
A RESPONSE TO PROFESSOR SAMUEL RASCOFF'S
PRESIDENTIAL INTELLIGENCE

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Should foreign intelligence collection be subject to more rigorous oversight, and therefore, improved accountability, through a policy process that involves deeper personal involvement by the President and National Security Council (NSC)? Would a greater number of political appointees across the intelligence community facilitate that oversight? These are the essential questions posed by Professor Samuel Rascoff in his article *Presidential Intelligence*.¹

It is critical that the intelligence community continually evaluate how it can improve oversight and accountability of foreign intelligence activities. Rascoff observes that “[it] makes little sense . . . to bar the White House from expressing a view about the desirability of spying on an ally, or weighing in on whether to forego controversial programs like metadata collection because their costs may outweigh their benefits.”² When put this way, presidential involvement in intelligence oversight is wholly unobjectionable. But there is a presumption underlying his proposals for oversight that is questionable. Specifically, Rascoff presumes that the President and NSC are not currently, and have not been previously, involved in intelligence oversight to any significant degree. As discussed below, I would suggest that Rascoff underestimates both presidential and NSC involvement in intelligence oversight, while also perhaps holding a romanticized view of what more granular NSC oversight would mean as a practical matter. Further, I would suggest that to bolster the type of oversight and accountability that we would agree is important, attention should be given to the role that the Director of National Intelligence (DNI) can play in this area.

To begin, on the one hand, Rascoff asserts that the intelligence community has been left out of presidential influence and control.³ But on the other hand, he acknowledges that organizational oversight

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¹ Samuel J. Rascoff, *Presidential Intelligence*, 129 HARV. L. REV. 633 (2016).

² *Id.* at 695.

³ *Id.* at 635 (“The tectonic shift toward presidential control of agencies has reverberated throughout the federal bureaucracy, including a large swath of the national security state — with the striking exception of the so-called ‘intelligence community.’” (footnotes omitted)).

of the intelligence community has been “somewhat presidentialized.”⁴ This much is true. At least in the post-9/11 era, the President (and NSC, by extension) has been involved in substantially re-engineering the intelligence community. These reforms include, as limited examples: creating the homeland security enterprise, starting with a presidential advisor and culminating in a Secretary and Department of Homeland Security (DHS); adding new elements to the intelligence community; transforming the FBI into an organization with a primary national security mission alongside its law enforcement function; using national security surveillance capabilities and authorities for counterterrorism purposes and accompanying legislative proposals and changes; developing the policy and implementation of a targeted-killing program in support of the counterterrorism mission; creating the DNI to lead and manage the intelligence community; and, not insignificantly, revising the roles and responsibilities in the intelligence community by amending Executive Order 12,333 in 2008, including refining authorities provided to the DNI.⁵ This is hardly a short list of modern presidential disengagement. Instead, one could conclude that the past decade-plus has been full of substantial and meaningful presidential and NSC involvement in intelligence matters.

Rascoff further suggests that up until the Obama Administration’s review of signals intelligence collection priorities following the unauthorized disclosures of classified information beginning in June 2013, the policy process overseeing foreign intelligence collection lacked White House involvement.⁶ Thus, he characterizes the discipline of collection, in particular, as “[w]eakly [p]residentialized.”⁷ I would suggest that this characterization of the policy process governing intelligence collection priorities underestimates White House and senior policymaker involvement. It is, however, a somewhat understandable characterization, given the limited information that is available publicly about this process, at least until recently.

Presidential Policy Directive-28⁸ (PPD-28), issued in January 2014, was presented as a new era of presidential oversight over the foreign signals intelligence collection process. And it does include what may turn out to be substantial policy changes, including restrictions on the use of bulk collection, and enhanced privacy protections for non-U.S.

⁴ *Id.* at 646.

⁵ See Exec. Order No. 13,470, 3 C.F.R. 218 (2009) (amending Exec. Order No. 12,333, 3 C.F.R. 200 (1982)).

⁶ Rascoff, *supra* note 1, at 651–59.

⁷ *Id.*

⁸ Press Release, Office of the Press Sec’y, Presidential Policy Directive — Signals Intelligence Activities (PPD-28) (Jan. 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> [http://perma.cc/P97T-DNQ6].

persons.⁹ More specifically, with respect to oversight of collection, PPD-28 directs “heads of departments and agencies” to review “priorities and requirements.”¹⁰ There is nothing to suggest, however, that this process is much of a change from existing, or even longstanding, practice available to the President and the NSC.

Instead, presidential or NSC involvement in reviewing intelligence-collection priorities has likely ebbed and flowed over the decades, based on world events, national security threats, the management and leadership approach of a particular White House, and other priorities of the moment. But that does not mean that there was not an institutional process available to those participants, if they had chosen to engage deeply with it. Instead, I would suggest that priorities across and within presidential administrations shift, and, typical of White House involvement in many matters, it sometimes takes a crisis to mobilize attention and prompt action.

PPD-28 gently acknowledges an existing policy process for collection oversight, in part, by referencing the directive’s classified Annex:

which supplements the *existing policy process* for reviewing signals intelligence activities, affirms that determinations about whether and how to conduct signals intelligence activities must carefully evaluate the benefits to our national interests and the risks posed by those activities.¹¹

In other words, contrary to what may be a prevailing understanding, there is, and has been, a process in place. PPD-28 reaffirms that process, and probably improves upon it and updates it.

But because the Annex is classified, and because of the historical way the policy process was implemented, what exactly that policy process was or is remains opaque. I am not convinced it needs to be this way. I believe deeply that much of what the intelligence community does — including operational matters, foreign intelligence targets, and sources and methods — is appropriately classified. But perhaps there is a way to provide a clearer understanding about the policy process for approving collection requirements and conducting oversight of intelligence matters.¹² Office of the Director of National Intelligence General Counsel Bob Litt took a deliberate step in this direction by describing the current policy process in a February 2015 speech at the

⁹ *Id.* § 2.

¹⁰ *Id.* § 3.

¹¹ *Id.* (emphasis added).

¹² On October 27, 2015, the DNI released its new *Principles of Intelligence Transparency Implementation Plan*. The plan outlines how the intelligence community will institutionalize a new era of public disclosure as it relates to its mission and governance structure. See OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, PRINCIPLES OF INTELLIGENCE TRANSPARENCY IMPLEMENTATION PLAN 1 (2015), <http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/Principles%20of%20Intelligence%20Transparency%20Implementation%20Plan.pdf> [<http://perma.cc/5BHB-M5MM>].

Brookings Institution. In those remarks, Litt confirmed that the President sets intelligence priorities for the National Security Agency (NSA), not the other way around.¹³ Litt also went on to describe in detail how senior executives and policymakers are responsible for setting collection priorities and requirements.¹⁴ Litt's remarks confirm what has been true across administrations: the intelligence community serves the president and policy makers.

Which is why it is curious that, in arguing for more robust oversight of intelligence collection by the President and NSC, Rascoff appears to dismiss the DNI in favor of an "expanded NSC process."¹⁵ Rascoff suggests that under the current model, "the relationship between the President and intelligence collection has largely defied the logic of presidential control."¹⁶ I would suggest that this is an overstatement. The President has, if he so chooses, daily access to the DNI and intelligence briefings. The authority provided to the DNI in the areas of budget, personnel, tasking, information sharing, protecting sources and methods, and acquisition¹⁷ suggests that the DNI, a political appointee, is precisely the leader and institution to whom the President should be able to delegate the important functions that Rascoff identifies. Why not continue to refine and improve the DNI's function and performance, as opposed to shifting oversight responsibilities to the NSC?¹⁸ Indeed, because it is not operational, a significant focus of the DNI and his office is currently on oversight responsibilities. The role of the DNI and other senior intelligence officials in carrying out oversight activities on behalf of the President and in support of his priorities are minimized in Rascoff's article.

But despite its flaws, Rascoff's proposal to bolster oversight responsibility at the NSC is more meaningful than his proposal to increase the number of political appointees across the intelligence community. The second is more of a corollary to the first: increasing the number of political appointees would facilitate the expanded NSC reach by increasing its touch points throughout the community.

¹³ See Robert S. Litt, Gen. Counsel, Office of the Dir. of Nat'l Intelligence, Speech at the Brookings Institution on U.S. Intelligence Community Surveillance One Year After President Obama's Address 10 (Feb. 4, 2015), http://www.brookings.edu/~media/events/2015/02/04-surveillance/20150204_intelligence_surveillance_litt_transcript.pdf [<http://perma.cc/6N7D-PRA9>].

¹⁴ *Id.* at 10–13.

¹⁵ Rascoff, *supra* note 1, at 677.

¹⁶ *Id.* at 646.

¹⁷ See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (codified as amended in scattered sections of the U.S. Code).

¹⁸ Rascoff identifies the goals of harmonizing agencies, conducting (nonmonetary) cost-benefit analysis of proposed activities, and quantifying (in dollars) the costs and benefits of certain activities as functions that increased presidential or NSC involvement should provide. See Rascoff, *supra* note 1, at 643. I would suggest instead that these types of functions are exactly what Congress and the President should expect of a DNI.

But Rascoff does not provide evidence (and I suspect that there is little) to support the proposition that the benefit of increasing the number of political appointees in the intelligence community would outweigh the downsides. The purported benefit is that political appointees will be more effective at adhering to the President's policy direction in terms of intelligence collection priorities and accompanying political sensitivities. But the downsides — frequent turnover in the high ranks of national security leadership; staff and operational national security personnel increasingly exposed to the politics of any given day; the increased potential for politicization of intelligence product; and long delays for those appointees requiring Senate confirmation — are substantial.¹⁹

Perhaps the most well-known example of truly hands-on presidential involvement in a specific signals intelligence program in our post-9/11 history was the Terrorist Surveillance Program. But Rascoff alludes that such a program is not what he means by presidential intelligence, because oversight of *that* program did not involve sustained and rigorous oversight by the NSC.²⁰ Therein lies a flaw in his proposal: increased presidential involvement and concentration of decisionmaking in a small group of political appointees may not produce a result that he will like. From this lens, Rascoff's proposal to increase political oversight strikes me as unlikely to prevent a future controversial executive-directed action in an intelligence matter.

I would suggest that the better investment would be to preserve presidential and NSC strategic guidance for intelligence collection priorities, and to take steps to continually improve the institutional oversight of intelligence collection that resides outside of the NSC. Those institutions include, for example, the Office of the Director of National Intelligence, the Department of Justice, agency Inspectors General and internal privacy officers, the Foreign Intelligence Surveillance Court, and the Privacy and Civil Liberties Oversight Board. While the President will continue to have visibility and provide direction aligned

¹⁹ Rascoff also suggests that it would be an improvement to current foreign intelligence surveillance oversight if intelligence lawyers presenting matters to the Foreign Intelligence Surveillance Court (FISC) did so with the understanding that “the White House might be paying attention.” *Id.* at 690. On the one hand, if the proposed surveillance concerns, for example, an emergent counterterrorism threat focused on a domestic target, then national security leaders in the executive branch, including the White House, would certainly be “paying attention” to the authorization and implementation of that surveillance, which might facilitate disrupting a potential terrorist act. On the other hand, my experience suggests that the federal judges sitting on the FISC rely on the objective and professional presentation of national security matters, and would not view as a favorable development a Justice Department lawyer presenting the Court with the facts and legal theory of a proposed surveillance under FISA with an eye toward how “the White House” might think or react.

²⁰ Rascoff suggests that “sustained, routinized governance by the White House and its components, especially the NSC,” is what he really has in mind. *Id.* at 655.

with policy objectives, these are the institutions that, from an institutional governance perspective, should carry the responsibility of improving the quality of their intelligence oversight activities, as opposed to minimizing their significance by placing greater responsibility directly on the NSC.