts from across the intelligence community to the NCTC. The Center also proposed counterterrorism "lanes in the road" that would delineate the key areas of focus among agencies.

Other intelligence agencies initially expressed concern about detailing analysts to the NCTC and accepting direction regarding the scope of terrorism analysis. Citing aforementioned vagaries in the IRTPA legislation,⁹⁹ these agencies argued that the NCTC and the ODNI had exceeded their statutory authorities. They emphasized that the IRTPA established the DNI as a coordinator of intelligence activities, not the manager of specific intelligence activities within agencies. They also highlighted that the Director of the NCTC was prohibited from conducting counterterrorism operations. Yet the IRTPA mandated that the NCTC was the primary organization in the U.S. government for analyzing and integrating terrorism intelligence.

The arguments of other intelligence agencies were not without their merits. These agencies had deep and storied histories. They had undertaken highly sensitive and successful intelligence activities without DNI oversight. This agency-centric mindset, however, was inconsistent with the vision of an integrated intelligence community that Congress endorsed. Despite the IRTPA's flaws, we needed to work within the IRTPA's mandates to make the DNI structure as effective as possible. The NCTC eventually expanded the size of its analytical cadre and sought to manage the types of terrorism analysis conducted in different agencies.

97. OFFICE OF THE DIR OF NAT'L INTELLIGENCE, DECLASSIFIED KEY JUDGMENTS OF THE NATIONAL INTELLIGENCE ESTIMATE "TRENDS IN GLOBAL TERRORISM: IMPLICATIONS FOR THE UNITED STATES" (2006) [hereinafter DECLASSIFIED NIE].

98. See, e.g., WMD COMMISSION REPORT, *supra* note 33, at 292-94.

99. See *supra* notes 49-51 and accompanying text.

Although it would be a mistake to read too much into the subsequent developments, there is no doubt that the intelligence community became more accepting of the DNI's leadership, that NCTC gained more prominence, and that the overall counterterrorism effort became more collaborative. Abu Musab al-Zarqawi was killed in June 2006 through an innovative and coordinated intelligence effort, putting out of business one of al-Qaeda's most lethal terrorists in Iraq.¹⁰⁰ That same month, President Bush approved the NCTC's National Implementation Plan.¹⁰¹ The highly classified plan integrated all elements of national power, disaggregated the terrorist threat into its multiple facets—diplomatic, military, intelligence, law enforcement, homeland security, and finance—and each category contained detailed operational objectives with lead and supporting agencies assigned. The document itself was rather unwieldy, but it represented a nearly year-long interagency process that had forged a sense of unity among elements of the counterterrorism community.

This shared sense of purpose and (at least tacit) acceptance of the NCTC's coordination role enabled the intelligence community to detect and disrupt al-Qaeda's transatlantic airline plot in August 2006. It is difficult to underestimate the significance of this attempted attack, which is often overlooked amidst current discussions about the intelligence community's effectiveness. Very much in line with the NCTC's ongoing analysis of the shifting threat, al-Qaeda's core leadership in the Afghanistan-Pakistan border area tapped into an existing network of radicalized British citizens to execute their most ambitious plot since 9/11: the simultaneous detonation of multiple passenger airplanes bound for the United States using liquid explosives.¹⁰² The British Secret Service learned of the potential plot during the course of a long-term investigation, but, when it became clear in the summer of 2006 that the target of the attack might be the United States,¹⁰³ the NCTC helped lead a focused interagency effort to assist the British and uncover additional details. The CIA, the FBI, and the National Security Agency (NSA) were in constant, real-time communication with their British counterparts, and we briefed the President on a daily basis.

100. Press Release, U.S. Embassy in Iraq, Statement by the President on the Death of Abu Musab al-Zarqawi (June 8, 2006), *available at* http://iraq.usembassy.gov/iraq/20060608_bush_zarqawi.html.

101. The details of the plan remain classified, but a slightly more detailed description is contained in Karen DeYoung, *A Fight Against Terrorism—and Disorganization*, WASH. POST, Aug. 9, 2006, at A01.

102. For an unclassified summary of available information on this attack, see NEFA FOUND., *BOJINKA II: THE TRANSATLANTIC LIQUID BOMB PLOT* (2008), *available at* <http://www.nefafoundation.org/miscellaneous/FeaturedDocs/Bojinka2LiquidBombs.pdf>.

103. Press Release, Dep't of Homeland Security, Remarks by Homeland Security Secretary Michael Chertoff, United States Attorney General Alberto Gonzales, FBI Director Robert Mueller, and Assistant Secretary for TSA Kip Hawley (Aug. 10, 2006), *available at* http://www.dhs.gov/xnews/releases/pr_1158349691914.shtm.

As evidence emerged of a highly sophisticated, nascent attack on transatlantic airlines, the NCTC and the White House Homeland Security Council held regular meetings (often virtual videoconferences) to discuss our evolving knowledge of the plot. The NCTC worked with the FBI and the Department of Homeland Security on the domestic dimensions of the plot, including any ties the suspects had to the United States and what transportation security measures to implement. The NCTC also worked with the CIA and the NSA on foreign dimensions, particularly as it became clear that the plotters received logistical and financial support from al-Qaeda operatives in Pakistan. The resulting British and Pakistani arrests exemplified interagency coordination at its best—the type of integrated intelligence community the IIRTPA sought to create.

The intelligence community's understanding of the evolving terrorist threat also influenced heavily the Bush Administration's decision to surge troops into Iraq in January 2007. The April 2006 National Intelligence Estimate on Trends in Global Terrorism noted how the Iraqi insurgency had morphed into a "cause célèbre" for jihadists, "shaping a new generation of terrorist leaders and operatives."¹⁰⁴ Reports from intelligence community elements in Iraq painted a bleak picture of escalating sectarian violence bordering on civil war. The ODNI and the CIA both communicated these views to the President, which helped initiate a wide-ranging interagency review of U.S. strategy in Iraq beginning in the fall of 2006. As part of this review, the intelligence community provided regular analysis to the National Security Council regarding the changing nature of the insurgency, the ability to train Iraqi army and police officers, and the likelihood of the Iraqi government achieving political reconciliation at the national level. These analyses formed the basis of the January 2007 National Intelligence Estimate on Iraq—an important piece of analysis that framed the Iraq challenge extremely well.¹⁰⁵ President Bush's decision to implement the "surge" in Iraq and the subsequent improvements in security can be attributed in part to the sound intelligence analysis that underpinned the strategic decision.

At the beginning of 2007, the intelligence community's progress very much remained a mixed picture, with signs of promise but just as many outstanding questions. The ODNI had set up its own office and initiated the most basic structural reforms in accordance with the IIRTPA and WMD Commission recommendations, but the actual effects of these reforms—such as the FBI's National Security Branch—remained to be seen. The ODNI had issued new policy guidance on coordinated collection, analytic standards, and personnel policies, but these initiatives had yet to progress much beyond their initial stages. Structural and policy changes lay an important foundation for reform,

104. DECLASSIFIED NIE, *supra* note 97, at 2.

105. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, PROSPECTS FOR IRAQ'S STABILITY: A CHALLENGING ROAD AHEAD (2007), available at http://www.dni.gov/press_releases/20070202_release.pdf.

but they had not achieved any sort of enduring cultural change beyond strong personal relationships among key intelligence officials.

The NCTC had demonstrated its ability to help the intelligence community adapt to the evolving terrorist threat relating to Europe and Iraq. The Center facilitated information-sharing, helped disrupt a key attempted attack, and developed a new interagency plan for action. Yet it was not clear at that time whether the NCTC would be able to implement its strategy, direct further changes to the counterterrorism community, and just as easily anticipate and respond to future threats. Although the quality of intelligence analysis had improved greatly through a strengthened National Intelligence Estimate and President's Daily Brief process, here too the improved product stemmed more from the personal efforts of senior analysts than from fundamental changes in how many analysts performed their work.

Perhaps the greatest disappointment was the lack of attention devoted to other important intelligence reform issues, given pressing day-to-day national security matters. Key challenges loomed large on the horizon, such as bringing the Defense Department intelligence agencies further into the DNI structure, implementing personnel and information sharing directives, and clearing up continued issues with the CIA regarding overlapping authorities. Meanwhile, Congress had begun to escalate its attacks on the ODNI and called for a reduction in its budget and personnel.

B. Further Reforms and Lingering Challenges

With our departure from the ODNI and move to the State Department in early 2007, the new DNI, retired Vice Admiral Mike McConnell, had an excellent opportunity to reenergize the intelligence reform effort. He issued an ambitious "100 Day Plan" to accelerate reform in a number of key areas, including information-sharing and relations with the Department of Defense.¹⁰⁶

The ODNI undertook a number of key reforms to synchronize its relationship more closely with the Department of Defense. First, as part of an office-wide reorganization, the DNI "dual-hatted" the Under Secretary of Defense for Intelligence as a new Deputy DNI for Defense Intelligence.¹⁰⁷ Though this step may have appeared largely symbolic, it helped streamline the relationship between the DNI and the Secretary of Defense. The ODNI took steps to clarify its budgetary acquisition authorities with the Defense Department, creating a new Deputy DNI for Acquisition and issuing revised

106. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, UNITED STATES INTELLIGENCE COMMUNITY (IC) 100 DAY PLAN FOR INTEGRATION AND COLLABORATION (2007), available at http://www.dni.gov/100-day-plan/100_day_plan.pdf.

107. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, ODNI NEWS RELEASE NO. 16-07, UNDER SECRETARY OF DEFENSE FOR INTELLIGENCE TO BE DUAL-HATTED AS DIRECTOR OF DEFENSE INTELLIGENCE (2007), available at http://www.dni.gov/press_releases/20070524_release.pdf.

policy guidance to streamline the process.¹⁰⁸ In addition, the ODNI strengthened the so-called “joint duty” program, issuing revised guidance to require intelligence community employees to undertake an assignment outside their “home” agency before being promoted to the next level.¹⁰⁹ Despite these best efforts, however, the ODNI was still limited by the ambiguous IRTPA legislation. In February 2008, before the Senate Select Committee on Intelligence, the DNI lamented:

[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.¹¹⁰

The DNI also devoted much-needed attention but continued to encounter obstacles with respect to information-sharing policies. In October 2007, President Bush issued the first National Strategy for Information Sharing.¹¹¹ The Strategy codified the goals of an ongoing multi-year effort to improve the flow of terrorist and other critical intelligence information within the federal government, as well as with state, local, and tribal governments, the private sector, and foreign partners. Yet the strategy also reflected the fact that disparate sharing efforts within the intelligence community and across the federal government still remained loosely coordinated. The NCTC, the FBI, and the Department of Homeland Security continued to disagree over responsibilities for sharing threat information with state and local officials.¹¹² Security classification and clearances remained the most serious impediments to sharing,

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108. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY POLICY GUIDANCE NO. 801.1: ACQUISITION (2007), *available at* http://www.dni.gov/electronic_reading_room/ICPG_801_1.pdf.
109. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY POLICY GUIDANCE NO. 601.1: INTELLIGENCE COMMUNITY CIVILIAN JOINT DUTY IMPLEMENTING INSTRUCTIONS (2007), *available at* http://www.dni.gov/electronic_reading_room/ICPG_601_1.pdf. This policy guidance built upon an earlier directive. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NO. 601, HUMAN CAPITAL JOINT INTELLIGENCE COMMUNITY DUTY ASSIGNMENTS (2006), *available at* http://www.dni.gov/electronic_reading_room/ICD_601.pdf.
110. *Statutory Authorities of the Director of National Intelligence: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. (2008).
111. Press Release, The White House, Fact Sheet: National Strategy for Information Sharing (Oct. 31, 2007), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2007/10/20071031-10.html>.
112. See Mike Levine, *White House Wades into Terror Intel Dispute Between FBI, Homeland Security*, FOXNEWS.COM, Dec. 17, 2009, <http://www.foxnews.com/politics/2009/12/16/white-house-intervenes-dispute-fbi-homeland-security/>; *supra* text accompanying note 48.

and the ODNI took steps to standardize these rules with respect to information about U.S. persons,¹¹³ certification of information technology systems,¹¹⁴ and access to sensitive compartmented information.¹¹⁵ Given the desire to share threat information widely since 9/11, however, the biggest problem facing the intelligence community had become the problem of *too much information*, not too little. Analysts now struggled to sort through large amounts of data to determine their significance, and the “data-mining” technology to do this was not well-developed.

With respect to analysis, the ODNI also issued further guidelines in June 2007 to ensure that analytic products met rigorous tradecraft expectations across the intelligence community.¹¹⁶ As evidence that policy documents alone do not alleviate tradecraft errors, however, the DNI’s own National Intelligence Council issued a new estimate on Iran’s nuclear program in December 2007 to widespread criticism.¹¹⁷ The estimate made a major public splash with its “high confidence” judgment that, “in the fall of 2003, Tehran halted its nuclear weapons program.”¹¹⁸ In a footnote reminiscent of those voicing interagency disagreement in the infamous Iraq WMD estimate, the Iran estimate defined “nuclear weapons program” to exclude “Iran’s declared civil work related to uranium enrichment” and its missile delivery systems.¹¹⁹ Prominent experts objected to this narrow definition of “nuclear weapons program,” given that many analysts believed Iran to be developing a so-called “break-out capability,”

113. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NO. 102: PROCESS FOR DEVELOPING INTERPRETIVE PRINCIPLES AND PROPOSING AMENDMENTS TO ATTORNEY GENERAL GUIDELINES GOVERNING THE COLLECTION, RETENTION, AND DISSEMINATION OF INFORMATION REGARDING U.S. PERSONS (2007), available at http://www.dni.gov/electronic_reading_room/ICD_102.pdf.

114. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NO. 503: INTELLIGENCE COMMUNITY INFORMATION TECHNOLOGY SYSTEMS SECURITY: RISK MANAGEMENT, CERTIFICATION AND ACCREDITATION (2008), available at http://www.dni.gov/electronic_reading_room/ICD_503.pdf.

115. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NO. 704: PERSONNEL SECURITY STANDARDS AND PROCEDURES GOVERNING ELIGIBILITY FOR ACCESS TO SENSITIVE COMPARTMENTED INFORMATION AND OTHER CONTROLLED ACCESS PROGRAM INFORMATION (2008), available at http://www.dni.gov/electronic_reading_room/ICD_704.pdf.

116. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY DIRECTIVE NO. 203: ANALYTIC STANDARDS (2007), available at http://www.odni.gov/electronic_reading_room/ICD_203.pdf.

117. OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, NATIONAL INTELLIGENCE COUNCIL, IRAN: NUCLEAR INTENTIONS AND CAPABILITIES (2007), available at http://www.odni.gov/press_releases/20071203_release.pdf.

118. *Id.* at 6.

119. *Id.*

through which the civilian nuclear and missile programs progress to a point just shy of weaponization, allowing the country to build a bomb quickly.¹²⁰ Still others claimed that analysts had politicized the estimate by hyping intelligence that appeared to diminish the Iranian threat, thereby limiting the Bush Administration's ability to take military action against Iran.¹²¹ Testifying before Congress that same month, the DNI acknowledged that in retrospect he "probably would have changed a thing or two" about the phrasing of the unclassified key judgment.¹²² The Obama Administration's February 2009 revelation that Iran had in fact been conducting undeclared uranium enrichment activities provided further evidence that the 2007 estimate had failed to communicate requisite uncertainty.¹²³

Building upon the National Intelligence Strategy of 2005, the DNI further formalized the intelligence community's strategic planning process, issuing a status report at the end of 100 days as well as an ambitious "500 Day Plan" to guide the reform effort to the end of the Bush Administration.¹²⁴ Again, however, the DNI encountered obstacles, not just from agencies resistant to reform, but also from Congress, which attempted to limit the DNI's resources. Since the passage of the IRTPA, there has been significant tension between the ODNI and congressional oversight committees, most notably the House Permanent Select Committee on Intelligence. Congress has questioned the growing size of the DNI's office and whether the organization creates added

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120. See, e.g., Leonard S. Spector, James Martin Ctr. for Nonproliferation Studies, Iranian Nuclear Program Remains Major Threat Despite Partial Freeze of Weapons-Relevant Activities Described in New U.S. National Intelligence Estimate (Dec. 6, 2007), <http://cns.miis.edu/stories/071206.htm>.
121. See, e.g., John R. Bolton, Op-Ed., *The Flaws in the Iran Report*, WASH. POST, Dec. 6, 2007, at A29; Henry Kissinger, Op-Ed., *Misreading the Iran Report*, WASH. POST, Dec. 13, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/12/AR2007121202331.html>.
122. *Current and Projected Threats to the National Security: Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 77 (2008) (statement by Michael McConnell, Director of National Intelligence).
123. Press Release, White House, Statements by President Obama, French President Sarkozy, and British Prime Minister Brown on Iranian Nuclear Facility (Sept. 25, 2009), available at http://www.whitehouse.gov/the_press_office/Statements-By-President-Obama-French-President-Sarkozy-And-British-Prime-Minister-Brown-On-Iranian-Nuclear-Facility/.
124. OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, UNITED STATES INTELLIGENCE COMMUNITY (IC) 100 DAY PLAN FOR INTEGRATION AND COLLABORATION: FOLLOW-UP REPORT (2007), available at http://www.dni.gov/100-day-plan/100_FOLLOW_UP_REPORT.pdf; OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, UNITED STATES INTELLIGENCE COMMUNITY (IC) 500 DAY PLAN: INTEGRATION AND COLLABORATION (2007), available at <http://www.dni.gov/500-day-plan.pdf>.

value in the intelligence community.¹²⁵ Somewhat hypocritically, Congress has disparaged successive DNIs both for having too many staff members and for not asserting a more direct managerial role over intelligence community functions.¹²⁶ In response, ODNI officials have emphasized the need for sufficient personnel to assume the management role desired by Congress and to focus on long-term challenges in addition to daily tactical requirements. As previously mentioned, the approximately 1500 employees in the ODNI is a small size compared to the vast responsibilities mandated by the IRTPA and the overall size of the intelligence community.

Congress leveled these criticisms against the ODNI as the al-Qaeda threat became more diffuse, requiring greater resources on the part of the NCTC. By 2008, al-Qaeda had begun to rejuvenate along the Afghanistan-Pakistan border area due in part to failed Pakistani efforts to negotiate a truce with militants in the Federally Administered Tribal Areas. As Iraq began to stabilize somewhat due to the increased U.S. military presence, the intelligence community also surged to support expanded counterterrorism operations in the Afghanistan-Pakistan border regions. Yet the more al-Qaeda's central leadership faced pressure in Afghanistan and Pakistan, the more it sought to reestablish ties and leverage regional extremists in other ungoverned areas, including Yemen, North Africa, and East Africa. This ever-shifting terrorist threat was difficult to track with finite analytic resources and limited NCTC authority to reduce unnecessary redundancy across the intelligence community in order to achieve full coverage of all threats.

In the last year of the Bush Administration, the ODNI wisely sought to codify its existing authorities and responsibilities through an executive order. Despite the IRTPA's provisions, the intelligence community still technically was governed by a Reagan-era executive order that did not even mention the DNI's existence.¹²⁷ A revision of that order potentially could clarify the DNI's authorities, but it also threatened to unleash the same interagency disagreements. What ensued was a spirited year-long debate among intelligence community elements under the direction of the National Security Council, which culminated in a new executive order issued in July 2008.¹²⁸ The new order reiterated many of the DNI's IRTPA authorities but strengthened them in other key respects. First, the executive order went beyond the IRTPA in granting the DNI a voice in the removal of other intelligence community heads, as opposed to only concurrence in their appointments.¹²⁹ Second, the order helped clarify

125. See, e.g., H.R. REP. NO. 109-411 (2006).

126. See, e.g., H.R. REP. NO. 110-131 (2006); Walter Pincus, *Intelligence Director Urged To Take Charge*, WASH. POST, May 11, 2007, at A04.

127. See *supra* note 20 and accompanying text.

128. Exec. Order No. 13,470, 3 C.F.R. 218 (2009) [hereinafter E.O. 13,470].

129. For the DCIA, the DNI may recommend removal to the President. For other heads of intelligence elements, the DNI and the relevant department head must

overlapping authorities with the CIA by stating that the DNI “shall align and synchronize intelligence and counterintelligence foreign relationships.”¹³⁰ The order also iterated that the DNI “shall oversee and provide advice to the President and the NSC with respect to all ongoing and proposed covert action programs.”¹³¹ Finally, although the executive order reiterated the problematic IRTPA language that the DNI shall not “abrogate the statutory responsibilities” of department heads and the DCIA,¹³² the document provided a streamlined review process for quickly appealing departmental objections to the President.¹³³ These reforms were important and helped solidify the DNI’s leadership within the intelligence community, at least on paper.

Nevertheless, the executive order still left key questions unanswered regarding the ODNI’s relationship with the CIA and the NCTC’s authority over other elements of the intelligence community. For example, although the order clarified the DNI’s authorities over foreign intelligence relationships, it did not address the issue of whether DNI Representatives overseas could be officials other than the CIA Chiefs of Station. Moreover, while the order clarified the DNI’s covert action oversight authorities, it did not specify whether oversight required detailed insight and approval of specific operations. Furthermore, even though the DNI was authorized to “manage and direct the tasking, collection, analysis, production, and dissemination” of intelligence across the community,¹³⁴ it was not clear whether the NCTC had such explicit authority.

III. PRESIDENT OBAMA’S TROUBLING INHERITANCE

Unlike in 2004, intelligence reform did not factor heavily in the 2008 presidential campaign. President Obama and most of his top aides therefore had minimal exposure to the matter before assuming office. While President Obama retained a number of key officials in leadership positions throughout the intelligence community,¹³⁵ he replaced two of the most seasoned intelligence

consult on removal and, if the position requires presidential appointment, may recommend removal to the President. E.O. 13,470 § 2(1.3)(e).

130. *Id.* § 2(1.3)(b)(4)(C).

131. *Id.* § 2(1.3)(b)(3).

132. *See supra* note 45.

133. E.O. 13,470 § 2(1.3)(c). Of note, by specifying that the appeals process applied to “any department head whose department contains an element of the Intelligence Community,” the order appeared to exclude the CIA—which is an agency, not a department—from having appeals rights similar to full-fledged departments. Notwithstanding this stipulation, however, the CIA apparently still appealed to the White House regarding the ODNI’s subsequent efforts to appoint the senior intelligence community official in each country overseas. *See infra* note 141.

134. E.O. 13,470 § 2(1.3)(b)(17).

135. Most notably the Under Secretary of Defense for Intelligence, the Deputy Director of CIA, and the Director of the NCTC.

professionals in the business, DNI Mike McConnell and DCIA Mike Hayden. This decision was perplexing given one of the incoming White House's only intelligence-related policy proposals during the campaign, best articulated in the "Blueprint for Change" document of February 2008:

Getting Politics out of Intelligence. Obama and Biden will insulate the Director of National Intelligence from political pressure by giving the DNI a fixed term, like the Chairman of the Federal Reserve. Obama and Biden will seek consistency and integrity at the top of our intelligence community – not just a political ally.¹³⁶

Although it received minimal coverage on the campaign trail, this important proposal could have been advanced by retaining the DNI and DCIA—both career intelligence officers—during the political transition. Moreover, the 9/11 Commission documented how the turnover in national security personnel during the transition between the Clinton and Bush Administrations contributed to the lack of decisive action against al-Qaeda prior to 9/11.¹³⁷ For the Obama Administration, leadership continuity could have been helpful in terms of fostering stability in an intelligence community that has been saddled with scandals, investigations, and reorganizations for most of the past decade. The first year of the Obama Administration saw revived disagreements among the ODNI, Congress, and other intelligence community elements and an evolving al-Qaeda threat to the homeland that culminated in the attempted Christmas Day bombing in 2009.

In June 2009, the Intelligence Authorization Act of 2010 passed the House Intelligence Committee.¹³⁸ Although the details of the intelligence budget are classified, NCTC Director Michael Leiter subsequently has confirmed that the bill included deep staffing cuts to the ODNI and the NCTC.¹³⁹ The bill was not considered on the House floor, but reportedly there were discussions about how the NCTC would absorb cuts of up to twenty percent in certain mission areas, including the watch-listing personnel that would come under much scrutiny following the Christmas Day bombing attempt.¹⁴⁰ These potential personnel cuts reflected the ODNI's ongoing dispute with Congress over the office's size and mandate. Time will tell whether the attempted Christmas bombing may have vindicated the ODNI's position.

These recurring resource disagreements with Congress occurred against the backdrop of reported disagreements between the new DNI Dennis Blair and

136. BLUEPRINT FOR CHANGE: OBAMA AND BIDEN'S PLAN FOR AMERICA 74 (2008), available at <http://www.barackobama.com/pdf/ObamaBlueprintForChange.pdf>.

137. 9/11 COMMISSION REPORT, *supra* note 3, at 198-214.

138. Intelligence Authorization Act for Fiscal Year 2010, H.R. 2701, 111th Cong. (2009).

139. *Flight 253: Learning Lessons from an Averted Tragedy: Hearing Before the H. Comm. on Homeland Security*, 111th Cong. (Jan. 27, 2010) (statement of Michael E. Leiter, Director, National Counterterrorism Center).

140. *Id.*

DCIA Leon Panetta over their respective authorities regarding foreign intelligence relationships and management of covert action. Although the details remain classified, it appears that both the ODNI and the CIA viewed the transition to a new administration as an opportunity to revive bureaucratic grievances: for the ODNI, an opportunity to assert clear direction over covert action and the appointment of DNI Representatives abroad; and for the CIA, an opportunity to resist DNI authority and reestablish its operational independence and direct line to the White House. Press reports indicate that in May 2009 the ODNI sought to exert its authority under the IRTPA and Executive Order 13,470 to appoint the senior intelligence community official in each country overseas and to establish a clearer management role over covert action and other sensitive intelligence operations. The CIA resisted, likely citing the aforementioned lack of legal clarity on both issues, and brought the matter to the White House.¹⁴¹ According to press accounts, and perhaps unsurprisingly, the dispute festered for more than six months, despite the personal interventions of the National Security Advisor and the Vice President.¹⁴² As reported in December 2009, the National Security Advisor issued a memo clarifying that CIA Chiefs of Station would serve as DNI Representatives abroad and that the CIA would maintain a direct line of communication to the White House on covert action while keeping the DNI informed.¹⁴³ Though there is no evidence that this dispute hindered any intelligence-sharing or operations, the outcome appeared to limit the DNI's authority, and, at the very least, it wasted time and resources that could have been spent on other reform efforts. The WMD Commission had warned in the letter to President Bush accompanying its final report that: "Sooner or later, [other intelligence agencies] will try to run around—or over—the DNI. Then, only [the President's] determined backing will convince them that we cannot return to the old ways."¹⁴⁴

By ruling in favor of the sub-Cabinet level DCIA, the White House dealt a political setback to the Cabinet-level DNI and the intelligence reform effort in general. As the DNI-CIA dispute continued, so too did al-Qaeda's decentralization and expansion beyond the Afghanistan-Pakistan border area.

141. Mark Mazetti, *Turf Battles on Intelligence Post Test for Spy Chiefs*, N.Y. TIMES.COM, June 9, 2009, <http://www.nytimes.com/2009/06/09/us/politics/09intel.html>. Moreover, that the CIA was able to appeal an ODNI policy to the White House at all seemed to undermine the DNI's authorities under Executive Order 13,470 § 2(1.3)(c). The appeals process in the order arguably excluded the CIA—which is an agency, not a department—from having appeals rights similar to full-fledged departments. See *supra* note 133.

142. Posting of Mark Hosenball to Declassified, <http://blog.newsweek.com/blogs/declassified/archive/2009/10/19/even-biden-can-t-resolve-endless-spy-squabble.aspx> (Oct. 19, 2009, 11:00 EDT).

143. Greg Miller, *A White House Intervention for Bickering Leaders of U.S. Intelligence*, L.A. TIMES, Dec. 28, 2009, available at <http://articles.latimes.com/2009/dec/29/nation/la-na-cia-dispute29-2009dec29>.

144. WMD COMMISSION LETTER OF TRANSMITTAL, *supra* note 60.

President Obama reportedly has continued—and even expanded—the Bush Administration’s policy of robust counterterrorism operations in Pakistan, dealing a series of lethal blows to al-Qaeda, the Taliban, and their affiliates.¹⁴⁵ To compensate for these setbacks, the al-Qaeda leadership increasingly has relied on its ideology and relations with regional extremist groups to inspire rather than direct specific terrorist attacks. Even though al-Qaeda likely continues to plan spectacular attacks on the scale of 9/11 and the 2006 transatlantic airline plot, its affiliates also appear to have encouraged smaller-scale attacks within the United States that still sow fear and attract publicity. This assessment is not based on any classified information, but rather on our understanding of a new wave of terrorist attacks directed at the homeland beginning in the summer of 2009.

In June 2009, a male citizen of Memphis who now claims ties to al-Qaeda in the Arabian Peninsula (AQAP)—the regional al-Qaeda off-shoot based in Yemen—allegedly shot two soldiers outside a military recruiting station in Arkansas.¹⁴⁶ In September 2009, the FBI arrested legal Denver resident Najibullah Zazi for an alleged al-Qaeda plot to bomb New York City.¹⁴⁷ These captures led to a series of other arrests and allegedly uncovered an al-Qaeda support network in the United States.¹⁴⁸ The Zazi arrest likely factored into President Obama’s decision to visit the NCTC in October, thank the Center for its hard work and dedication, and urge it to remain vigilant in the face of evolving threats.¹⁴⁹ Later that month, federal authorities in Chicago disclosed arrests and unsealed complaints against Chicago-based U.S. citizen David Headley and associates, accusing them of supporting a Pakistani militant group in the November 2008 terrorist attacks in Mumbai, India and aiding the murder of U.S. citizens.¹⁵⁰ In November, U.S. Army Major Nidal Hasan opened fire at the Fort Hood military base in Texas, killing thirteen people. Hasan allegedly

145. See, e.g., Bill Roggio & Alexander Mayer, *Charting the Data for US Airstrikes in Pakistan, 2004-2010*, LONG WAR J. (2010), <http://www.longwarjournal.org/pakistan-strikes.php> (updating continuously after each strike in Pakistan).

146. James Dao, *Man Claims Terror Ties in Little Rock Shooting*, N.Y. TIMES, Jan. 22, 2010, at A13.

147. Brief of Petitioner at 2, *Unites States v. Zazi*, No. 09-663 (E.D.N.Y. Sept. 24, 2009).

148. Press Release, Fed. Bureau of Investigation, Three Arrested in Ongoing Terror Investigation (Sept. 20, 2009), available at http://www.fbi.gov/pressrel/pressrelog/zazi_092009.htm.

149. Press Release, White House, Remarks by the President at the National Counterterrorism Center (Oct. 6, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-the-National-Counterterrorism-Center/.

150. Press Release, Dep’t of Justice, Chicagoan Charge with Conspiracy in 2008 Mumbai Attacks in Addition to Foreign Terror Plot in Denmark (Dec. 7, 2009), available at <http://www.justice.gov/opa/pr/2009/December/09-nsd-1304.html>.

communicated with a radical cleric in Yemen associated with AQAP prior to the shooting.¹⁵¹

In a December 2009 op-ed in the *Washington Post*, DNI Blair praised the Zazi and Headley arrests as evidence of a “new level of cooperation among FBI, local law enforcement, and U.S. intelligence agencies.”¹⁵² He continued:

In both cases, tips and leads were smoothly passed among those gathering information in this country and those gathering information overseas, including foreign intelligence services that provided information or responded to questions. These investigations connected the dots in exactly the ways the Intelligence Reform and Terrorism Prevention Act envisioned. However, as the case of Army Maj. Nidal Hasan . . . shows, we must go even further in our efforts to turn intelligence into the knowledge needed to protect Americans.¹⁵³

The attempted Christmas Day bombing occurred exactly one week later. Obama Administration officials have since acknowledged that, in hindsight, the intelligence community possessed bits and pieces of relevant information about the Yemen-based Nigerian operative, Umar Farouk Abdulmutallab, which should have prevented him from boarding the Northwest Airlines flight bound for Detroit.¹⁵⁴ This attack is the third on the homeland since the summer of 2009 with ties to AQAP, a fact demonstrating the increasing importance of Yemen as an al-Qaeda external operations hub.

It is tempting to view the Christmas Day bombing plot as symptomatic of larger problems plaguing the intelligence community since 2004: ODNI and NCTC struggles to assert control over the intelligence community while adapting to evolving threats; Congress’s desire to limit ODNI and NCTC resources, even while holding it accountable for terrorist attacks; and information overload, by which agencies now share endless volumes of threat information and increase the difficulty of distinguishing real from mundane threats. Obama Administration officials have harped on all these issues during recent congressional testimony,¹⁵⁵ and the President has vowed an aggressive response. In his January 2010 memo on corrective actions to the heads of key departments and intelligence agencies, President Obama directed the DNI to “[i]mmediately reaffirm and clarify roles and responsibilities of the counterterrorism analytic components of the Intelligence Community” and

151. David Johnston & Scott Shane, *U.S. Was Aware of Suspect’s Tie to Yemeni Cleric*, N.Y. TIMES, Nov. 10, 2009, at A1.

152. Dennis C. Blair, Op-Ed., *Strengthening Our Nation’s Front Line of Defense*, WASH. POST, Dec. 18, 2009, at A31.

153. *Id.*

154. *Flight 253: Learning Lessons from an Averted Tragedy: Hearing Before the H. Comm. on Homeland Security*, 111th Cong. (Jan. 27, 2010) (statement of Michael E. Leiter, Director, National Counterterrorism Center).

155. *Id.*

“accelerate information technology enhancements” to sort more efficiently through growing terrorism databases.¹⁵⁶ He also directed the NCTC to “establish and resource appropriately a process to prioritize and pursue thoroughly and exhaustively terrorism threat leads, to include the identification of appropriate follow-up action.”¹⁵⁷

NCTC Director Leiter has testified that he plans to field new analytical pursuit teams that will run specific threats to ground but that the NCTC “does not have enough analysts to comb through the thousands of terrorism-related information it receives everyday.”¹⁵⁸ He has requested additional analysts to track threats and ensure that individuals of concern are placed on appropriate airline watch-lists.¹⁵⁹ Yet the NCTC Director also claimed: “I do not [have], nor do I believe the DNI as currently constructed has, all of the authorities to move all of the information in a way that will maximize the likelihood of detecting these plots.”¹⁶⁰ He presumably was referring to the NCTC’s aforementioned ambiguous IRTPA authorities, which appear to allow the Center to identify but not direct operations.¹⁶¹

Yet it also is worth emphasizing the NCTC’s instrumental role in disrupting the 2006 transatlantic airline plot as well as identifying Najibullah Zazi and David Headley, the recently arrested al-Qaeda affiliates in the United States. The Center has been able to detect and disrupt a number of plots with a nexus in the Afghanistan-Pakistan border area. The challenge is to develop that capability in other potential al-Qaeda havens around the world (e.g., Yemen, North Africa, and Somalia) without detracting from ongoing counterterrorism efforts that have proven successful.

CONCLUSION

On December 25, 2009, President Obama received rather unsettling exposure to the challenges confronting the U.S. intelligence community. The May 2010 attempted bombing in New York’s Times Square emphasized the severity of the terrorist threat and the intelligence community’s struggle to detect and disrupt these plots. Yet the President, like the rest of the United

156. Memorandum from President Obama to the Secretary of State et al., Attempted Terrorist Attack on December 25, 2009: Intelligence, Screening, and Watchlisting System Corrective Action (Jan. 7, 2010), available at http://www.whitehouse.gov/sites/default/files/potus_directive_corrective_actions_1-7-10.pdf.

157. *Id.*

158. *Flight 253: Learning Lessons from an Averted Tragedy: Hearing Before the H. Comm. on Homeland Security*, 111th Cong. (Jan. 27, 2009) (statement of Michael E. Leiter, Director, National Counterterrorism Center).

159. *Id.*

160. *Id.*

161. See *supra* notes 51-52 and accompanying text.

States, was fortunate that neither of these terrorist attacks succeeded. With the resignation of DNI Blair and the nomination of former Lieutenant General James Clapper to be the next DNI, the Obama Administration now has an opportunity to take ownership of the counterterrorism struggle and further strengthen the intelligence community's capabilities. This is no easy feat. A brief review of the recent history of intelligence reform reveals the troubling circumstances under which the DNI position was created and the inherent weaknesses in the IRTPA that have led to bureaucratic squabbles ever since. The IRTPA clearly could have been drafted more carefully, but, through sustained White House leadership and support for the DNI, many of the intelligence coordination mechanisms gradually have come into place. Sustained presidential commitment always has been essential to effective intelligence reform, and it is even more necessary today. Sustained congressional support is equally necessary. The ODNI is not well-served by a Congress that is quick to criticize and score political points when mistakes are made but unwilling—once the cameras turn away—to provide the robust and stable funding needed to accomplish the intelligence reform mission.

The Obama Administration must emphasize that the intelligence community cannot return to a pre-IRTPA world. Despite all of the IRTPA's imperfections, the intelligence community still is adjusting to a new organizational system and simply cannot survive another reorganization or de-organization, whichever the case may be. Although there certainly have been serious recent mistakes, the NCTC has persevered in the face of adversity and demonstrated its ability to coordinate counterterrorism intelligence efforts. Recognition within the intelligence community that the ODNI and the NCTC are here to stay, and that their authority will not be undermined depending on the issue of the moment, can afford the DNI opportunity to tackle the tough long-term issues in intelligence reform.

To this end, the intelligence community needs to be run by nonpolitical, career professionals. President Obama apparently shares these aspirations, given the 2008 campaign proposal to create a fixed term for the DNI similar to the Chairman of the Board of Governors of the Federal Reserve System. Despite the questionable decision to replace the DNI and the DCIA upon assuming office, President Obama's campaign pledge recognized that organizational stability can foster a collaborative, nonpartisan atmosphere and acceptance of the DNI's authorities. Intelligence is a complex, dangerous business that only functions effectively in secrecy, out of the public eye. The President, his Cabinet, and our nation's warfighters need an intelligence service that stays out of the front-page headlines, delivers unbiased and confidential analysis, and engages in risky but necessary activities abroad. The Obama Administration should revisit this campaign proposal and work with Congress to explore legislative corrections that promote leadership continuity in the intelligence community.

An analysis of potential legislative remedies indicates that the Director of the FBI position is a more sensible model for DNI leadership than the Federal Reserve Chairman. As established by Congress, the Federal Reserve Chairman is nominated by the President and confirmed by the Senate to serve a fixed four-

year term that does not coincide with the President's own four-year term of office.¹⁶² The fixed term helps foster a degree of independence from the White House. Although the President may remove the Federal Reserve Chairman with a showing of cause,¹⁶³ scholars have observed that refusal to obey a presidential directive has not been interpreted as sufficient "cause" to warrant removal.¹⁶⁴ A four-year term, however, may not be long enough to help solidify the nascent DNI leadership structure. Moreover, intelligence operations are often dangerous and so politically sensitive that a President requires more accountability from the intelligence community than the near-complete independence that the Federal Reserve Chairman enjoys. Furthermore, any legislative attempt to extend the term of the DNI also must apply to the DCIA, since it would undermine the DNI's leadership of the intelligence community if the President had greater flexibility in choosing the DCIA and thus developed a stronger relationship with an individual technically subordinate to the DNI.

With the creation of the ODNI in the wake of the 9/11 and Iraq WMD intelligence failures, the challenges confronting the intelligence community today are reminiscent of those that the FBI encountered following the allegations of politicization and misconduct revealed by the Church Committee during the Watergate affair. To enhance the FBI's legitimacy and independence, in 1976 Congress limited the FBI Director position to a ten-year term,¹⁶⁵ and since then the job has gone to nonpartisan, career law enforcement officials. The FBI Director thus enjoys an extended term limit, as opposed to the Federal Reserve Chairman's fixed term. There is no statutory limit on the power of the President to remove the FBI Director before the end of the ten-year period, but in practice the President is constrained since the successor requires Senate confirmation. However, the President maintains far greater control over the FBI Director than the Federal Reserve Chairman, and most FBI Directors do not serve the full ten years. The intelligence community would benefit greatly from a similar type of leadership continuity. We recommend that President Obama work with Congress to create similar ten-year appointments for the positions of DNI and DCIA.

Yet we also must avoid overcompensating for the failures of the past. Since 9/11, the intelligence community has suffered from a narrow-minded focus on correcting previous mistakes without considering future threats lurking on the

162. 12 U.S.C. § 242 (2006).

163. *Id.*

164. Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2008/03/world-financial-crisis-and-unitary.html> (Mar. 17, 2008, 16:35 EDT).

165. The FBI director was first established as a presidentially appointed position requiring Senate confirmation in 1968. The statute did not apply to the FBI Director at the time, J. Edgar Hoover, but did apply to his successor. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1101, 82 Stat. 197. The ten-year limit for the FBI Director's term was added as part of the Crime Control Act of 1976, Pub. L. No. 94-503, § 203, 90 Stat. 2407.

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horizon. The intelligence community cannot afford to concentrate counterterrorism resources in Yemen, only to let al-Qaeda regroup in Pakistan or in an ungoverned space. Nor can the intelligence community organize itself solely around the counterterrorism mission without devoting sufficient resources to the full array of global challenges, including WMD proliferation and the threats posed by traditional state actors.

Finally, we must recognize not just the potential of intelligence reform but also its limitations. People and technology are far more important than bureaucratic policies and plans. The intelligence community can and must perform better to help protect the United States, but it never will protect the country completely from strategic surprise. Its analysts and collectors will make mistakes, its organizational systems and procedures will break down, and its leaders occasionally will say and do the wrong things. When that happens—and it will—nonpartisan, professional leadership of the intelligence community becomes even more critical. A realistic knowledge of the intelligence community's capabilities is essential to achieving the best results. With strong leaders at the top who respect each other and with the most effective collaborative tools at the fingertips of their subordinates, the men and women who comprise the intelligence community are capable of disrupting terrorist plots and communicating critical analyses to policymakers. The American people expect and deserve nothing less.

