
A RESPONSE TO MY CRITICS

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In arguing for a new approach to governing intelligence collection, and in assigning the White House a critical role in realizing that goal, *Presidential Intelligence*¹ bucks sensibilities that are powerfully ingrained in intelligence professionals and intellectuals. Unsurprisingly, my critics² — all of whom are experienced in the practice of intelligence and its oversight — are provoked. They argue that, when it comes to intelligence gathering, the intelligence community should be allowed to self-regulate. And they contend that intelligence gathering is already extensively exposed to presidential oversight. With the utmost respect for their professional and intellectual attainments, and with gratitude for their thoughtful essays, my critics miss the mark on both points.

One of my critics claims that the Office of the Director of National Intelligence (ODNI) is the natural place to furnish programmatic governance of surveillance programs.³ I do not deny that some amount of governance is, and must be, shouldered by the ODNI.⁴ But it is a mistake to view the ODNI as the optimal overseer here, even setting aside familiar observations about that office's limited statutory authority and its practical inability to exercise control over ostensibly subordinate agencies. That is because the contention that ODNI supervision suffices misunderstands the nature and scale of the oversight challenge at hand.

As I argue, the tradeoffs that contemporary surveillance entail are not confined to questions of whether to increase satellite budgets, say, at the expense of human intelligence operations.⁵ Instead, intelligence governance necessitates a programmatic reckoning with the costs and benefits of surveillance measured in such categories as the economic harms to American industry, the fraying of ties with overseas allies, and the intrusions into the private lives of ordinary citizens. In other words, the governance of contemporary surveillance programs requires

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

² See Philip Bobbitt, *A Response to Professor Rascoff's Presidential Intelligence*, 129 HARV. L. REV. F. 98 (2016); Carrie Cordero, *A Response to Professor Samuel Rascoff's Presidential Intelligence*, 129 HARV. L. REV. F. 104 (2016); Stephen B. Slick, *Comment on Presidential Intelligence*, 129 HARV. L. REV. F. 110 (2016).

³ See Cordero, *supra* note 2, at 104.

⁴ See Rascoff, *supra* note 1, at 655–56.

⁵ See *id.* at 655, 673–74.

policy horizons, political sensibilities, and legal authorities that extend far beyond those of the ODNI. Spying is best left to the professionals. But the governance of spying is emphatically not.

Nor should the fact that White House–based oversight is inevitably informed by political sensibilities be a source of concern. For forty years we have entrusted politicians on Capitol Hill with a vital role in intelligence oversight, and for good reason. For oversight to be effective at generating sounder and more accountable intelligence, it (unlike the analytic judgments of intelligence officers) must be politicized. The fact that I call for heightened politicization through the White House,⁶ as opposed to (or more accurately, in addition to) the Congress does not alter that basic truth.

My critics argue that presidential intelligence already exists.⁷ In some cases, this is based on a misreading of my central claim. I freely acknowledge that certain domains of intelligence are already highly presidentialized, such as covert action and the consumption of intelligence analysis.⁸ (Indeed, I argue that the former ought to supply a template for how to presidentialize surveillance.⁹) But the thrust of my Article is that intelligence gathering — the core function of all intelligence agencies — has been insufficiently exposed to White House control. In effect, collection stands today where covert action stood forty years ago when Congress started to legislate in this area. So when my critics adduce the example of the targeted-killing program as an instance of presidential control,¹⁰ it confirms one of my working assumptions, but leaves my core claim untouched.

As evidence of the present availability of presidential review of surveillance, my critics also point to institutions that exist within the White House and in particular the National Security Council (NSC).¹¹ My contention is not, of course, that presidential intelligence emerged from whole cloth in the aftermath of the Snowden leaks and I freely concede that the White House has been involved in certain bounded aspects of reviewing collection for some time.¹² Instead, I argue that the political and economic forces that have lately been unleashed in this area (and are unlikely to fade away soon) have significantly ratcheted up White House attention.

⁶ See *id.* at 712–16.

⁷ See, e.g., Cordero, *supra* note 2, at 105.

⁸ See Rascoff, *supra* note 1, at 646–48.

⁹ *Id.* at 706–08.

¹⁰ Cordero, *supra* note 2, at 105.

¹¹ See, e.g., Slick, *supra* note 2, at 113–14.

¹² See Rascoff, *supra* note 1, at 651 n.87. Here, again, the covert action example is instructive. Prior to the Hughes-Ryan Act of 1974, there had already been some amount of NSC involvement in the process. But no one would deny that the passage of that law represented a watershed in intelligence oversight.

The evidence is on my side. Reflecting on the pre-Snowden period, Deputy National Security Advisor Lisa Monaco commented that the White House had previously failed to undertake “cost-benefit analysis” of the foreign policy and economic impacts of American surveillance.¹³ She conceded that in the post-Snowden era such assessments are necessary, and that they require the involvement of “senior-level policy-makers” as well as a “procedure” for effectuating the assessment of potential tradeoffs.¹⁴ Certainly the Deputy National Security Advisor was not unaware of the existence of the President’s Intelligence Advisory Board or of weekly meetings between the NSC and intelligence community leadership.¹⁵ What she was implicitly acknowledging was that, cumulatively, these institutions did not supply the right sort or the right amount of presidential control. What was apparently missing, and appears now to be changing (as evidenced by Presidential Policy Directive 28), is the energetic involvement of the White House, itself underwritten by the emergence of what I refer to as a new political economy of intelligence.¹⁶

In their essays, some of my critics lament the new strategic landscape in which intelligence operates, noting, for example, that intelligence disclosures are potentially at odds with valid national security goals.¹⁷ We agree that greater transparency is not necessarily an unvarnished good. (Championing presidential intelligence is not the same as championing the circumstances that catalyzed it or that make it necessary.) But it is a trend that will inevitably continue to redefine intelligence practice in the coming years and decades. As in sound intelligence analysis, so too in meaningful intelligence oversight: a clear-eyed assessment of reality is the necessary starting point.

I am glad to have stimulated a conversation about how to promote more effective, accountable, and rights-regarding intelligence collection. Given the dynamism of the threat landscape, and the comparably dynamic social, technological, and political contexts in which intelligence officials operate, that conversation is timely and necessary.

¹³ *The View from the West Wing*, ASPEN INST. (July 26, 2014), <http://www.aspeninstitute.org/video/view-west-wing>; see also Rascoff, *supra* note 1, at 673.

¹⁴ *The View from the West Wing* *supra* note 13.

¹⁵ Cf. Slick, *supra* note 2, at 114.

¹⁶ See, e.g., Rascoff, *supra* note 1, at 660.

¹⁷ See, e.g., Bobbitt, *supra* note 2, at 101–02.