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CONFERENCE REPORT

# Strengthening Intelligence Oversight

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## I. ORIGIN AND SIGNIFICANCE OF THE CHURCH-TOWER COMMITTEE

Remarks given on May 28th, 2015 in Washington, DC at the Brennan Center Dinner in Honor of Vice President Walter Mondale and Senator Gary Hart

Ambassador William Green Miller

*Staff Director to the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*

It is a great pleasure to be here at this dinner in honor of Vice President Walter Mondale and Senator Gary Hart, who made it possible for the Church-Tower committee to carry out the course corrections necessary for our country's system of governance. They fully recognized the dangers posed by secrecy and the demands of national security and pointed the way for reforms needed to protect our open, democratic system of government.

I want to thank the Brennan Center at NYU, particularly my friend and colleague Fritz Schwarz and Michael German for bringing us all together. It is a special pleasure to be with you all again.

In 1976, during the celebrations of the bicentennial year of the founding of our nation, the senate select committee to study governmental operations with respect to intelligence activities — the Church-Tower committee — was at work in the auditorium of the Dirksen Senate Office Building.

Many of you here tonight will remember your long hours in Dirksen G-308 (tel: 224-1700)

Dirksen G-308 was home to 125 staff members working on as many as 155 projects, tasks, or investigations at any given moment. During the year and a half of the committee's mandated existence, we reviewed tens of thousands of documents, interviewed thousands of individuals, and published 14 volumes of public documents and reports. The classified register is ten times and more than our publicly disclosed work.

Dirksen G-308 was transformed from an auditorium to a beehive. Cubicles were constructed opening one to the next like the cells of a beehive frame. Four walls open at the top — everything was known or heard by all. It was a kind of architectural transparency. For private discussions, ironically, it was necessary to go into the park, into the open air. The hum of the staff at work sticks firmly in my memory. The entrance to Dirksen G-308 was a transforming medium, somewhat like the wardrobe in CS Lewis' Narnia novels, or the looking glass mirror in Lewis Carroll's Alice in Wonderland. For some, the entrance to Dirksen G-308 was a direct path into Brer' Rabbit's Briar Patch.

Dirksen G-308 was certainly a portal into the world of secrets — a very different world than the open, declamatory, democratic world of the rest of the capitol.

Our work, our main task for the Church-Tower Committee was to first review and understand what had been done in secrecy during the 200 years of the government of the open, democratic republic of the united states. Our task was to review and study carefully what our government had done and was presently doing under the rubric of "necessary secrecy" particularly since 1945 — the end of World War II.

What did we find? What was the situation in 1975-1976? Our overall assessment was that our constitutional system of divided powers was threatened by the skewing of the needs of national security. The list of pressures and security issues is long and compelling:

- The impact of two world wars

- Revolution, sectarian violence, and terrorism in the nations of former colonial empires. It was also the desire of the US and former colonial ruler to maintain influence over the new nations and their resources.
- The dangers of the nuclear arms race
- The Korean War
- The Vietnam War
- The intended and unintended consequences of the host of secret paramilitary actions and covert actions
- New means of intruding on means of communication
- Major transgressions by our political leaders, including Presidents, of which the “Family of Jewels” are only some examples.

The list is, indeed, long and compelling. The Church-Tower committee was faced with the fundamental task of addressing the damages done to our constitutional balances by the demands of national security that were not always a compelling, overriding reality

Dominant power was in the hands of the Executive Branch, particularly in the presidency — the White House — because of the dynamic rush of the continuing wars, states of emergency of military, economic and political kinds, which concentrated political power, and the means to act in the presidency.

Perhaps because of a combination of habitual trust amongst our leaders of government and a lack of awareness of the ways and means and realities of secret activities, as well as a failure to fulfill rigorous oversight, the legislative and judicial branches ceded power to the presidency.

Indeed, the changed and still changing techniques of national security gravely affected our domestic politics and tranquility. Sam Ervin’s Watergate Committee uncovered the illegal activities of the Nixon White House. The Watergate Hearings of 1973 revealed the details of the Huston Plan:

- The bugging and break-in of DNC headquarters at the Watergate Hotel
- The break-in and taking of documents from Daniel Ellsberg’s office
- The proposed plan to firebomb the Brookings Institution
- The use of the Internal Revenue Service (IRS) to intimidate political enemies
- The application of mail openings
- The extensive use of telephone intercepts and electronic eavesdropping

In sum, as Nixon’s Attorney General, John Mitchell said, “the full panoply of the White House Horrors.”

The Watergate criminality and the 1975 “Family Jewels” compendium of CIA abuses were only the latest manifestations of illegality and unlawful misuse of power. The “Family Jewels” were only the surface of extensive misuse of power.

It is my view, however, that the beginnings of awareness that the march toward a national security state had to be stopped and a new path for democratic governance had to be found, reaches back in time and place to 1964 and the alleged attack on US Naval forces in the Gulf of Tonkin off the coast of Vietnam. It was not until 1971, seven years later, that the White House and Defense Department admitted that the alleged attack did not take place. Faulty intelligence and preferred conclusions led to the call for escalation of the war. The Gulf of Tonkin Resolution was rushed through the Senate led by Chairman of the Foreign Relations Committee, Bill Fulbright, with only two dissenting votes and six principled abstentions. President Johnson and Secretary McNamara led the charge to wider war based on flawed secret information.

Growing popular discontent and overwhelming congressional opposition to the Vietnam War resulted in 1973 in the passage of the War Powers Resolution which is still in effect, although violated, evaded, and ignored by successive presidents. It is a pertinent example of how the demands of the national security state have set aside the mandates set forth in the Constitution such as Article I, Section 8 which gives to the legislature the power and authority to declare war.

The Gulf of Tonkin affair investigation in 1971 marked a decisive turning point in the way the Executive Branch and the legislature dealt with each other: The old boy trust system failed and was set aside. Four presidents — Kennedy, Johnson, Nixon and Ford were trusted members of the legislature before going to the White House. Trust between friends who shared a common experience was proven to be not enough. The legislature had to have access to the same basic information as the president. They had to be fully and currently informed of all information pertinent to the issues to be governed. This included all “secret” information. This was the great change: the necessity to share the information our government produces, including all secret information “fully and currently.” That is still the present problem and the answer to the new challenges that face us today.

Finally, thanks to the wisdom and support of the leaders of the Senate, Senators Mike Mansfield and Hugh Scott, and the “greybeards” of the Senate almost without exception, the Church-Tower Committee was able to complete its work.

But the need for further effort to restore the balances between the branches that our constitution intended goes on.

And that is why we are here together now.

## II. DINNER REMARKS: FORMER VICE PRESIDENT WALTER MONDALE

*Vice President Walter Mondale*  
*Wednesday, May 27, 2015*

This intervention has been approved by Gary Hart.

Fritz Schwarz is one of the most extraordinary people I've ever met in my life.

And those years on the Church Committee, now 40 years ago, the successes that we connect with that committee: widely regarded as one of the most probing important studies of intelligence agencies of our government ever in American history; the ability to hold that committee together based on a bipartisan approach, which was hugely successful; the depth in which we were able to go in a range of issues that needed to be explored; and the way in which Fritz reassured us, encouraged us, supported us, kept the committee together — I had the extraordinary opportunity to be a member of that committee and then to be in the White House to receive our message. Fritz ran up there and said, “Do it favorably,” so I did.

So here we are, 40 years later, many many people in this room were a part of that process then, and the Brennan foundation, which is one of my favorite organizations, is right at the center of this, which is also a tribute to Fritz.

I don't think there are many examples of one person who has done more requiring the highest intellectual efforts and values that go to the very basis of our country than Fritz Schwarz.

So if somebody could give me a drink, I'd like to offer — no, I don't want any water — would you please rise, and thank you, Fritz.

### III. ODE TO THE CHURCH COMMITTEE

*Burt Wides*  
*Former Church Committee Staff Member*

For Church Committee alums, it's been quite a journey,  
So let us now roll back on our memory gurney.  
Forty years have passed, but who can forget  
COINTELPRO, MONGOOSE or MINARET?

We learned that officials of our law-abiding nation  
Had become an Assassination Association  
And just as U.S. med schools were reformed by Abraham Flexner,  
We reformed the CIA, and brought the world Judith Exner.

HILLINGUAL, we found, had badly stained  
The Constitution that Angleton clearly disdained.  
As he maintained midst the ensuring gale,  
"Of course, Gentlemen read everyone's mail."

Washington storm clouds gathered, rough seas kept on rising,  
But we all stayed calm, which was not so surprising.  
Because at our helm, firmly gripping the tiller  
Stood our steadfast helmsman, Horatio Miller.

Not to be confused with Captain Ahab Church  
Who sometimes left John Tower in the lurch  
As he persistently pursued his Holy Grail,  
But mixed up a Rogue Elephant with the White Whale,

Despite each Administration's professed nobility,  
We learned that, cloaked in plausible deniability,  
The White House had often given its direction  
To what had seemed the CIA's dereliction.

We scoured each presidency, without fear or bias,  
And thanks to Senator Charles Mac Mathias  
We were just as fairly bipartisan  
As any Eighteenth Century courtesan

Thus, both sides of the Committee stayed right in sync.  
Ironed out every squabble, unsnarled every kink,  
Like an elderly couple dancing a sexy rhumba  
Until we got to JFK on Castro versus Ike on Lumumba.

General Doolittle had written in his bare-knuckled report  
We had to act even worse than the worst Kremlin thought.  
Whatever it might take for our boys to be besting  
The KGB -- whether poison darts or drug testing.

MI 5's nightmares were Philby, Fuchs, Blake, and Lonsdale.



The FBI's nightmares were Gitensteinn, Epstein, Eliff and Mondale.  
They investigated the Bureau's Bill of Rights mutilation,  
Despite thinly veiled threats of political retaliation,

At our COINTELPRO hearing, as those horrors were exposed,  
The FBI tried to dodge every question that Mondale posed.  
Until Phil Hart sadly observed, as the Bureau was bested,  
Their tactics had been even worse than his wife had suggested.

While our report roared, that of the House  
Made all the impact of a muffled mouse.  
Sadly hoisted by its petard, just like  
A soldier badly impaled on his Pike.

We started the crusade against excessive secrecy,  
To implement the premise of our democracy.  
And nothing gave the Agency any more fits  
Than declassification fights with Bill and Fritz.

Bill Colby kept warning that the sky would fall,  
And our work would end spying, once and for all,  
Not to mention allies' fearing loss of protections  
For agent identities and code interceptions.

But the Agency was merely playing possum  
Ready to revive, to expand, and to blossom.  
And soon they roared right back with new plots and new schemes  
To befuddle the Congress with briefings in reams.

The Church Committee birthed reforms of a great many kinds:  
Covert Action Findings, FISA, and the Levi Guidelines  
But we couldn't predict our skewed reforms' direction  
into State Secrets, water boarding and bulk collection.

Who knew 9-11 would give voters such shakes  
That their mantra would become: "Whatever it takes?."  
Or that some of highest rank would betray us,  
Like Tennesse, Brennan, Clapper and Petraeus

Given warp-speed changes in collection technology,  
And cross-cultural, social media psychology,  
Are the Church Committee reforms still very relevant?  
Should they just be buried like an old bull elephant?"

Or is a comprehensive reassessment long overdue?  
And, if it is, who could do such a complete review,  
Of where our reforms have gone off the track  
And what must be achieved to bring them back.

The Hill Intel Committees are swamped with each new crisis.  
Did torture work? What's Putin's next ploy? How can we stop ISIS?  
Their oversight work is very taxing, and we applaud it.

But they lack time and space for a full intelligence audit.

Can we repair the Nation's intelligence schisms?

And can we improve the oversight mechanisms?

It seems very clear what America must do.

The time has come for a Church Committee, Point Two.

## IV. NO PLACE TO HIDE

*Peter Fenn  
Former Church Committee Staff Member*

At *U.S. News & World Report*, Peter Fenn [describes](#) how Sen. Frank Church's warnings from 40 years ago have resonance for the current debate over NSA surveillance powers.

Read the full op-ed [here](#).



## V. STRENGTHENING INTELLIGENCE OVERSIGHT SYMPOSIUM

### OPENING PANEL

*Michael German, Fellow, Brennan Center for Justice*  
*Vice President Walter Mondale, former Church Committee member*  
*Sen. Gary Hart, former Church Committee member*  
*Frederick A.O. Schwartz, Jr., former Church Committee chief counsel*

**MIKE GERMAN:** Good morning everyone. My name is Mike German and I am a fellow at the Brennan Center for Justice at NYU School of Law. I welcome you to today's symposium on Strengthening Intelligence Oversight. This year marks the 40th anniversary of the creation of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, more simply known as the Church Committee after its chairman, Sen. Frank Church. It was the first and only comprehensive investigation of secret intelligence activities within the United States. This is one of a series of activities the Brennan Center has undertaken to recognize this anniversary. We published a report called *What's Wrong with the FISA Court*, written by our Liberty and National Security program co-directors Faiza Patel and Liza Goitein. They will be leading two panels this afternoon on judicial and executive branch oversight and intelligence activities. We also published a report on strengthening congressional oversight, signed by 18 Church Committee staffers, many who are in the room with us today. It also contains a foreword written by two Church Committee members: Walter Mondale, who was a senator of Minnesota and then Vice President, and Sen. Gary Hart of Colorado. Finally, Brennan Center Chief Counsel Fritz Schwarz, who was the chief counsel of the Church Committee, has written a new book called *Democracy in the Dark: The Seduction of Government Secrecy*.

The purpose of today's symposium is to examine how the intelligence reforms instituted as a result of the Church Committee investigation 40 years ago have fared, and how they might be improved. When the Church Committee issued its report, it warned that its recommendations for reform would be tested over time and that new national security threats would arise that could be used to justify new departures from American values and the rule of law. And so we have it, that CHAOS and COINTELPRO and SHAMROCK and MINARET were replaced by Stellar Wind and XKEYSCORE, by TALON and the fusion centers, by black sites and "enhanced interrogation techniques." We're hoping that a new generation of intelligence overseers can benefit from the wisdom generated from the Church Committee investigation, and be inspired by the decades of public service our guests have dedicated to strengthening our democracy. It's my honor and privilege to welcome Vice President Walter Mondale, Sen. Gary Hart, and Brennan Center Counsel Fritz Schwarz.

I thought that I'd like to start by kind of knocking down some of the myths. One of them that I think was persistent during my time in the government as an FBI agent, was that the Church Committee investigation took place during a period of tranquility, that our current situation is a threat so high that we should put off any kind of comprehensive investigation so as not to distract those who are working to protect us from their important mission. But here are just a few of the things that were going on at the time of the Church Committee: The United States army had withdrawn from Vietnam, and the North Vietnamese army started its final assault on Saigon. The Khmer Rouge took over in Cambodia. King Faisal of Saudi Arabia was assassinated. The Red Brigade's Red Army Faction and Japanese Red Army engaged in bombings throughout Europe and the Middle East. IRA and the Ulster Volunteer Force were killing dozens in Northern Ireland and Britain. The Abu Nadal organization bombed the TWA flight from Tel Aviv to JFK, killing 88 people. CIA Station Chief Richard Welch was assassinated in Greece. Two FBI agents were killed at Pine Ridge Indian reservation. A bombing by Croatian nationalists at LaGuardia airport killed 11 people. And Puerto Rican nationalists killed four in a bombing in downtown New York.

So with this dynamic threat environment going on, how is it possible that the investigation began, Vice President Mondale? Why was it necessary and why did you want to be a part of it?

**VICE PRESIDENT WALTER MONDALE:** I think it began by looking at Seymour Hersh's story. It got an explosive headline in *The New York Times* that contained the list of abuses and dysfunction in the intelligence agencies — a list made up by the agency itself that had leaked — and told the nation we were really in trouble. If you look at these problems you've cited, one of the reasons why we had to reform and make the agencies more responsive was in order to deal with the threats that were apparent to the security of our nation. And I would say there was a general agreement to that. I remember I was on the floor of the Senate when Sen. John Pastore stood up and moved for the creation of what is now known as the Church Committee, on the grounds that this couldn't continue. I'm convinced that Sen. Mike Mansfield saw right away that this had to be dealt with. So I think what we did could be explained because it helped prevent some of the abuses in the past, some of the mistakes in the past that cost us dearly, but also because we had to straighten this out, and only an outside committee within the control of the Senate could do it.

**GERMAN:** And why did you want to be on it?

**MONDALE:** Wow! Well, I had found this stuff as a senator. I had been attorney general in my state, and I had dealt with some of these issues. I sensed that something was really wrong without being on the inside. When I heard Sen. Pastore give that speech, I went to Sen. Mansfield and I said, "When you're setting this committee up, would you look at me?" And he said, "Yeah I will."

**GERMAN:** Sen. Hart, you were a freshman senator, only three weeks on the job at that point, and given a prominent role as a primary drafter of the reports. How did you handle that kind of responsibility so quickly?

**SEN. GARY HART:** Well, I was not only a freshman senator, it was my first month in the Senate, and I had barely met the other senators by this time. The answer to your first question of why do it now is: Why hadn't we done it before? The First Article of the Constitution requires the Congress of the United States to oversee the operations of the executive branch — all of them! It does not exempt national security.

From 1947 and the passage of the National Security Act — the beginning of the creation of what is being called the "national security state," which began to incorporate the CIA and expanded very, very rapidly — there had been *no* congressional oversight! So, historically the question is, between 1947 and 1975, why hadn't Congress done its work? We could spend a profitable hour discussing how most members of Congress didn't want to know. In fact, senior members of the Senate had said, "I don't want to know." Well that's not what the Constitution says — you have to know, whether you want to or not. So this was long overdue.

**GERMAN:** And what did that experience teach you, as a young senator, about how the government works?

**HART:** Well, I still tell student audiences that I'm the last idealist, so when I'm gone there are no more! It was a hugely disillusioning experience. I would say, not just the surveillance that went on, particularly under the previous administration, but what we discovered as the assassination plots and then, even worse, the use by the CIA of the mafia to try to carry out those plots against Fidel Castro. Well, this opened up so many dark currents under our government — I've characterized it as "a sewer under the city on a hill." For a 37-year-old, first-term, first-year senator, this was a great disillusionment. But I think, in a way, the work of the committee and our willingness on a bi-partisan basis to make fundamental changes in the broadly defined intelligence sector was a triumph of democracy and a tribute to the 11 members of that committee. It was probably one of the best congressional staffs that has ever been put together in the history of the Republic.

**GERMAN:** Fritz, you were the chief counsel of that staff, but you didn't have any intelligence background when you were asked to do that job. How did you gain the trust of the intelligence agencies?

**FREDERICK A. O. SCHWARZ, JR.:** You should say how did *we* gain trust — I don't think I'm very important in that, but *we* got it by first being determined. That was absolutely necessary and Sen. Mondale had a great remark in which he said, "We'll just get extensions so they can't outlast us." Then, showing the bipartisan nature of the committee, John Tower said something like, "Hallelujah! God bless you!" Or something like that. In addition to being determined, show that you can reliably handle secrets, because there are legitimate secrets, and I think our committee did that extraordinarily well. We had, essentially, no leaks, and we made reasonable agreements with the executive branch about keeping secrets. In contrast, the House committee floundered and faltered and failed because they refused to reach those accommodations with the government.

**GERMAN:** Vice President Mondale, it's always hard to keep politics out of politics, and this was an investigation by politicians. What did you do to relieve any concerns that there was going to be politicization or partisanship in the investigation?

**MONDALE:** You know, I think there ought to be a separate study on how this committee worked, how it was established, and how it approached its activities, because we did achieve, I think, a general acceptance as a committee that was truly bipartisan, and was working with everybody to bring these results about. I would start, in that study, by reading the following names: Frank Church, Chairman; John C. Tower, Vice Chairman; Phillip Hart; Walter Huddleston; Bob Morgan; Gary Hart; Howard Baker; Barry Goldwater; Mack Matthias; and Richard Schweiker. As staff: Bill Miller, Fritz Schwarz, and Curt Smothers, who I don't think is here. How did you get a committee like that? Mike Mansfield! He wanted this to succeed, and he wanted to set up a committee he thought could go through this huge, explosive hearing process and do what he knew would have to be done to work together and sustain bipartisanship. And that worked. This committee was working together as a single staff. We didn't have a Republican staff and a Democratic staff. Bill Miller came off the staff of John Sherman Cooper, one of the saints of the Senate, and also a Republican. He had enormous prestige in that Senate as a gifted staff member, and he knew exactly what had to be done. He was an old hand.

Then I think you'd have to say the executive branch, maybe with a little time, ended up, in effect, supporting what we were all doing. You have to give some credit to President Ford, who was not an ideologue. He was probably a little afraid of the process but wanted a plan that would succeed. You had Attorney General Levi, from University of Chicago, who became a tremendous supporter as the head of the Justice Department in shaping regulations and rules, and became a believer before it was over. So the contrast of this committee that worked together, excellent staff that provided that same background, and then the executive branch cooperating, not perfectly, but when you think of what we asked of them and what they delivered.

One of the jobs I had as chairman of this committee's "domestic task force," as we called it, was to look into the FBI records. Some of you were with me on that process. We were seeing stuff that had never been seen before. We were seeing a pattern of abuse. We uncovered, for example, the FBI's — well it was really Hoover's — antagonism towards Martin Luther King. He was convinced that Martin Luther King headed a "black hate group," as they put it. He had agents all over the place trying to find something on King "to knock him off his pedestal," as they put it. They tried to break up his marriage. When King was picked to go to see the Pope, to get the high international awards, the bureau tried to block that. They tried to, in effect, corrupt the public process and undermine and destroy one of the great leaders America's had. When this came out, and we realized this was not a process that let democracy work, but it was, in fact, a process that was corrupting one of the most essential elements, we knew we had something. I think that carried the day.

**HART:** In the panoply of, not heroes, but certainly important figures, I would add to what Vice President Mondale has said: Director William Colby. It was a very controversial situation for him. He was under enormous pressure from the CIA not to reveal some of the worst excesses. But he made a decision to disclose to us in a highly intense, long session what came to be called in short-hand, the family jewels. It was an inspector general's report that pretty much covered the waterfront of things that might be controversial,

illegal, or unconstitutional. He made a decision to reveal those to us. It was a monumental decision, and it made an incredible difference in our ability to address the reforms and propose the reforms that we did. He left the agency eventually, under great criticism from people who thought he should have stonewalled and chose not to. I've always felt that he was a very, very important figure.

**SCHWARZ:** Another factor that was really important was the structure of the committee, because as Sen. Mansfield set it up, it was six Democrats to five Republicans instead of what would have been normal: seven to four. John Tower was a vice chairman, not a ranking member. Then the committee, in its reaching bipartisan conclusions, our most important finding was that every president, from Franklin Roosevelt through Richard Nixon — six presidents, four of whom happened to be Democrats and two Republicans — had abused their secret powers. It helped us enormously, internally and externally, to show we were not being partisan in our major findings.

**GERMAN:** Sen. Hart, you worked more on the foreign intelligence matters, and in a recent remembrance you wrote of your Church Committee experience: It is important that we recognize the extraordinary power the United States has in the international respect for our constitutional principles. But it often seems that in times of crisis we forget that power. Why is that?

**HART:** I think the phrase “in times of crisis.” We cede — “we” being the other branches of government, particularly the Congress cede to the executive branch — great powers if we are under assault or perceive ourselves to be under assault. The problem is, that then encourages administrations to — I wouldn't say generate crisis, but to elevate a crisis to acquire power. This is where Congress is most under pressure to do its job, and to ask questions, not to undermine executive authority, but to defend the Constitution and protect the American people. Again, as I've said many times, those of us who have had the chance to travel the world know, we are being watched. Not only by leaders in foreign governments, but people on the street. They watch us, not only for the comical excesses we exhibit, but the degree to which we live up to who we claim to be. The American people, their presidents, and others claim high standards for this country. When we don't live up to those, it isn't missed by people around the world, they see that. And it's not only a kind of hypocrisy, it's used by our opponents to say, “See, they claim one thing and do another.”

**GERMAN:** Fritz, you've now written a book on secrecy. How does government secrecy undermine the power our constitutional structure and our democratic processes?

**SCHWARZ:** Well I can pick up exactly on what Gary said. The heart of American democracy is that the people should be involved. That's what we're about. James Madison said that in a democracy, public opinion is the true sovereign. The problem is that we have, over the last 60 years or more, gone into a secrecy society, a secrecy culture where the norm is to keep it away from the people instead of striving to get it to the people. That is totally inconsistent with the values upon which this country was built.

**GERMAN:** Another one of the myths I think has developed is the idea that the Church Committee investigation or another type of comprehensive investigation is about playing “gotcha.” It's only about trying to find the abuses and wag a finger, rather than trying to improve the functioning of intelligence. Vice President Mondale?

**MONDALE:** I think one of the greatest strengths exhibited by the work of the Church Committee is how that report has endured. No one has challenged the accuracy of our findings. I haven't heard one serious scholar say, “This is not right.” So we got our facts right, and it wasn't just a “gotcha” disclosure. It contained a range of remedies that were designed to prevent recurrence of these abuses. The two intelligence committees, which hadn't been there before, the Foreign Intelligence Surveillance Act, the FISA court, the new regulations and rules issued out of the White house — this was not a passing effort to move on. It was an attempt to bring about a fundamental change in how we dealt with intelligence so it would be more efficient, more responsive, and also adhere to the laws and the Constitution of the United States.



**GERMAN:** And did the heads of the intelligence agencies at the time recognize its purpose as making the intelligence agencies better at what they did?

**MONDALE:** Some of them did. One of the underlying themes I picked up, and several others did, is when you talked to people like Colby, to some of the people in the bureau, to some of the people elsewhere in the agencies, they were complaining about how screwed up their agencies were. We mentioned James Angleton earlier — I heard from Colby that Angleton was in a key spot in the CIA. He decided all intelligence dealing with counter-espionage was contrived by the Soviet Union, so none of it was to be believed, none of it, so don't worry about it. It should be worried about! What was correct, what wasn't, how do we deal with it? And there were other stories about, well Hoover was gone now, but Hoover had witches' brew, nut stuff going on in there and the people around him knew that. He was full of all kinds of strange ideas. He wanted to make certain that any gossip about any high official was immediately delivered to him. He had a file that he kept in his own office, several file cabinets, with every salacious rumor that he heard. What he would often do was go to the principal involved and say, "Well there's a story out, but don't worry about it, we'll keep it under." So he'd have another kept officer. This stuff was going on, and it bothered a lot of the sensitive bureau agents, so there was a great desire within these agencies to get reformed and I think they wanted us to succeed.

**HART:** Let me fortify that with a story I told at a dinner last night, that recurs in one of our early organizational meetings as to how we should proceed. By the way, since it had never been done before, no one knew what step one was! Order files and so forth. So it came my turn, as the most junior member, to make a suggestion. I said, "What if we start out by each of us asking for our own CIA and FBI files?" And the room got very, very quiet. The silence was broken by Barry Goldwater who said, "I don't want to know what they got on me!" So there you are: you have senior members of the Senate of the United States intimidated by the very agencies we were setting out to investigate!

**SCHWARZ:** If Hoover had not been dead, we would have had a hard time getting going with the FBI. Maybe we would've, maybe we wouldn't have, but it was sure helpful he was dead. On your first point about "gotcha," that never was our point, but we did believe that to get reformed it was important to not just theorize about the problems, but to get hard evidence. And that really helped, because we showed not only Dr. King, but many, many, less well-known people were abused, and injured, and committed suicide, and so forth. So it's not "gotcha," but it's to make credible the need for fundamental reform.

**MONDALE:** Well, then you take perhaps the most controversial area we investigated, the assassination attempt, to a person, members, and staff — the effort was not to pin blame. The effort was to find out systematically how that decision was made. We spent hours asking questions, hearing secret hearings, with people involved both in the Eisenhower and Kennedy administration. Who made the decision? Who decides in our government, to kill another foreign leader? It wasn't "pin the tail on the donkey," it was an enquiry that was systemic. How does the government of the United States make the decision to kill a foreign leader?

**GERMAN:** With the idea being that by knowing how those decisions are made, you can put in guidelines and procedures and oversight mechanisms that will then make sure we have systems that will prevent those improper activities from happening.

**SCHWARZ:** Discovering a system which was designed to make it extremely difficult to decide who made the decision was itself a terrible mistake by the government, and that system needed to be exposed and criticized.

**MONDALE:** Yes, and that led to one of the reforms which is so-called presidential finding. That came out of our inquiry, that if you're going to conduct a significant covert operation, the president of the United States has to authorize it. Again, it's not to pin blame, it is to identify accountability. That's what we were trying to establish.



**GERMAN:** One thing I appreciate about all of your service is how you stuck to these issues and worked on them all the decades since. Sen. Hart, you co-chaired the 1998 Hart-Rudman Commission on National Security for the 21<sup>st</sup> Century, which warned of the increasing threat from international terrorism before the 9/11 attacks. What were you able to see in conducting that investigation that the intelligence agencies weren't, or that the administration wasn't?

**HART:** Well, I think the intelligence agencies were beginning to see the terrorist threat. We had naval ships bombed, or dynamite-attacked, our embassies had been attacked, so it wasn't a secret. But what we were led to conclude in that commission, two and a half years of study, was that sooner or later, this kind of conflict was coming to our shores. It wasn't that there's going to be more terrorism. Our statement in our final report was that America will be attacked by terrorists using weapons of mass destruction — we did not say commercial airliners — and that Americans will die on American soil, possibly in large numbers. That was nine months before 9/11. What failed there was not the intelligence community, it was the failure of executive authorities to listen and pay attention. They had the same intelligence we did, they just didn't pay attention to it.

**GERMAN:** Fritz, in your book you quote former White House Chief of Staff James Baker, who after 9/11 said the Church Committee had, “unilaterally disarmed our intelligence agencies.”

**HART:** Well it was on the afternoon—

**MONDALE:** Do you agree with that?

**SCHWARZ:** I forgive him because I think he was emotional at that moment. It was the afternoon of 9/11, and he said we had *caused* 9/11. He didn't pay attention to the record, number one. For example, the Church Committee said the FBI should get out of the business of investigating dissent and should concentrate on terrorism. We said the CIA should spend more effort with human intelligence and less time simply relying on machines. Also, Howard Baker, his fellow Republican with the same last name, who was a great member of the Church Committee, had said that in the long run this investigation will be very helpful to the intelligence community. Then, the idea that for 25 years, which it was then, the people in government had been helpless to correct this terrible wrong we'd done, is itself absurd. Finally, picking up on the warnings that Gary talked about that were going on, in the summer of 2001, after your Hart-Rudman report, the White House got many warnings that there was going to be a devastating terrorist attack. I tried to develop in my book the argument that had they released that information to the public, and particularly importantly to all the people in the government who were responsible for looking at things like strange people getting pilots' licenses, it is very, very likely that 9/11 would have been prevented. They simply didn't do it. Not out of malice, but because the secrecy culture is one that, once something is secret people sort of stop thinking about it. So they never thought about whether it would be smart to let the public and the people in the government know there are these real, powerful threats.

**HART:** Well secrecy culture operated even inside the intelligence community. Our commission recommended the creation of the Department of Homeland Security because we found out Coast Guard, Customs, and Border Patrol were all operating under different federal departments. They did not have a common database, they did not have a common communications system, they had no way of talking to each other, and they all reported to separate cabinet officers. So that's why we recommended the creation of the Department of Homeland Security: those three agencies and FEMA, not the gargantuan thing we now have.

**GERMAN:** The Church Committee's recommendations were an attempt to harness the power of our constitutional checks and balances, and the recommended reforms touched all three branches. We mentioned the executive reporting requirements; there were attorney general guidelines for the FBI; 10-year term for FBI directors. There's also the judicial branch, bringing them in with the Foreign Intelligence Surveillance Court,

which we'll talk about in a minute. But Sen. Hart, you were one of the founding members of the Senate Intelligence Committee which was the congressional oversight committee created as a result of the investigation. How would you rate its performance?

**HART:** Start with the negative: Fritz Schwarz said earlier the common belief in Washington was that members of Congress, politicians, couldn't keep secrets — and overwhelmingly all of us heard, and it was in the press, this is going to fail because these guys can't keep their mouths shut. So that was challenge number one: Don't talk! Don't leak. Now, in a culture and city of overwhelming leaks, this was a huge, historic achievement! Not only the Church Committee, but the follow-on permanent oversight committees. So, that was step number one: Keep your mouth shut. When you're told secrets, don't divulge the secrets, even to your friends, and particularly if your friends are journalists, with all due respect. We had to institutionalize the reforms of the Church Committee. That was our first task: Set these recommendations into process — some of which were statutory, some of which were by executive order — and institutionalize briefings. So, you had to setup a system whereby the director of the CIA or his designee, the FBI, and the NSA would routinely come before us. Particularly on covert operations this was a very tenuous situation, because part of the mandate to the intelligence community was that if you're going to undertake the covert operation, you have to tell us about it. Not just an agent on the street talking to a possible source, but an operation. That was also a question of could we keep our mouths shut. So, I was involved in the first two or three notifications. I think our first chairman was Sen. Danny Inouye, and he was in Hawaii when one of the first notices came in, and it happened to be when Congress was not in session. I happened to be here, so the agency got ahold of me and said, "OK, we're told to do this, here's what we're doing, here's the operation." So I had to find a secure phone, call the chairman of the committee, brief him, and let him decide whether to brief all the other members of the committee. So, it was a work in progress. We were inventing oversight as we went along. Then finally, Rick Inderfurth, one of the staff members, and I made the first congressional trip. It was just the two of us to visit CIA stations abroad to see how they operated. We went to some of the key agency stations in Europe and the Middle East, as many as 10 or 11 of them, including in Tehran at the time, 1977 or 1978, the Shah was still in power — I've got some stories to tell about that.

**GERMAN:** Vice President Mondale, you were elected Vice President and went to the executive branch. How did you look at these reform recommendations once you changed branches?

**MONDALE:** If I had any questions about it I called Fritz Schwarz over to help me understand it! No, I think that was a fortuitous development that helped for a smooth transition from the recommendations of the Church Committee to the incorporation of those recommendations in the executive policies. President Carter agreed with that, the attorney general agreed with that, I spent time talking to the head of the agencies and they agreed to it, and when our executive rules went into place there was, I would say, almost unanimity within the executive branch and within Congress about where we wanted to go. That unanimity I think worked for about five years and then slowly it went elsewhere. Our proposal was based on the idea that there has to be a separation, and checks and balances while trying to keep this information secret. It hadn't really been tried before, and we gave it the college try. I would say it's worked fairly well, but with time there were some disappointments. I think the work of the congressional committees has been somewhat co-opted by the federal agencies themselves, and I think we've seen evidence that they're restrained by maintaining diplomatic relations with each other, and the public pays the price because we don't get full accountability. We've had some recent internal disputes that I think help demonstrate that.

We thought the FISA court was going to be a magistrate function for the federal bench — in other words, that its only function would be to act on applications for warrants. That's what it was. It was not to be a court that operated with general jurisdiction as though it were a regular federal court. That has slipped some — I know this afternoon we're going to hear from one of the judges — and that bothers me because the FISA court can be a private Supreme Court for the agencies. Everything they do is in camera and without any other litigants or persons who might be interested in the issue involved at all. It's in secret, without other interest involved, not only at the trial level, but at the appellate level. There is no way a responsible party who objects

to what's going on with solid reasons for doing so will be heard, and I think the idea of giving broader jurisdiction to that court is a mistake. Either we have to broaden the rules for who can participate in these hearings, or we have to walk the FISA courts back to the rules that we put in place when we made our recommendations. But the idea of having a secret court of general jurisdiction, competing with regular courts, and with the imprimatur of being *the* secret agency court, I think is intolerable. We should do something about that.

Another thing that really bothers me is the “state secrets” defense. Almost every court case involves activities of the agencies, very quickly a petition comes in from the government saying this is a state secret issue and cannot be heard, we cannot participate. And the courts, not always, but very often will say we'll dismiss the case. So you can't even get to the merits of the case, no matter what the reasons for it. We have a general statute that's supposed to deal with secrets, where the judge will hear this and make a judgement about what could be done, but under the current process the state secrets issue that's being used across the board now, almost every case is followed by a dismissal. I don't know if Ms. Donahue is here today from a local law school, but she said there's a lot of evidence that private companies will press the government to claim state secrets to help them with a case. So it's a really dangerous tendency.

**GERMAN:** I think you're referring to Laura Donahue from Georgetown Law.

**MONDALE:** Yeah, is she here? No, she was on the list. I think this is really a serious problem. I'd like to see some reforms in these issues to make the court more accountable.

**GERMAN:** And because there is so much secrecy in the courts and in the intelligence committees, one of the ways we find out about things going on are often leaks to the media. Fritz, a lot of conscientious government employees who see something wrong and try to report it end up suffering greatly — losing their jobs and even being prosecuted, more recently. How important is that channel of information to the public?

**SCHWARZ:** Well it's vital. There's one person who is here today, Tom Drake, who's “crime” was describing how NSA was being inefficient in trying to deal with the incredible volume of information they take in every second. He was charged under the Espionage Act and 35 years of potential sentence. It was a terrible overreaction to what was essentially an effort to simply blow the whistle and to get the government to do a better job. Being more general, this country depends on newspapers and journalists in general. We were built on newspapers. Right after Madison made that report, that comment about public opinion, the U.S. Congress gave subsidies to newspapers so that, in a while, 90 per cent of the weight of the mails were newspapers and only 10 per cent of the revenue. So journalism is vital and it is still vital today. Whistleblowers are vital — I'm just going to make an unsolicited comment about Edward Snowden, it seems to me what Congress is now doing in trying to amend the Patriot Act proved that he, acting from patriotic motives, actually has helped the country. So information coming from the inside, information coming from investigative journalists is absolutely vital to American democracy.

**GERMAN:** Great, thank you. I want to get to questions, but you both signed on, all three of you signed on to the *Strengthening Intelligence Oversight* report the Brennan Center put out. It calls for a comprehensive investigation. Do you think it's time for that kind of investigation, and what advice can you give?

**MONDALE:** Before we get to that, I want to pick up on Fritz's point. I'm a big Obama supporter. I support him in every election. I'm proud of him as President, but I don't like what he's doing in the intelligence area. This administration has been tougher on the press, by far, than any other administration in American history. The press is terrorized, people might want to talk to the press scared to death. I would hope they think this over and try to help us find balance between the responsibility of the press and the ability of Americans to speak out. This is a real tough problem now.

**GERMAN:** I'm going to go ahead and open it up to questions if we have questions. We do have a mic, if you could raise your hand.

**SCHWARZ:** Come on, there are a lot of intelligent people here. We need some hard questions.

**QUESTION FROM THE AUDIENCE:** Good morning. Incredible program. Thank you for being here. 60 to 70 percent of our national security budget is now paid to private contractors and many of the abuses that occurred by the government are now being handled under the covers by these private contractors. I'm thinking of, for instance, Janice Potker, was surveilled for eight years by Clair George because she wrote something unfavorable about Ringling Brothers Circus. We saw that with the HB Gary hack there had PowerPoint presentations describing how they were going to harass Wikileaks contributors and Glen Greenwald and various different critics.

So I think what you're doing is fantastic, but how do you reach out and include the intelligence community in this effort, because I think the worst abuses are probably happening there.

**GERMAN:** And to repeat the question, she was asking about the increasing privatization, excuse me, of intelligence and how we get oversight control of private companies that are doing work that used to be in the purview of—

**HART:** Well, this is one of the biggest developments in the last 40 years, the explosive growth of the government side of intelligence, the expansion of the NSA, to some degree the CIA and others, and of course the new layer of director of National Intelligence with hundreds if not thousands of employees. That's a separate issue.

So the government side of it has grown explosively, but then you have the contractors and I don't think in our time, in our ancient time there were private contractors in this so-called community. How many there are today God knows. It's estimated the number of employees and contractors in the hundreds and hundreds of thousands. And many, as the new system of government is to go quote off budget, so you don't even have budgetary accountability because the director of the CIA or the NDI or whatever they're called, can hire these consultants, Mr. Snowden, by the way, for better or worse, and they are not in the same level of accountability as public employees.

And then finally, you layer on top of that, the explosive expansion of technology, so you've got a bigger public community, you add to that a private side of the dimensions we do not know and maybe even the president of the United States does not know, and then the ability to pick stuff out of the ether of any individual in America and the world, and it's a brave new world.

**QUESTION FROM THE AUDIENCE:** Hi. I wanted to talk about intelligence agency charters. Now, one of the big projects that came out of the committee and Mr. Vice President, there was actual work done on this inside the administration early in the Carter years. If you look at the paperwork on that you see suddenly the administration which started out supportive of intelligence agency charters just stopped doing anything on this, and Senator Hart, the Senate Intelligence Committee, which pushes on charters, stopped at 1980. And I'd like to get your reading on did we lose an opportunity there, should we have charters for our intelligence agencies and how would we go about doing that if we wanted to get there.

**MONDALE:** My recollection is pretty vague on that, but I think we found it impossible to write. We were for it and we tried to write it. It's so difficult on the committee. I think we gave up, and I was for it. But we couldn't get it done, didn't know how to do it.

**GERMAN:** And Attorney General Edward Levy wrote internal guidelines, attorney general guidelines for the FBI that sort of took some of that pressure off. Unfortunately those have been amended many times

since, including in 2008, where they were basically eviscerated, but certainly a great question. Thank you very much.

**HART:** Something was directed to me, but I didn't hear it.

**GERMAN:** That the committee stopped pressing for it eventually. That the intelligence committees that were pressing for charters for the agencies eventually grew weary and stopped pressing for the charters.

**HART:** Intelligence committees today.

**GERMAN:** No, no, no. Up until 1980.

**HART:** I don't know.

**ADAM EISGRAU** Hi, and thank you very much to the Center and to the panelists for the program. I'm Adam Eisgrau with the American Library Association. Librarians of course for decades have been on the front line of attempting to restore some of the civil liberties that have been lost to the Patriot Act and before. In 78 hours the Senate is going to reconvene to do something or nothing with respect to the USA Freedom Act, with respect to extending expiring provisions of the USA Patriot Act.

I would be a hell of a bad lobbyist if I didn't take advantage of this panel to ask you gentlemen, if you will, to say whatever you wish to your former colleagues in the Senate.

**GERMAN:** So his question is, there are three provisions to the Patriot Act that are set to expire and Congress is now coming to a decision point and what would your advice be to them?

**HART:** Well, it's fashionable to say we've got to find a balance between security and liberty, privacy. And yet no one has figured out what that balance is. And it's one, I think, that perplexes all of us, does me anyway, to this day. There are bad people in the world and some of them are in our country. And so a public which by and large, if surveyed would overwhelmingly say protect my privacy, 99 percent of whom when the bomb goes off would say why weren't you doing your job.

And again, we're into this 21<sup>st</sup> century world of technology where the ability to surveil someone, listen to phone calls, track messages and so forth, is greater than it's ever been. In the old days you had to send 40 FBI agents out on the street to follow somebody. Today you can sit in a control room somewhere and listen to virtually anything if you can.

I'm told that we're now entering an age of encryption in which your cell phone, the vendors of the cell phones are saying, oh no, we're going to protect you from the government. Well, if your concern is the bomb going off, then you're not quite sure whether you want citizens protected from their government if the government is doing its job in the appropriate way.

So I keep coming back to the best protection of people's liberty is the Fourth Amendment to the Constitution, and if the FISA system isn't working, then let's find one that does in which, in secret or not, probably in secret, but with a public advocate on the other side of the case to say, Your Honor, you've heard the government's case, now let me tell you hypothetically or otherwise what the case for rejecting this warrant is, so at least you have an advocacy proceeding, which the Vice President's promoting here, that's one solution.

But all I can say is there's going to be another major terrorist attack on this country. I happen to think it's going to be biological, but it may not be. And it concerns me. People in New York are deeply concerned, as they should be. People in Denver should be concerned as well.



**GERMAN:** One of the controversies, I'll just pick up on that question, with one of the expiring provisions, Section 215, is that when the government did an analysis and also some independent groups, they found it was never actually useful to preventing a terrorist attack.

**MONDALE:** I'd like to answer that question, and now that I've listened to Gary, I agree with what he said, but I think that the issue before the Congress the next few days is whether we're going to eliminate this so-called meta-data strategy. There have been two insider commissions with key officials, experts, both of which said this is not effective. It's an enormous undertaking, it's a big unlimited strategy to interfere with the privacy of Americans and the Fourth Amendment.

It was adopted in secret. Congress acted later without being told what they were voting on. This is the first time we really know what's going on, and I hope when this is over, and I think the president said that he wants to get rid of meta-data, and many of the leaders in the Congress are saying that on both sides, this is the most optimistic opportunity I've seen in a long time to step back from some of this excess that we've been dealing with.

**SCHWARZ:** Picking up on the word optimistic, you know, it's natural for all of us to say, wow, particularly since 9/11, look at all the terrible things that have happened, and a lot of awful things have happened, excesses have happened. But what's going on now is not partisan. You have that vote in the House, was like 340 to 80. Overwhelmingly both Republicans and Democrats upset about excess and wanting to find creative ways that still protect the country but that don't just say you can do anything you want to.

**HART:** Let me add to my comment what Vice President Mondale said. We've got to cancel, not renew, the Great Hoover in the Sky, J. Edgar but vacuum. What I was talking about was the targeted with some probably cause that a crime has been committed or is about to be committed.

**GERMAN:** Let me go to this side if there is somebody.

**QUESTION FROM THE AUDIENCE:** Hi there. Good morning. Thank you so much for coming in and speaking. It's an honor and a pleasure. So my question is about, and we touched on this earlier, walking the fine line between liberty and secrecy. I was wondering, was there ever a point in time when you guys were working the Church Committee where you found that something you had seen wasn't to be shared with the public, where you found it was actually better to keep it secret?

How do you feel about keeping certain things secret? How do you feel about walking that fine line between liberty and secrecy? Where does it end, sharing things with the public? Where do they not need to know?

**GERMAN:** So the question, during your Church Committee investigation, did you come across secrets that needed to be kept secret? And in your later life, how do you look at the balance between secrecy and our democratic systems?

**MONDALE:** Yes, that was the great challenge of the Church Committee, to do our work but knowing that much of it had to be in secret. So it was a daily, it wasn't an extraordinary event, it was almost a daily event. We tried to put in place things that helped us, like we wouldn't accept the name of any agent, any American agent. We did not want it in the files, we did not want to hear the person's name, we wanted to stay out of that business because it wasn't essential to what we were doing.

So all the way through we were trying to sort out ways of dealing with your question yet move ahead with our strategy.

**SCHWARZ:** One interesting issue we faced was whether the hearings on the assassination plots to kill Castro and to kill Lumumba and to kill other people would be held in public. Senator Howard Baker pushed hard that they should be held in public, giving good arguments, and Senator Frank Church, the chair, said no, I don't think we should hold them in public, because A) these are going to be our first hearings, and B) it's inevitable, if you hold those hearings in public, things will come out which would not be good to come out.

One thing particularly: names. Whereas, if you hold the hearing in executive session and then write an extremely detailed report, you avoid those risks. Of course it would have been politically great for Senator Church to hold those incredibly dramatic hearings. It would have been kind of fun for me because I usually did the first examination of the witnesses. But I think he was right that it was better to be cautious and hold those hearings in private and then have an extremely detailed final report which Gary was one of the people who was the drafting committee, Church and Tower and Gary.

**HART:** Could I use this occasion as I have in the past to identify tangentially a hang nail that plagues me 40 years later: naming names. The three Mafia figures involved in the Castro plots with the CIA, we heard from one of them, John Emercelli twice. The first time he came and went. No public notice at all. Highly secret. The questions obviously were who ordered Castro killed, what role did you play, and so forth.

And I felt at the time, I don't know about Vice President Mondale, he was generally forthcoming but still knew a lot of stuff he wasn't telling us. He went home to Miami and disappeared and ended up dead. He was in his 70s. In Mafia terms in those days that was retirement. For the rest of us now that's middle age.

The second figure was Sam Giancana, probably the top Mafia figure in America. Either we, Fritz can verify this, either we were prepared to subpoena him or the House committee was. He was killed in his basement.

**SCHWARZ:** We were.

**HART:** We were. He was killed in his basement with six bullet holes in his throat. Neither of these crimes have been solved. Now by and large, the media included, these were dismissed as kind of Mafia stuff. There is no doubt in my mind they were killed in connection with our committee. Now the question is why. Who did it and why.

**GERMAN:** Burt, go ahead. Burt and then Ray.

**BURT:** Yes, I have a brief comment and a question. The brief comment is, Vice President Mondale, that the Judiciary Committee a couple of years ago reported out a bill, bipartisan, to dramatically change the state secret problem which this administration opposed. But my question goes back to Mike's original question about how the Church Committee was able to come about. And you describe the turbulent times. But my experience is that the history of intelligence and oversight is all before 9/11 and after 9/11.

And what I mean is that not people in this room but people who follow current events, a lot of my acquaintances who are liberals, after the Church Committee report and disclosures were sufficiently outraged to back a lot of reforms which as you say have been vitiated, the Levy guidelines which really came from the Church Committee recommendations that Vice President Mondale worked on and assassination executive order.

But after 9/11 those same people, the same kinds of people in my experience have a different attitude, and it is essentially I don't care even if they're eavesdropping on my First Amendment activity, my dissent, protest, and I don't care even if they can't show that they have thwarted terrorist attacks as a result if it infinitesimally decreases the chance of my husband getting blown up at Grand Central, just do it.

And so my question, and the votes in the House bipartisan now on 215 maybe show a little improvement, but I think it's been vitiated and will continue to be vitiated. So my question is, how do you get the public on this balancing that you were talking about to really understand the harm of excessive secrecy in light of that attitude?

**MONDALE:** It's a reality of dealing in this field that when Americans are afraid, they reach for a strategy where they wipe away the Constitutional legal protections and usually at great sacrifice to our security and to America's stature as a law abiding nation. And whenever these issues come up, the people that want to go in that direction try to fan the flames of fear, rather than trust, even though I think there's all kinds of evidence that responsible intelligence operation committees like ours actually strengthen the capacity of these agencies to defend us, made it more possible that they would do their job well and efficiently.

Also this argument totally ignores the effect of limiting democracy upon the public process. If you just say we're going to turn off the Constitution for a while till we get this, it's not an innocent thing. I mean you chill the whole public process. You prohibit debate that should be heard, and the reforms that can follow. The right of the public to be heard on these great issues. And I think it's a hard argument to make but I am confident that what we did and how we tried to do it, and the spirit of what we did is the best way of protecting our country.

**GERMAN:** Rick and Pat.

**RICK INDERFURTH:** Yeah, I'm Rick Inderfurth and it's great to see the three of you together again. I can't believe it's been 40 years since we were all working together. I'd like to ask two questions, one on the CIA and one on the FBI. On the CIA, post-9/11 I read a report in the *Washington Post* saying that the CIA has become a highly efficient killing machine.

This goes to the question of the use of drones, and we know that that's something we didn't have to deal with on the Church Committee because drones and Hellfire missiles and the rest weren't there. This is something that is of concern for a number of reasons, including whether or not the use of drones for basically targeted assassinations is bumping up against executive order and that.

I think the administration says that enemy combatants is the way they are allowed to get around the assassination prohibition. But there are real questions about whether or not the CIA has evolved from a Central Intelligence Agency to a Central Action Agency and is losing its central function, of collecting intelligence to inform decision makers.

President Obama has said and John Brennan has said that they think that maybe this should be off loaded to the Pentagon. So my question is, are you concerned about this evolution of the CIA and do you believe that these kinds of actions which will certainly continue into the future should be military or CIA? Then a quick question on the FBI.

They're looking for a new building. It's going to be either in Virginia or Maryland, but this monstrosity on Pennsylvania Avenue will go away. My question is, is it now time to retire the name of J. Edgar Hoover for that building?

**MONDALE:** That's old Bob Morgan wanted to take Hoover's name off while he was on the committee. We decided to wait a while.

**SCHWARZ:** It would be great. I mean why should Hoover's name be on the FBI? I mean he was a great bureaucrat. He did so much harm to this country, not just to people but by confusing presidents to believe that communists controlled the civil rights movement or the anti-Vietnam War movement. His name should not be on a public building. And now that it's a new building, it doesn't have quite the same, you know,



looking like the Soviet Union and the book "1984" of changing things. It's a choice not to put it on a new building.

**HART:** Yeah, I was back to drones and haven't gotten to Hoover yet. I mentioned technology earlier and the great changes in the last 40 years and that's one of them. There are those who think, I'm still pondering, the use of drones is a sophisticated assassination, in fact. And if you think about the use of drones in the battlefield, and the battlefield now is not a defined place in the Battle of the Bulge, the battlefields in a way all over the place, it raises amazing moral questions and we all know what those are in the sense of is it better take out a handful of people with a drone, not only the bad guy but his family as well, and people who happen by at the time, or drop a bomb and wipe out a whole village?

Well, if you put it to a vote, most people would say the former. Confine the ancillary damage. But you do take the human element out of it. Now I guess Hollywood's discovered this and there are all kind of movies, and stage plays, about the kind of anonymous game player in some vehicle in the desert in Nevada killing somebody or somebodies in Afghanistan, it is pretty eerie. And you know, after World War II we the world, maybe during World War II or between the world wars, created these conventions on warfare and how to conduct warfare and repatriation of prisoners and we more or less created rules of conducting civilized warfare.

And now you've got, you almost have to go back and create new international conventions to deal with these kinds of questions, and I'm not sure again, as a not only a law school graduate but divinity school graduate, but we have come close to figuring out the moral dimension that drones and other things like drone represent. Because in a way if you're futuristic and you look, we should have Newt Gingrich here, if you look 10 year or 20 years down the road, people will look back on drones like biplanes in World War I, I suppose.

I don't know the answer. It's complex.

**MONDALE:** One thing to answer your question. I think it should be transferred to the Department of Defense because the Department of Defense is more accountable to the Congress under the appropriations process and in other ways. The CIA is a dark cloud out there somewhere, and it's not responsive, it's not accountable, and I think that if it were moved to the Defense Department, it doesn't solve the problem but the chances of making it more accountable and responsible are improved.

**GERMAN:** And one last question. Pat Shea.

**PAT SHEA:** After the Church Committee I worked in the executive branch and discovered as a civil servant politically appointed, the only control I really had was on a budget. And one other thing since the Church Committee is the budget has never really been analyzed in a public way without revealing sources or methods. I don't think we need to know that but we do need to know dollars and cents, and it does seem to me on the question of drones or on Burt's question, if we had a budgetary process that was truly followed. I'd be interested on your own notion.

And one last question. Since you brought up Sy Hersch, Mr. Vice President, what do you think of his most recent article in the London literary magazine about Bin Laden?

**GERMAN:** He asked how you felt about Sy Hersch's recent article on the Bin Laden raid.

**MONDALE:** I don't know. I read it twice. I'm not sure about that.

**GERMAN:** And his other question was on the budget process. Should we have a more transparent budget process?

**MONDALE:** Obviously yes. I don't know why we keep these so-called secrets about what these departments are spending. It always leaks anyway. Would we be better to do it in a responsible way where we could rely on the information we're getting?

**GERMAN:** So we're over time. Please thank Vice President Mondale, Senator Hart, and Fritz Schwarz. Thank you very much.

## PANEL 1: CONGRESSIONAL OVERSIGHT

*Michael German, Fellow, Brennan Center for Justice*

*Dr. Loch Johnson, Regents Professor of Public and International Affairs, University of Georgia*

*Diane Roark, Former Staffer, House Permanent Select Committee on Intelligence*

**MIKE GERMAN:** This panel will explore some problems with congressional oversight, and how it might be improved. We have two incredible panelists. I know we covered a lot of the congressional oversight issues with Vice President Mondale, Sen. Gary Hart, and Fritz Schwarz, so on this one we are going to try to get a little more in depth on some nuts and bolts, how things have worked, and how they can be improved.

My first panelist is Dr. Loch Johnson who was a Church Committee staffer and is now the Regents Professor of Public and International Affairs at the University of Georgia. He served as the special assistant to Sen. Frank Church during the Church Committee investigation, and later as the staff director to the House Intelligence Oversight Subcommittee of the first House Intelligence Committee, set-up after the Church Committee. He's had a career in other staff jobs on the Hill, and was also the assistant to the chairman of the Aspin-Brown Commission on the Role and Capabilities of the Intelligence Community in 1996. You could also say he has written the book on intelligence but that would be wrong because he actually written the books on intelligence — more than a dozen of them. So we're very pleased to have you here, Loch.

We also have Diane Roark. She worked in executive branch positions at the Department of Energy, the Department of Defense, and the National Security Council. She then spent 17 years as a Republican staff member to the House Permanent Select Committee on Intelligence, where she stayed until she retired in 2002. Many of us probably would not know her name but for a *New York Times* article in 2005 that revealed the warrantless wiretapping program that President Bush had authorized after 9/11. Diane was targeted with a very aggressive FBI investigation and threats of prosecution that I'll let her get into more of the details with.

Loch, why don't we start from sort of a higher level? Some have argued that national security and foreign policy are the domain of the executive, and that Congress should let the executive have free reign in those areas. What's the appropriate role for Congress in intelligence activities, and how has it performed in that role?

**DR. LOCH JOHNSON:** Well, thank you, Mike. This is a complex topic, and I approach it with a great deal of humility. Some of my former colleagues on the Church Committee remind me from time to time that the humility is well deserved. I would begin by pointing out that we have pictures in our head, I think, of how government ought to work. Some people have a picture in their head that indicates power is most important, and efficiency. Former Vice President Cheney, for example, or the University of California Berkeley Law Professor John Yoo — they believe, particularly when it comes to national security, the president ought to be the sole organ of the government, basically. I much prefer, and I think many of our panelists do, the model projected at the Founding Fathers' convention, often called the Madisonian model, which believes efficiency is not unimportant, of course, but there is a higher value. That higher value has to do with preventing autocracy from taking over a country. So, if you read Federalist Paper No. 51, which most of us have I think, it's a primer on how the government should work when it comes to accountability. If you walk into the eponymous Library of Congress wing, named after Madison, you'll find, etched nicely on the wall, a quote from him, not from Federalist Paper No. 51 but from another document, in which he says, "Power, lodged as it must be in human hands, is ever liable to abuse." That is what animated the Founding Fathers in 1787. They weren't power-oriented, they were anti-power-oriented. They understood the danger of power.

Today I think most people who study this carefully have adopted the Madisonian model — although, certainly we know there are those out there who believe in the imperial, unitary presidency model — but those who adopt the Madisonian model point out that the reason we need accountabilities is because it's not

enough just to pass laws. Congress has an obligation to make sure those laws are being carried out properly. Lee Hamilton once said to me that accountability is all about keeping the bureaucrats on their toes. Wyche Fowler, of my state, who served on both the House and Senate Intelligence Committees said that accountability is all about keeping the bureaucrats from doing something stupid. There are a couple of ways of doing that. One can review programs, which has a kind of an *ex post facto* aspect to it. I like to point out that ante-facto review is important too, looking at programs before they're actually implemented. So I think that's what we're talking about when we discuss the commission of accountability.

I think the pattern over the years, since the Church Committee, has been highly uneven. I've discerned this pattern when it comes to intelligence accountability, and I use the metaphor from political science about police patrolling and firefighting. By police patrolling, I mean lawmakers checking the locks on the door, shining the flashlights into these agencies, monitoring what they're doing on a regular basis. By firefighting, I mean when things really go wrong, when there's a train wreck and members of Congress have to jump on the fire truck and go to the rescue and put out the fire. What I see as being the pattern is rather desultory police patrolling by members of Congress for most of the time — a lot better than before the Church Committee, I guarantee you, the difference is between night and day. However, it is still not as energetic as one would like — until there's what I call a shock to the system, and by that I mean a scandal of some kind. Iran Contra, for instance, or a terrible intelligence failure such as what preceded the 9/11 events. When you have a shock, then suddenly lawmakers become very energetic. They jump on the fire trucks, they go and they conduct the investigation and this has happened five times. It happened with the Church Committee, the Iran Contra scandal, the Aldrich Ames counterintelligence case, the 9/11 mistakes that occurred, and with the wrong hypothesis about WMD's in Iraq. Those have been the five main fires that we've had, and the firefighting behavior.

What concerns me is what happens in between these fires and how we can avoid the fires in the first place. What that points to is the need for more energetic police patrolling, and the only time we really tend to have energetic police patrolling is right after the firefighting when members are aware of the importance of accountability. But then it begins to ebb away, and you go back to low-level, low-energy police patrolling until, guess what happens — exactly what Madison would have predicted — these agencies abuse their power, they make major mistakes, or they engage in a scandal and then have what I would call more genuine accountability. So one of the big questions I think we need to address is how we can sustain this police patrolling in order to avoid the fires that eventually break out?

**GERMAN:** Diane, you spent some years on the executive branch and then came over to the Intelligence Committee. How did you see your role when you changed from being in the community to being an overseer in the community?

**DIANE ROARK:** Well, I have to say that anybody who says with a straight face that the executive branch is extremely efficient and streamlined has never served there, or is not being honest. My main two issues, for instance, while I was at the National Security Council staff were verifying compliance with arms control agreements and some counterintelligence issues related to diplomatic reciprocity with the Soviet Union, at that time. The story of my career basically, both in the Administration and in the legislative branch, is a struggle with bureaucracy. They basically do not want any oversight from anybody, including in the Executive Office of the President. They certainly don't want it from the legislative branch either. It's much easier for them to put off the legislative branch but we do believe, as Loch said, separation of powers is fundamental. The Founders did not say foreign policy was exempt. They gave commander-in-chief powers, because in a fast-moving war you can't be going to get approval for every tactical or other move from the Congress, but they didn't exempt foreign policy in general.

I came to the legislative branch determined to do significant oversight, as I had been in the executive branch, and it was tough in both places but tougher in the legislative side. I was known for pretty aggressive oversight. Once the Republicans came in power. I had the NRO account first and insisted that they should

compete their contracts, for instance. I questioned the way they were going in a number of areas — this was very unpopular, both with the NRO and with the contractors. I was then assigned to NSA. When I came to the NSA account, the general perception was that it was in good shape. After about three months I was totally depressed. I thought the national security was at risk because they had not even begun to adapt to the digital age, and had no real plans to do so.

**GERMAN:** And this was 1998?

**ROARK:** 1997. That was when telecommunications industry was changing extremely rapidly. Communications security was also becoming an issue at that time and both those are NSA accounts. So, I was extremely worried at the lack of urgency. And what became even more important was a cultural problem at the NSA. I focused not on operations, which most people had done, I focused on development and engineering, and there was a considerable lack of engineering discipline. They were not used to building big integrated systems anymore, they were one-off little garage type projects. We had a very sclerotic enemy previously, the Soviet Union didn't change its telecommunications much.

**GERMAN:** Neither did the FBI where I was working at the time!

**ROARK:** This is the irony: I actually got some money for the FBI for some of their technical capabilities that were later used against me! The other big issue to me was the complete lack of objectivity in evaluating various approaches, technical approaches to modernize. Later on these became enormous issues.

**GERMAN:** How did your oversight work? Did you go to the NSA? Did you go to members to go to the NSA? How was your interaction with the agency, trying to get both them and the members to understand the problem?

**ROARK:** I was always at the NSA at least once a week, often more. These are briefings, upon briefings, upon briefings, and they're very technical. I hadn't had the NSA account before so there was a lot to learn. What I learned and became very concerned about, and I said within a few months, was that nothing was connected. Everybody was off doing their own little tiny projects and so on. Other staff became concerned also. In this respect at least, both the Democrats and Republican staff were on the same page. We both began telling our members, and especially our ranking members, about this quickly.

**GERMAN:** How was it received?

**ROARK:** I think one of the issues here is staff can have an awful lot of power. They were willing to go along with me with some marks as long as they weren't too ambitious, as long as they didn't cut major programs. They were also willing to let me put really tough language into some of the reports, especially the classified report which did not embarrass the agency as much. I was warning, frankly, that their modernization program was doomed from the start after I took one look at it. When they finally came up with a proposal for a modernization program I asked them for their decision paper and they sent it to me. I read it and called them and said, "Alright, I just really want to understand this. Am I correct in seeing from this paper that what you want to do is take your old analog system and modernize it into the digital age?" In response they said, "Yes, yes that's absolutely correct." I told them it will never work. I say this to IT people and they just shake their heads because they can't believe it. First of all, the old analog system was completely inadequate. To build on a system that's already inadequate and take it into the digital age is just ridiculous.

**GERMAN:** Did you have a technological background? How did you come to understand the technology?

**ROARK:** Crash course.

**GERMAN:** Does the committee have experts that it can rely on? Or do they rely on the expertise from the agency?

**ROARK:** The Senate actually did get technical experts on board and some auditing people that they used. There is a problem with this because the real experts in the systems often tend to be from the agencies, but the problem is they, of course, have an agency perspective, often, and if they want to go back to the agency that's a big issue because they don't want to antagonize them. If they want to go out in the contractor world afterward, they also don't want to antagonize them. So there becomes a "go along and get along," kind of attitude, and where do you get the expertise without them?

**GERMAN:** One of the reasons I really wanted to have you on the panel is I think it's very important to understand these agencies aren't monolithic. There are people in the agencies trying very hard to reform them from the inside. Loch, I know with intelligence oversight you've written quite a bit about the importance of personalities in how oversight gets done and how reform gets done.

**JOHNSON:** I really think that's true. If you look at these oversight committees, you'll find that the devotion to accountability varies according to personalities. If I may refer to Vice President Mondale, for example, he became the hero of the Church Committee staff because we would give him thick briefing books and would get them back at the end of the day with notations in the margins, things underlined. That was so inspiring, to be a staff member who had someone so interested and so dedicated to preparing for the next hearing.

I see, generally speaking, four types of members of these oversight committees. The first I call the cheerleader, and this is the person who has nothing but positive praise for the intelligence agencies. I personally think a lot of that praise is warranted, after all, these agencies are extremely important. They do a lot to help protect us and we couldn't do it without them, though we could do without their excesses, obviously. So, the cheerleader is involved in unalloyed devotion to these agencies. It's not all bad, because the American people need to understand why we're spending \$50 to \$80 billion dollars on these agencies. Someone's got to explain why we have that kind of expenditure.

Another type is the ostrich, and this is maybe the worst type of all. This is the person with his or her head in the sand, who oddly enough is on one of these committees, but doesn't do anything. When I think of the ostrich, forgive me for saying so, but I think of Barry Goldwater. After all, he voted against the creation of the Senate Intelligence Committee to begin with, and in one of those quirky twists of history became chairman of that committee. He did very little until he became angry with the Director of Central Intelligence, William Casey, who misled him, and that became a matter of institutional pride. The CIA was misleading the Senate Intelligence Committee and Goldwater was unhappy about that. He then became very energetic. And to put a name to the cheerleader, there are lots of people who could fall into that category. I would estimate that about 80 percent of the members of these two intelligence committees are purely cheerleaders. For instance, Porter Goss might qualify, or Eddie Boland, a person I worked for, in his early stages. He once said to me, calm down about oversight because we've had a lot of trouble having good relationships with the intelligence community. We've gone through the Pike Committee experience, so we're going to be partners for a while, calm down. So for a while, I think we engaged in sort of cheerleading.

A third category of the four on my list is what I call the lemon sucker, and I take this from Bill Clinton who once said that all economists are lemon suckers. What he meant by that is they'd come into the oval office and they'd have nothing but bad news to tell him about the economy. In this case, the lemon suckers would see no value whatsoever in the intelligence community. I think a little bit of Daniel Patrick Moynihan, who all of us admire in many ways. He was really over the top when it came to his criticism of the CIA and actually wanted to close that place down, you may recall.

Finally, the model I try to espouse, is the guardian. This is a person who combines some skepticism that one might find in the lemon sucker category, but balanced off with some cheerleading as well. Someone who



strikes a balance between the two. For instance, when we're raising children, we try to compliment them and reward them when they do well, but if we're good parents, we'll also criticize them when they're doing things they shouldn't be doing. This is what the guardian tries to do. An example of the guardian, I think Mr. Mondale would be one example. So would Gary Hart, and I think Lee Hamilton played the role of a guardian very well. So yes, I think personality matters very much, and the really energetic guardians also tend to be the more energetic police patrollers who try to prevent the fires from breaking out. What we need on Capitol Hill – well you could fill in that blank with a lot of different things. But one of the things we need on these intelligence committees is more guardians and more police patrollers.

**GERMAN:** Diane, your worst fears come true: the NSA isn't prepared, 9/11 happens. What happens next?

**ROARK:** I retired in April of 2002, but before I retired I found out about the NSA Domestic Surveillance Program, which of course I was not supposed to know about. Only the four top people in Congress on the Intelligence Committees were supposed to know about it. So, I immediately wrote many memos to the chairman and ranking, which were Porter Goss and Nancy Pelosi, explaining the whole thing to them, indicating where it was going, which to my mind was very serious. It became clear to me this was not a temporary thing, it was to be a permanent thing. I also indicated that it was expanding in terms of the data to be covered. It was expanding rapidly.

To my horror, I found out they had already approved it. So I argued that it was illegal and unconstitutional, and that they had taken off the civil liberties protections that initially had been built into it. These included encryption of U.S. person names until there was probable cause and a warrant from a judge. Secondly, and I think equally important, it included automatic tracking of all accesses to the databases, and what was done with the data. Obviously, this would be a huge boon to oversight, which I believe is precisely why they didn't want it. Both of those. I argued that adding these two back in was the absolute minimum they could do. It would still be illegal and unconstitutional, but at least we would have some protections.

When I got nowhere on the intelligence committee, I then attempted to, or went to other people in the executive and judicial branches who I knew probably were cleared into the program, and I would ask them initially, are you cleared into the post-9/11 NSA Program? They would say yes, but usually nothing else. They would listen and I would make the same argument to them. Of course, I knew it originated at the White House, and this was a big problem, because there was nobody who could overrule him. It went all the way to the top, and therefore a lot of the avenues you normally could take were cut off. For instance, I tried to meet with David Addington who didn't return my phone call.

**GERMAN:** He was the counsel to Vice President Cheney.

**ROARK:** And the one who was writing up the law for all of this. I sat six feet away from him for years. Anyway, nothing worked. I did everything I could, including a few months into retirement I met with General Hayden twice. He became concerned about my constant agitation and actually called me in with the obvious purpose of trying to shut me up. In doing so, he said, “I want to run this as long as I can.” He said, “you can yell and scream and wave your arms all you want after it leaks” — by the way, every single person I talked to knew it would leak, because it was so obviously contrary to all the training the intelligence community had received with regard to what they could and couldn't do.

**GERMAN:** And particularly the NSA, that was kind of a mantra.

**ROARK:** At the NSA, every year they had to review the legal standards and sign off that they had reviewed them.

**GERMAN:** And it was: You do not spy on Americans.

**ROARK:** Right.

**GERMAN:** So, you make all these extraordinary efforts, and then realize there's not an avenue to go through?

**ROARK:** Yeah. I tried to see Chief Justice Rehnquist, because there was some hint from Hayden that they may have talked to him about it. I tried to see Judge Colleen Kollar-Kotelly, the head of the FISA Court, who ironically told me she could not talk to me because it might prejudice her consideration of a future case. In retrospect, we know she was already briefed into it, and of course, prejudicing a case in which only one side is received anyway... So my main issue to her was going to be, and if she had listened to me and had done it — encrypt U.S. names, the capability is there; do automated tracking, and give it to the court, have a court review of that — it would have given the FISA Court a lot of power, and we could have avoided a lot of this.

So, everybody I went to just listened silently and did nothing. So, I retired and then myself as well as some of my compadres, including Tom Drake who is here today, Bill Binney, Ed Loomis, and Kirk Wiebe decided that we would, at the very least, try to address the fraud, waste, and abuse that had appeared to become rampant at NSA: the waste of money in the modernization process, and the killing of programs that were much more advanced and appeared to be much cheaper also.

**GERMAN:** And more privacy-protective?

**ROARK:** Yes, and more privacy-protective. So we went to the Department of Defense I.G., given that the NSA I.G. was not independent and was also heavily involved in the modernization effort. We used the hotline in order to protect our reputations. Tom did not sign the letter we sent, but he helped them from the inside, and gave them absolutely crucial help because the NSA stonewalled what eventually became an audit that went on for two and a half years. It was so devastating that they still put "for official use only" on it, and all these years later it is in a black hole.

**GERMAN:** The program does eventually leak in 2005. Tell us about the FBI's contact with you.

**ROARK:** I had warned everybody that it would leak and they had all agreed. I couldn't believe how long it lasted, so I had finally decided, well, maybe I was wrong. And the next week I open up my paper, and there it was, the headline. So at that point I was free to discuss my objections under the 'Hayden guidelines.' I wrote an op-ed, eventually. I became very concerned, especially when the Administration started stonewalling the courts and trying to get the whole thing kicked out of the courts. That was basically my trigger and I wrote an op-ed on it that I passed through [NSA pre-publication review]. They said, no it's not classified, but it came back with no theme left, black marks everywhere. They claimed they could take out unclassified information, too. At that point I contacted the Committee and asked them for a copy of my nondisclosure agreement and I didn't get an answer. One of the reasons this may be is because this wasn't very flattering to the Committee either.

I think from that time on, the Committee was completely in league, it appeared to me, with the FBI and the Administration. The op-ed died, and then a reporter from the *Baltimore Sun*, Siobhan Gorman, contacted me and wanted my comments on this. I told her what my objections had been, and that these two safeguards should be restored. This apparently was another nail in my coffin because when the leaks occurred in 2005 in *The New York Times*, I was apparently immediately targeted as the likely leaker. As I said to people subsequently, how dumb do you think I am? Do you think I'm going to go to everybody I know who's cleared and protest and then go leak it? This is really counterintuitive. As it was revealed in Tom's sentencing hearing, they never had any evidence. They pursued this investigation for five or six years with no evidence of either motive or fact.

**GERMAN:** And actually raided your home.



**ROARK:** Yes. They raided my home in 2007, at 6:00 AM, the same time they were raiding Bill, Kirk, and Ed's homes, and later on Tom's as well. They were attempting to indict Tom and/or me. They evidently decided on Tom, because he had been much more involved with the same *Baltimore Sun* reporter. Both of us, by the way, gave only unclassified information to the reporter. And, Tom's statements were basically in the good government kind of waste and abuse category.

**GERMAN:** That investigation, you said, has gone on for five years? Do you now have some idea that the investigation is no longer moving forward?

**ROARK:** Well, the other four were resolved, but they deliberately left me hanging. Initially all of us sued, to try to get our property back, because they told us they weren't giving it back, believe it or not. You're found innocent and the NSA — one of the many powers they claim, that I didn't realize before, was that they can basically seize everything, such as your computer and all your papers.

**GERMAN:** This unfortunately has recurred. We saw, during the torture report debate, that the CIA had actually made a crimes report to the Department of Justice, accusing staff members of violating criminal laws. Loch, in some of your writing you've discussed different eras of oversight and described them. Explain those eras and how would you describe this new era where there are such aggressive attacks on staffers?

**JOHNSON:** Well, if you look back from 1787 all the way up until 1974, which is the wide sweep of our country's history, you'll find that intelligence is treated as an exception to the Madisonian rules. That was going to be a special case, because it's too delicate and too sensitive for normal accountability. But, then with the Church Committee responding to the "family jewels" leaks, we entered a new era which I've called an uneasy partnership, where Congress and the intelligence community were going to try and work together. That lasted all the way, with some bumpy road along the way, until the Iran-Contra scandal. Which is a bit chilling when you think about it, because we had all of these finely embroidered oversight regulation and statutes to guide this partnership, and yet it all fell apart. It shows you the importance of personality and tone. When Jimmy Carter was in office, he set a tone: We're going to follow these regulations, we're going to obey the law. I would argue that when the Reagan Administration came into town, it was a much different tone. Embracing, before Cheney made it popular, the unitary-president presidency, that particular model we talked about before where Congress really doesn't matter that much from their point of view. So, we had a brief period, which I label the era of distrust, starting with Iran-Contra scandal revelation in 1987 and going up until 1992. But then I think we entered another disappointing era, which I call the era of partisanship, where suddenly the House and Senate Intelligence Committees voted strictly along party lines on every single vote they had. That did not happen in the earlier eras, with the exception of the Nicaragua votes, those were partisan as well, but now everything those two committees did became partisan. Then, with 9/11 we enter yet another era, which I call the era of ambivalence. Now even Republicans, which tended to be cheerleaders for the community during these earlier eras, were becoming more skeptical about the effectiveness of these intelligence agencies. They couldn't warn us about the 9/11 attacks, and they got the WMD hypothesis wrong in Iraq, so now you had some criticism coming from Republicans as well. This latest era that you refer to, Mike, which I think dates from Snowden forward, is what I'm calling the era of rebalancing. This is where Republicans and Democrats alike are saying, wait a minute, maybe we've gone too far in the security side of the equation, maybe we need to move back more toward the liberty side. And you see that most vividly, I think, in the House vote on U.S. Freedom Act. So, you go through different phases.

I would make two overarching comments about accountability. First of all, I think you've got to have, this is *sine qua non* for effective accountability, an executive branch willing to share information. All too often, that hasn't happened. You could analyze Administrations, one from another, by looking at the willingness of people at the highest levels to work with Congress. I've interviewed every single DCI from Helms forward and most of them understand what I call the new oversight, the post Church Committee days. They realize the importance of this, they are Madisonians. I'll tell you the major exception in a moment. One of the

reasons they like the new oversight is, as they tell me, because it allows them to share responsibility. If you have a blow-up like the Bay of Pigs episode then you can point to the Hill and say, well, I told those people about it, they were with me. That takes a great burden off some of these intelligence managers. So even most of them are realizing the post Church Committee accountability is a good thing for them. The exception is William J. Casey. I had dinner with him once and I asked him: What's the role of Congress when it comes to intelligence? He said, the role of Congress is to stay the 'blank' out of my business — you can insert your favorite sailor word there if you want. So he had a very negative attitude. He was a unitarian-presidency kind of guy, and it got him into trouble — even with, ironically, the quintessential ostrich-cheerleader, Barry Goldwater, who became very anti-Casey when Casey was *so* disdainful of the Senate Intelligence Committee as to badly mislead it about actions in Nicaragua.

**GERMAN:** Even when the executive *does* share information with Congress, or at least a limited number, in this case it was just the two.

**ROARK:** Four, two on each side.

**GERMAN:** Right, two on each side. How can those four be assured they're actually getting truthful information? And how did you get information about these programs that perhaps wasn't being briefed to those four?

**ROARK:** This is when you get into whistleblowers, I think. In my experience with oversight, it is absolutely essential that any staffer has to develop informal sources of information from within the agencies. The agencies hate this, they absolutely despise it. There are rules that nobody can talk to Congress except through the P.R. people or the Legislative Affairs. Nobody can talk to press except through P.R., so the agencies hate it. I heard, at one point, that the NRO threatened to tap all the phones at the NRO to find out who was talking to me. The NSA was really upset also, to the extent that finally General Hayden sent around a notorious directive to the entire workforce telling them that once the NSA had made a decision, they were not to tell anything to Congress that would undercut it. So, oversight is not really accepted, especially when it's vigorous. Though they *are* quite willing to share the responsibility when something goes wrong, but often, I have to say, in my career we found out about something the day before it was to appear in a newspaper. A free press is absolutely essential to legislative oversight.

**JOHNSON:** Well, I would agree with that. I actually forgot the other side of the equation I wanted to put on the table. You've got to have an executive branch willing to share information. The other side is that you've got to have a legislative branch willing to take it seriously, get involved, read the information, and go to the hearings, and that can be a problem as well. I think one of the most important developments since the Church Committee is the establishment of mandatory reporting requirements. In fact, the Hughes-Ryan Amendment occurred before the Church Committee by a few days, which required a finding for covert actions. Now when you have any important covert action — anything costing over \$1 million or so — you have to come up and brief the two committees. The 1980 Intelligence Oversight Act is thrilling — if you can get thrilled by a subject like intelligence accountability — in the sense that it required ante-facto reporting on *all* important intelligence activities! It's unheralded! I mean, even in the domain of executive agreements: The Kay-Souvlaki Act gave the executive branch 90 days to report. The 1980 Intelligence Oversight Act says, you will let us know *in advance* of any important intelligence activity. Not just covert action, but any very sensitive collection operation or counterintelligence operation. Now, there was an escape hatch — the so-called gang of eight: In times of emergency, you had to tell only eight members. But then, if you take the law seriously, which I think we should, you have to tell the full committee within two days — both the House and the Senate Committees. So these acts are important, but they haven't always been honored by the executive branch.

**GERMAN:** What protections exist for the agency whistleblowers who are talking to members of Congress? And how does Congress — particularly members of the Committee — protect those whistleblowers?

**ROARK:** I believe during my time there it was pretty much up to individual staff to protect their own sources. My staff director would say, where do you get that stuff? Who'd you get it from? And I'd say, I'm not telling you. I didn't tell anybody who my sources were. It's just a lot better for everybody if they don't know. I really tried hard to protect them, but the Committee as a whole, particularly post-9/11, seems to be totally uninterested in protecting whistleblowers, which are their lifeblood. They actually are their lifeblood. Tom was one of them. He was talking to me about problems at NSA before 9/11. I think that's one of the reasons he got the treatment, so did Bill Binney, who had also sometimes talked to me. I think it's evident, and I think you have some experience in this, that the intelligence committees did not sign on to whistleblowers protections. They did not include national security information in this. So for a long time they were hung out to dry, and there still are inadequate protections.

I think it's also, I don't want to center this around myself, but I think that my case indicates a lot of problems and a lot of dangers that face us today. The FBI did finally contact me about eight months after *The New York Times* leak, and asked if I would voluntarily cooperate with them. I said, yes, I will, except I will never tell you my sources. Of course, that's what they wanted. I called the Committee and asked them if they would support me on this, and I did this a number of times, and never got an answer. I went to meet with the FBI some months later, in February of 2008, and found, to my surprise, that it was not a meeting, it was an interrogation. It became clear at that point that I was a target. And it also became clear at that point that the Committee had thrown me under the bus. They repeatedly asked me for my sources, and I repeatedly told them I will not tell you my sources. I said, I would not tell you otherwise, but how can there be a more important issue than this? If I set that precedent in this all-important issue then the committees are worthless. They will have no sources whatsoever.

Jumping forward to the present time, anybody who goes to the intelligence committees at this point as a whistleblower is out of their mind. They will do absolutely nothing, at least on the post-9/11 NSA issues. They will not protect you. I should also add, just to finish that, after I was raided and all my items were seized, guess what they seized? They seized my telephone logs and all of my meeting books for the entire time that I had the NSA account. So, potentially they had access to every person from the NSA ranks or otherwise that I had talked to. The Committee decided they also wanted to search my computer and all my papers. So the NSA did a separate keyword search for them. All these searches are illegal, by the way. And they also told — I have it in writing — they told NSA they could keep all my agenda books and telephone logs.

**GERMAN:** This is a separation of powers issue, right?

**ROARK:** It's an absolute separation of powers issue, yes.

**GERMAN:** That Congress is allowing the executive branch to gather information about their oversight activities?

**ROARK:** Not only allowing, but facilitating, in my view. And I think the big issue was, before 9/11 all they cared about was stopping leaks. That was on their public agenda, at least, almost the only thing you read about. So, when the FBI comes to them and says, we think she's the leaker of *The New York Times*, they dropped me like a rock. They dropped all the sources, all the committee prerequisites, and the legislative privilege as well.

**GERMAN:** We've seen this happen in a similar way with the Senate Intelligence report on detainee abuse — are there tools that Congress has to better protect? In that case at least, to her credit, Senator Dianne Feinstein came out and made a very big deal of the fact that the CIA was going after her staff members that way. But are there tools, other than that sort of public appeal, that Congress has to protect its staff, and to protect its investigative prerogatives.

**JOHNSON:** I think you're lost on these committees unless you have some champions among the members, members who are willing to go to the mat with the executive branch if there's a problem. I can think of Fritz Schwarz, and Mr. Mondale, and others really getting into a bit of a struggle with the Ford Administration during the Church Committee inquiry on some matters, threatening and sometimes using subpoenas. I think we went to court on a couple of issues. You have to be a fighter, and unfortunately the cheerleader species is spreading rapidly since 9/11.

**GERMAN:** They have to defend their fighters within the staff as well.

**JOHNSON:** Yes, that's what I had in mind.

**GERMAN:** Because if they don't do that, where is the incentive?

**JOHNSON:** Right, that's what I really meant. If the staff doesn't have these champions, they're really lost. Accountability begins to revolve around a couple of key people, and that's all it takes.

I remember on HPSCI, the House Permanent Select Committee on Intelligence, where Admiral Turner came up to present our first covert action notification under the Hughes-Ryan Act. We had a reporter there who had a mask over his face and was taking things down verbatim. Admiral Turner looked at that fellow and said to the Chairman, Mr. Boland, what's he doing here? Mr. Boland explained, and Admiral Turner said I don't want him here, this is a breach of security. So Mr. Boland, during his peaceful, loving period with the intelligence community said, okay well, we'll get rid of him. Aspin, who was a junior member on the committee, raised his hand and said, Mr. Chairman — and keep in mind, Boland was number two on appropriations, the best friend of Tip O'Neill, the Speaker of the House, so getting in a fight with Boland was probably not healthy for your career as a House member — but, Les Aspin was a tough guy, and a very smart guy. He said, Mr. Boland, I'd like a roll call vote on this, I think it's important for us to have a verbatim record. Boland's face turned crimson, he was so angry. But any member of a committee has a right to call for a roll call vote, so a roll call vote was called upon. The final tally was seven to six, among the members in the room, in favor of keeping the reporter there. Boland was furious, and remained so for many weeks.

But the importance of that can't be understated because, henceforth, the House Intelligence Committee had a verbatim record of the covert action briefing and all the questions and answers that came after. So a year later, when memories began to fade, we could go back to that record and have Admiral Turner come back up here and say, well, is this what you've actually done? It was very important. The word spread over to the Senate Intelligence Committee and they demanded to have a reporter there as well. One of the most important moments, I think, in the evolution of intelligence accountability.

**GERMAN:** I think one of the interesting things — Diane, you wanted to say something?

**ROARK:** Yes, I wanted to say something in regard to the problems that the Senate Select Committee on Intelligence had with CIA monitoring of their computers and seizing records they had been given. I believe that after the way I was treated, with there being no reaction, but instead complicity, I think that invited what happened to the SSCI. I also would say I'm glad Dianne Feinstein did her one-hour speech and presented all that information, but I still think the Senate Intelligence Committee's reaction was less than it should have been. First of all, this was not the first time they had done it. It was the second time, as she said in her speech. The first time, she tried to keep this all quiet, tried to keep it in the family, and was unsuccessful in getting them to back down. They had taken documents off the staffers' computers that they had been given and had sequestered there. She went quietly to the White House Counsel who got them to agree they would never do it again. But there's no indication those documents were ever returned, in her speech at least, and then it just happened again. Then they had the nerve to go on the offensive thinking, apparently, that she would back down. She has also shown some weaknesses since in trying to resolve it — in order to prevent the staff from

being indicted, she said. But instead what she should have done was go to the Senate General Counsel and say, we'll back these people in court.

**GERMAN:** How do we reform this system? Have you had any thoughts on what either the Committee can do, or what laws can be passed? Obviously passing a whistleblower protection law that applied to the intelligence community and giving them rights to enforce those rights.

**ROARK:** I have many ideas! I don't know that they'll be palatable to a lot of people. We are so far gone, I think most people do not realize how far down this road toward a complete overturn of democracy we are. I see this as population control, bottom line. That's what it is. That's the only way it can be justified. It cannot be justified by terrorism because it is not helping with terrorism that much, at least some of the domestic surveillance programs. There has not been a single tip yet from this program, because they are drowning in data. If they were doing a targeted approach instead, they would have been far more successful. What is the use of all this data? Why do they still say, in the words of Chris Inglis, we have to have it all, we want to own the web? That was a big thing earlier, too. Well why? It's because all this information — contrary to what they say sometimes publicly — all this information is immediately filed under your identity as soon as it comes in. That was Bill Binney's contribution to the system: a very good database with your entire social circle, and all of your connections. It's all there and people don't realize how much data is involved. This so-called metadata is a tiny, tiny percentage of it. This is a very significant thing, trying to take the metadata database away from the NSA, and CIA, and FBI, and everybody else, which most people ignore. This whole program is so massive that there's no way, nowhere for any terrorist to go to hide. Listen, I know — I've been trying to find some shred of privacy since 2006.

**GERMAN:** I'll attest to that. It took me a while to find you.

**ROARK:** I want to put this out: So, there's phone metadata, which the Administration has basically focused everything on this as a red herring to keep you from looking at everything else they're doing, like everything Snowden has revealed. There was email metadata, which they also now claim that they have stopped even though it was the most productive program. Well, my contention is they haven't stopped it. They almost certainly moved it out of the FISA Court's purview, because their requirements were too expensive. That's what Chris Inglis said, that it was too expensive to do it the way the Court wanted them to do it. Then they moved it into overseas collection of the databases held by the ISP's and telco's overseas, which include a lot of domestic stuff.

**GERMAN:** So clearly, Loch, part of the problem is we still don't know enough. These questions, “What other programs are out there that we don't know about?” You signed onto the report asking for a comprehensive investigation.

**JOHNSON:** Oh, I do indeed. One of my favorite presidents is Harry Truman. He once said, every seven years or so, the government needs a house cleaning. I think that's a good rule of thumb. So, I think a second Church inquiry or something like that would be very helpful, but let's don't be fully pessimistic about oversight in America today. We need to worry about what Diane's talking about very much, I agree. The democracies around the world look to the United States and its post-Church, new accountability as something they want to emulate. Slowly but surely you can see Holland, Germany, France, England, Australia, and New Zealand adopting serious parliamentary oversight committees. They still haven't gone as far as we have. Most of those countries don't give these committees subpoena powers, for example. So we're widely admired around the world for taking the dark side of government and at least bringing some modicum of democracy to it.

I'd also point out that before the Church Committee, the idea of having a five-year study of torture carried out by the CIA would be unthinkable. You'd never have that. So there have been some examples since the Church Committee of really rigorous oversight. I've been in the room on the House Intelligence Committee



where members have changed covert actions through dialogue with the DCI — this is stupid, this costs too much, what do you really want to achieve here? As a result, the DCI will go back to the White House and say, the House or the Senate thinks we need to make these modifications. Let's never forget the importance of the power of the purse. Eddie Boland, at a later stage where he went from cheerleader to guardian, turned off the spigots for covert action in Nicaragua. Now, as we know, that had terrible, negative effects as people went underground in the Administration and decided to carry out covert action regardless of the Boland Amendment. It's a good example of an ultimate power Congress has if it wants to use it.

**ROARK:** Could I reply to that?

**GERMAN:** Sure.

**ROARK:** I would have to say there is no visible oversight today, post-9/11. There may be things they do on the sides that aren't publicized, but there is nothing on this big issue, which is our freedoms and the Bill of Rights. The very purpose these committees were established for they are now ignoring. I just don't see it. I agree the Feinstein Report on Torture was long overdue, and probably deliberately delayed by CIA by doing a huge data dump and then trying to take some of it back when they found out some incriminating things were in there. But let's look at that. There is nothing done that is contrary to the Administration in power at the moment, whether it be Republican or Democrat. In this case, the Democrats felt they could do a torture report because Obama had already stopped it and opposed it. The Republicans, unfortunately, did not support that because they felt it was aimed at Bush. So this was a highly politicized thing. It was the only thing I have seen that was done that made waves. It was because they had permission from the president. That's why.

To reform this system, one has to first of all get rid of the Democratic and Republican leadership in the House and Senate. There is no hope otherwise because they are pulling all the strings. Why can they pull all the strings? Number one, because these are the only committees on which they appoint the membership. So they have appointed almost totally membership that is supportive of this program. Then, they manipulate the whole legislative process and the process behind the scenes. Everything goes through the Intelligence Committees. The Judiciary Committees, if they have any independent views at all, have to accommodate the Intelligence Committees before anything emerges. This is a kabuki dance, the only thing that gets out is what the Administration has already agreed to do and what the House and Senate leadership agree to. Mr. Boehner said recently, we don't mess around with this, it's very fragile.

**JOHNSON:** As Mr. Mondale has suggested, in the crucible of fear the Constitution can take on malleable portions. But, then, we're a resilient nation, and I think we begin to bounce back. And I think the times-are-a-changing. We're in the middle right now of something of a sea change back toward the liberty side in this balance between security and liberty. The House vote is good evidence of this. I certainly can't prove it, but I would imagine the comments made publicly by Sen. Ron Wyden and Sen. Udall of the Senate Intelligence Committee, who are very critical of the metadata program, has helped feed into that change that we're now seeing. So I'm a little more optimistic.

**ROARK:** Could I reply to that, please?

**GERMAN:** Sure.

**ROARK:** Get a little dialogue going here, it's good to hear different points of view. I guess I'll take on the Brennan [Center] on this.

**GERMAN:** Sure.

**ROARK:** I believe the USA Freedom Act is a red herring and it is pretty much crafted by the Administration to distract attention from everything else they are doing. They're giving up what, admittedly, is an ineffective program and are still maintaining ties into it. The bill is riddled with problems. It allegedly increases transparency, but actually can decrease transparency. If you want to look at all this stuff, look at Marcy Wheeler's comments on the USA Freedom Act. Have we learned nothing? Basically, what the Administration done is it has redefined terms and exploited vague language. They have done all these things, and we keep giving it to them over, and over, and over again. The same thing! This bill is one big example of that, again.

I agree that it's great to have that metadata program ended in the Administration, but look at what else there is. As I started to say before, we probably have email metadata, things that are going on outside the FISA Court, and an enormous mail program in which they photograph the front and back of every letter. So don't put your return address on it! We have everything on your computer. Everything is collected: your emails, your chat, it goes on, and on, and on. There are many other aspects, as well, and I just think there are no options. All the browsing, all the web sites, everything is collected. You can't escape it. There is nowhere you can go for electronic privacy. There is nowhere. Every potential terrorist knows this is the same for them. They become very inefficient if they try to elude all of this.

I think the other thing that has to be done is people have to be told there is no perfect security. There is nothing we can do that will absolutely give us protection against another terrorist attack. We have already witnessed that. There is no amount of intrusion into your privacy that will do this.

**GERMAN:** The president's review group that looked at the program actually put it very well, that part of security is security from unnecessary government intrusion into our private lives.

I've been terrible at time-management, so let me just get some questions. John?

**JOHN:** Is there a microphone that we're supposed to use?

**GERMAN:** Go ahead and I'll repeat your question.

**JOHN:** Loch, do you remember in 1981 when Barry Goldwater insisted that Bobby Inman be the deputy DCI? And when Barry Goldwater insured directly with the White House that there would be full consultation on the revision of the executive order on intelligence with the bipartisan Senate Intelligence Committee fully staffed to be able to review the White House draft of an executive order?

And if you recall those, does that adjust your view of Barry Goldwater's role?

**JOHNSON:** Well, these are not pure types, John. There's no such thing as someone being only a cheerleader. But as a tendency, no, it doesn't change my mind. What changes my mind about him is when he finally got into a tussle with Casey over the mining of harbors in Nicaragua. Then he became a true overseer. But I grant you your example there.

**JOHN:** Diane, to complete the record of the story, can you explain to people what we now know about the source of the *New York Times* leak that was not you?

**ROARK:** Well, actually, Russell Tice had already admitted that he was one of the sources. As I understand from reading, I believe James Risen has said once or twice that there were about a dozen sources. But none of the other ones have been revealed, and Risen took the unusual step of saying publicly on a number of occasions that it wasn't the five of us who were targeted, that he didn't know any of us, and had not received any information from us.

**JOHN:** And who was this person who came forward? You said Russell? Who was he? Where did he work?

**ROARK:** Russell Tice was a contractor at an NRO ground station — and if I want to depress you more, yes, the satellites are collecting on us too. Russell had high level clearances and I think he was working nights, and he went there once to put a piece of paper into a burn bag, which are usually bags about this big, you know, paper bags in which they collect classified that is supposed to be burned. And he saw something in a bag that he thought was very unusual. He took it out and he read it. And that was his first insight into this program. It appears that thereafter he educated himself further from the burn bag.

**JOHN:** Do you recall, there was a Justice Department lawyer who also came forward?

**ROARK:** Thomas Tamm also came forward, but he didn't give any content. All he told *The New York Times* was that there was an illegal program, and he was also persecuted. He was an FBI agent from a long line...

**GERMAN:** It again shows there are a lot of conscientious employees within these agencies that are trying to get the information the public deserves to know.

**JOHNSON:** By the way, Mike, just very quickly. One thing Diane and I would certainly agree on is the hubris of the NSA. The attitude that if we can collect it, let's collect it.

**ROARK:** May I also add, Russell Tice is one of those who has stated that there are numerous very highly compartmented programs that target the elite in the US, which he has said include all three branches of government, congressional staff, congressional members, judges, including the Supreme Court, attorneys, White House staff, apparently they checked loyalty also, reporters, first of all. If this isn't population control, what is?

**BURT:** I'd like to shift ground a little to what I think is a central question that really hasn't been touched on. There's been a lot of very important information about how the executive branch does oversight of the Congress and valuable insights about members and different orientations of members on the committees. But as to the core question of how can these committees, and especially staff, really do oversight that's effective and penetrating of the agencies, there really hasn't been much discussion.

So I'd like to ask a question of all three of you. I've been trying to do that after the Church Committee for House and Senate Intelligence and at the White House under Carter for the IOB, and I've evolved four or five basic rules for how staff or committees can do effective intelligence, and I'd like your comments on it.

It's not a letterman list, so I'll be brief, but one that was touched on by Diane is that when there's some expose and they say you've got us, and here's the stuff, that means you've got to look for what they're not pointing to and what they don't want you to get into, and Diane indicated that.

The second thing with regard to the briefings, my second rule is that when the agency head and his top aides say there are no more records, they've all been destroyed, there's nothing left for you to look at, they're probably telling the truth as they know it. You have to go into the bowels and talk to the people who were involved and you'll probably find out that there are files somewhere. That's how I found the Lumumba assassination and the drug testing before the Church Committee.

But the most important rule is the following. I think at the end of the day the only way to have effective oversight, especially of operations that impinge on U.S. citizens is for the staff on a random basis to have full access to the file on an investigation or an operation. And to look and see whether it complies or whether they complied with all the rules and executive orders and statutes, and if they didn't, what is to be done, and if they did, and it still shows problems, what it indicates about how those rules and statutes have to be revised.



And unless that's done, I think it's been done by the committees sporadically, but to me, unless that's done, you don't have effective oversight and I'd like your comments.

**JOHNSON:** I think all the rules you mentioned are excellent. And as I look at people in the first few rows here, we have some masters at ferreting out information from the executive branch. The Church Committee was one daily struggle after another to get access to information, and Burt, you and others became quite effective at it. I think a lot of it is done informally. Most oversight is done informally with staff developing a relationship with people in the executive branch, you know, going to breakfast, going to lunch, being on the telephone, going overseas and visiting the US embassy.

And you've got to do all that without being coopted. You've got to keep your distance so you don't become part of the organization you're studying. So it's dialogue.

**BURT:** Can you do it without looking, randomly, at files of operations?

**JOHNSON:** No. I love this word randomly, and I think it's extremely important. We don't do enough of it. In Canada, believe it or not, they're much more effective at these random searches of intelligence files and we need to do more of them.

**ROARK:** Could I say I agree with all your points? And regarding the one that's most important, I think we have to go even further. We have to have a technical IT team that goes and gets into all their computers, and has systems administration rights, and so on, to find the stuff that's buried. And if this ever comes out, there also has to be a law immediately passed that if anybody destroys evidence, they will be hauled before a court.

**GERMAN:** And I think one of the things that's key as well is, you know, we talk about that Section 215 telephone meta-data program, which when Edward Snowden leaked the scope of it, it became a topic and we were all talking about how it was used for terrorism and how it came into being, only to much later find out the DEA had been doing something very similar for decades. So unless you're doing something that touches all the agencies, a comprehensive investigation, you're not really going to understand where there might be other activities that are equally as bad.

**ROARK:** Could I also add just one sentence here. In regard to what you said, the NSA program actually started no later than 1999 and was hidden from Congress. And this was a program looking for an excuse, and they found it.

**QUESTION FROM THE AUDIENCE:** I'd like to ask a question about how we can have effective oversight if you have secret records and then you also have record destruction, so responsive to the comment you just made. And let me give a specific example which I admit is an historic example. When Judge Green ordered the preservation of FBI records of historic value in 1980, you had established the National Archives special FBI record task force, and that task force invited historians to make recommendations to the kinds of records that should be preserved permanently because they were of historic value.

And I served as a consultant to that task force, and in my own research I had come across the fact that there seemed to be a case where FBI officials maintained separate office files. And the specific discovery I had was in a 1946 memo where they FBI director was briefed about accessing certain records and he asked the question, "Where were these records maintained," and the response was, "The Tolson file."

So one of the recommendations I made to the archives first was to seek to insure the preservation of FBI officials' office files, but specifically the Tolson file. In response to that, there was not only the disclosure that there was a Tolson file, but there was this memo that was created in 1975 that was responsive to the letter sent by Senator Mansfield to all the intelligence agencies to abandon their normal record destruction procedure and preserve all records.

And this created a certain problem because what FBI officials discovered was that, in violation of Hoover's March 1953 order, FBI assistant directors insured the regular destruction every six months of their office files, that Tolson's file was maintained for the period '65 to '72. So what we find out is that in fact FBI officials were regularly destroying office files, and clearly there were sensitive records, and that for some peculiar reason, maybe it had to do with the fact that Hoover reached the mandatory retirement age of 65, there was a decision made to preserve this office file from '65 to '72.

So my question is, how can you have effective oversight if not only is it the case that intelligence officials insure that secret records are maintained, but also to insure they get destroyed on a regular basis?

**ROARK:** Yes, and another obvious example was the torture videos. That's why I think that you need a technical team. All these files now are electronic. They're all on computers. And so you need a technical IT team that goes in and searches and has full range of search to find this stuff before it gets destroyed.

**JOHNSON:** I once asked Bill Colby, what can Congress do if it's lied to by agencies in the intelligence community? And his response was, when you find out about it, as eventually you will, come down hard on these agencies and shame them and cut off their funding for certain programs. There are tools of retaliation.

**ROARK:** I agree, the budget is the biggest power Congress has, and if we had the NSA budget we'd have a lot less trouble.

**STEVE:** Steve Winters, a Washington-based researcher. I've been following the investigation in the German parliament, the Bundestag, where they have an intelligence committee, and of course Bill Binney gave extensive testimony there. In fact Bill Binney told me, "It's amazing, over there they want to hear my story, they want to hear what happened, but I don't see that here."

Also because of the connections between our intelligence agencies and their intelligence agencies, in essence their investigation is as much an investigation of certain practices of NSA, and it's really heating up over there. So what's really striking to me is that there's so little coming in this direction from that investigation. Because as old as I am, I can remember the Church Committee, and the spirit of this committee in Germany, a lot of those people, it really reminds me of the Church Committee.

So I think it's worth being aware. There is a very active investigation going on right now in the spirit of the Church Committee, and why don't we invite some of those people over here and get a little bit going back and forth. Comments on that?

**JOHNSON:** Well, I would just say I've been in touch with that committee and they're doing a good job, I think. But let's keep in mind that in Germany you have the memory of the Nazis, Gestapo, and you also have the memory during the Cold War in East Germany of Stasi, and they find intelligence organizations potentially highly toxic, and that's one of the reasons they're very agitated.

**ROARK:** They're agitated, but what the Germans want to do is join the Five Eyes and make it Six Eyes.

**GERMAN:** This has to be the last one, I afraid.

**WILLIAM MILLER:** This has been fascinating revelation, your experience. In 1975 and '76, with the discovery of the capacity of NSA and other agencies to acquire information not only about individuals but about every subject that affects mankind, the question immediately arose: What do we do with this mass of information? How do we make use of it? How do we prevent the kinds of abuse that you indicated?

And we wrote a report that's contained in Volume VI of the supplementary documents that we published on intelligence. It was written by Dick Garwin, one of our country's most prominent physicists, a member of the Manhattan Project and an extraordinary "can do" sort of person. We asked him to look into the future and the future that he foresaw, as Bobby Inman also foresaw, was an ability which would be exponential in acquiring data.

The problem was addressed about massive files. What do you do with the discrimination of information on massive files? Increasingly massive, totally, the electronic world is accessible now. The answers that were given at that time, by us as well as by the technical people of the quality of Dick Garwin, was minimization. You have to work on the question of minimizing the files, what's kept, what's distributed. You have to be very specific about who has access and why.

This is the essence of the warrant procedure, and in the world of mega-information the problem is still the same. And the answer is still the same: Make rules and regulations about who has access, why, and for how long.

**ROARK:** But, could I add to that. When I went to see General Hayden in July of 2002, he told me we are not in the business of minimization.

**WILLIAM MILLER:** Well, that's a crime.

**ROARK:** They have claimed since then that they are, but it is basically a joke. If they really wanted to minimize they would encrypt US identities and they would keep a track, but they deactivated that code. And it's still deactivated, and if the Congress wants to know what they can do, that's what they can do. They can demand that.

**GERMAN:** So I'm afraid we've run out of time. It's been a fascinating panel.

## PANEL 2: JUDICIAL OVERSIGHT

*Faiza Patel, Co-Director, Liberty & National Security Program, Brennan Center for Justice*

*David Medine, Privacy and Civil Liberties Oversight Board*

*Hon. James Robertson, Foreign Intelligence Surveillance Court*

*Hina Shamsi, American Civil Liberties Union, National Security Project*

**FAIZA PATEL:** We have three wonderful speakers with us this afternoon, as we turn from the issue of legislative oversight to the issue of judicial oversight of intelligence activities, and also of national security cases more broadly. So, our panel is really wonderful, we are going to hear a variety of views and perspectives on this.

To my left, I have David Medine, who has done many amazing things on data privacy, but most recently he has been serving as the chair of the Privacy and Civil Liberties Oversight Board (PCLOB), which, as many of you know, serves a critical function in protecting privacy and civil liberties as we see more and more expansive counterterrorism programs in the post-9/11 world. In particular, the PCLOB has issued two reports — one on Section 215 of the Patriot Act, and another one on Section 702 of the FISA Amendments Act — and is currently working on the big Kahuna: the counterterrorism programs under Executive Order 12333.

To his left is Hina Shamsi who directs the National Security Project at the ACLU and has litigated many national security cases, as well as having been involved in a variety of projects to reform intelligence laws.

Finally, on the far left is Judge Robertson who served on the District of Columbia District Court and also served on the FISA court for three years. Judge Robertson, I'm hoping you'll tell us more about your service there and why you left.

With these three panelists you get three very different perspectives on how judicial oversight works. David Medine has graciously stepped in for Judge Wald, who is unable to join us because of a family emergency.

So, with that, I'm going to start with you, Judge Robertson. Can you tell us, from your perspective, what are the strengths and weaknesses of judicial oversight of national security cases, and especially those involving intelligence operations?

**HON. JUDGE JAMES ROBERTSON:** The first thing I have to do is to quarrel with the word "oversight," or to talk about oversight versus judicial decisionmaking. Judges are not used to being overseers, and the oversight idea is a little strange. The whole FISA court concept at first wasn't really *oversight* of everything, it was issuing warrants. Judges can issue warrants, they know how to do that, and the search warrant process that consumed the first 15 or 20 years of the FISA activities was the bread and butter of what FISA was doing. It's only in later years — well, we'll get to that point.

But, to the extent we're talking about judicial oversight, I have to say — and I hope this doesn't sound cynical — that the chief strength of it is whatever public reassurance there is in finding that these almost unimpeachable, black-robed, life-tenured, Article III judges are deciding things. That should reassure people that there are no politics involved (though, even that is undercut by some of the suggestions that the FISA court has been a rubber stamp, that it's political — I deny both of those charges, and we can spell it out if you need to), but it's the fact that judges are doing it that is its biggest strength.

On weaknesses — well, we're going to get to that, I think. But, in my view, the biggest problem is, where I began, when FISA does *oversight* instead of deciding between competing views of a case or with an adversary in the case. It's not doing what judges are supposed to do, it's not *deciding* a case. It's doing something different, it's doing some policy oversight. I don't think the judiciary should be doing that.

**PATEL:** So, let me ask you a question about this issue about the FISA court being a rubber stamp. A lot of that argument comes from the number of applications from the government that the FISA court has approved. FISA court judges and others have pointed out that, actually that's not a very accurate understanding of the role the court plays, because a number of applications are modified, and there's a back-and-forth process between the government and the FISA judges to get things right, and that's why you see such a high rate of approval. But, my question is: That back-and-forth process, which is taking place entirely in secret and behind closed doors, does that give you any pause in terms of thinking about the kind of role the FISA court plays?

**ROBERTSON:** Well, I always distinguish the warrant-issuance function from the program-approval function, which is where I part ways with what's been happening. As with the warrant-issuance function — I wouldn't call it ministerial, but frankly it is not rocket science. The Justice Department people who help prepare the warrant applications, the FBI agents who do it, the CIA people who do it, all the people who are working on preparing warrant applications are fastidious, careful, and precise. If they're not, they get sent back to do it right. So, it is true there's some back-and-forth, but it isn't back-and-forth on real arguments about the law. It's, “Did you identify this person properly,” “Do we know what reliance you have on this particular informant and why,” “Have you properly described probable cause?” That's all warrant application stuff, and I would not put an adversary in the room for the issuance of warrants any more than I would issuance of search warrants by magistrate judges.

**PATEL:** So, Hina, you've litigated a number of these kinds of cases. Do you agree with that assessment that judicial review, shall we say for precision, of intelligence operations and national security cases is the strength of the federal judiciary — and what do you identify as the weaknesses?

**HINA SHAMSI:** It's always good to start out with agreement, right? Especially with a former judge! And yes, I agree that judicial review is a strength, obviously. It's part of our system of checks and balances, and I think that has been demonstrated in this particular surveillance context by the Second Circuit's decision in *ACLU v. Clapper* recently. In that case, for the first time an appeals court took on and examined, after an adversarial process, surveillance authorities that have been deeply controversial, that have been criticized as unlawful and over-broad, and conducted a really meticulous and comprehensive analysis before finding that, in fact, the Call Record Program was unlawful. That is, I think, undoubtedly a strength. It's a strength of our system, and it's a strength of checks and balances.

The problem is that, with respect to national security policies and intelligence agencies generally, this kind of decision is the exception and certainly not the rule. I think that's a problem. I've been fascinated all day long and last night listening to the experiences of members of the Church Committee, talking about the oversight that they conducted and the changes that resulted, and the extent to which we're now back in a period where the intelligence agencies have undergone a radical transformation in terms of both what they do, how they do it, the sources of authority that they claim, and the extent to which those sources of authority have been secret, and in many instances remain secret. So, you have the CIA, for example — just stepping away for a moment from the NSA — which has gone far beyond its legitimate foreign intelligence gathering purpose and engaged, under the Bush Administration, in a program of torture and unlawful detention. You have it in an expanded program under the Obama Administration where it has turned, essentially, into a paramilitary organization running a program including lethal force far from any battlefield. That's just one example of a set of many controversial policies and practices which the courts have not engaged with on the merits.

Over and over again in the last 10 years, we and others have filed multiple cases and briefs challenging these controversial policies. Almost without exception, those cases have been dismissed. They've been thrown out on standing, state secrets, immunity doctrines, political question doctrines, and what that has meant — it's meant many things, but among the things that has meant — is that the judiciary has not engaged on the merits with some of the most controversial policies in the national security intelligence arena. This has huge

impacts on individuals, including the right to life, privacy, First, Fourth, and Fifth Amendment rights. Through the decision not to engage on the merits, far too often the judiciary has written itself out of saying not just what the law is, but whether the executive branch has complied with it in hugely significant areas of national security and civil liberties.

**PATEL:** So David, you look at these intelligence programs from a different perspective. You're meeting with the NSA many days and learning from the inside how these programs operate and are really getting the intelligence community's understanding, as well as, of course, hearing from the civil liberties groups who are advocating reforming these programs. How do you see the judiciary as a sort of counterpart to the kind of work that you're doing in the PCLOB?

**DAVID MEDINE:** Well, first of all, I agree with much of what has been said by my prior panelists. Also, Judge Wald might agree with what I have to say today, but my views are my own.

I think the court plays an important role. The independence of the court adds credibility to its review, the court has sanctions, the court also has an appellate process where it can correct decisions on the way up.

**PATEL:** You mean the FISA Court, or you mean generally?

**MEDINE:** Well, the FISA Court. Although, we can talk later about how the FISA Court could improve that.

**PATEL:** Right.

**MEDINE:** I think the down-side of courts generally is they're not often well-equipped to handle classified cases. Aside from standing issues, the process of handling classified materials, getting staff with clearances, is a challenge to the courts. I think the courts have also shown some timidity in taking on the government when the government asserts a national security interest. They tend to defer to the government on that rather than challenge the government or look to the government to look for the least intrusive methods of collection consistent with privacy and civil liberty. So, I think in some ways the courts could strengthen their review.

But, to make a pitch for the Privacy and Civil Liberties Oversight Board, I think we complement the courts' efforts because we have some advantages. One is that we have less formality, so, as you mentioned, we can meet with the NSA and the CIA and the FBI informally. We can also confer with Congress informally about rules of evidence and standing requirements, and we can have a review that's not limited to legal review. Although, obviously, we did a legal review and I was pleased the Second Circuit adopted much of our legal analysis. But, we can also do a policy review and make recommendations to both the President and to Congress, not only on whether something is constitutional or legal, which are obviously important, but also on whether the program strikes the right balance between privacy and civil liberties, on the one hand, and national security.

**PATEL:** What do you think, Judge Robertson? Is that right? Do you think courts aren't well-equipped to handle these kinds of classified evidence and secret, you know, creepy programs?

**ROBERTSON:** Look, I could not agree more. I mean, the truth is that most federal judges defer almost automatically to the Justice Department. They bring in a guy called a security officer. They tell you what you have to do. They bring you a safe, and they put it in your office, but you don't know how to open the damn thing most of the time. Your law clerks may or may not be cleared. No matter what kind of classified information you're handling, it's difficult. It's difficult to handle it, it's difficult to deal with it, but more than that, there is this deference that judges pay to the executive branch of the government in all matters that have to do with national security.



And, frankly, I think they should defer. Not only because it's a separation of powers question, but because, what do we know about intelligence? What do we know about the merits? We're not trained intelligence officers — although, I actually did serve in the Office of Naval Intelligence for a while. I served as the administrative officer to a young captain who was running naval attachés around the country. I still don't know anything about intelligence. I mean, it's a very specialized field, and, of course, security is a world of its own. We need three more seminars on the over-securitization of life in America. That's not today's subject, but it does intrude on the way we handle classified material in court. So yes, we defer.

By the way, PCLOB deserves all the credit, I think, for “belling the cat” on the illegality of the Section 215 program. Before the PCLOB Report came out and said, here's why it's unlawful as a statutory matter, everybody was chasing the constitutional issue. But the Second Circuit finally adopted the theory that PCLOB came up with and that never surfaced in any FISA proceeding. There was no adversary in any FISA proceeding who made the points that PCLOB made. I've gotten a little off the track of your question, but I had to give kudos to PCLOB because they deserve it.

**PATEL:** Certainly, in the Second Circuit decision there was a lot of reference made to the work of the PCLOB and extensive citations, so that's an interesting dynamic to see between these two institutions playing off each other.

Coming to your point about judicial deference to claims of national security, there is obviously a separation of powers concern over there, but are there some instances in which we see the judiciary being, perhaps, too automatic in its deference to that? And maybe, Hina, you want to talk a little bit about that issue?

**SHAMSI:** Well, I think it sort of begs the question about deference with respect to what. Certainly, when we're talking about the criminal context, there's the Classified Information Procedures Act, and the courts have shown themselves more than capable of being able to adjudicate cases involving national security, terrorism, sensitive information, and to still do so fairly. It's one of the strengths of our criminal justice system. I think about the context of Guantanamo, where the courts in D.C. have certainly shown themselves fully capable of adjudicating those important habeas cases — I'll put aside for now the D.C. Circuit's decisions in which review had been circumscribed to, I think, the detriment of our system.

I do think perhaps, Judge Robertson, you're being modest. I think the courts are very well able to address issues of classification. Indeed, they do so all the time and every day. I think the concerns arise when, for example, the executive branch makes extreme claims with respect to classification. It did so recently in a case that is currently before the D.C. Circuit with respect to force-feeding videotapes at Guantanamo. The government said that the videotapes were classified and the judge had no authority to order their disclosure, applying the First Amendment right of judicial access. There are certainly arguments to be made, but the argument made was for complete deference to the executive's classification decision. That's something that I think we look to the courts *not* to do. We look to the courts not to defer when the executive branch decides what its interpretation of the law is. That is a quintessential judicial function, and the use of secrecy and classification authority, including with respect to opinions, classified opinions, interpreting the law, should not deserve that same kind of deference.

Certainly, I think we can all agree that there are legitimate things that must be classified and kept secret from everyone — sources and methods, for example, legitimate sources and methods. But, I think we've gone far beyond that in terms of the executive branch's claims of deference based on classification and other secrecy concerns, and our need as a democracy, based on separation of powers and checks and balances, to look at those claims of harm and so on. I think here, Judge Sach's decision in the *ACLU v Clapper* case is really quite instructive. He points out that, although the context is very different, in the Pentagon Papers case when the judge was hearing only from the government in open session about the harm that might come from disclosure and publication of the Pentagon papers, it looked like the government had a slam dunk case. But,

*The New York Times* had very able counsel, said Judge Sach, and in closed session *New York Times'* counsel questioned high-level officials at the Department of Defense and Department of State, and the judge ultimately found that the claims of harm from publication were not as strong. The case came out the way it did, and I think Judge Sach did that advisedly, as a sort of recognition of the importance of an adversarial process where claims of harm and classification authority are not dispositive but are subject to judicial review.

**MEDINE:** Since we're passing praise around, I want to turn some of it back to Judge Robertson. He was a witness on PCLOB's first public hearings and talked about the shortcomings of the FISA court process. If I recall, he talked about how judges hear one side of the case and find it very persuasive and that is, currently, the end of the story in the FISA court. But then, if the judge hears the other side of the case, they say, "Aha, maybe that sounds interesting, too." That's the judge's job, to wrestle with both sides. Judge Robertson's testimony, at least for me, led to our recommendation that there be a special advocate in the FISA court so that both sides could be heard. Again, that's an example on Section 215, is that it took our report to essentially bring some legal issues to bear. The judges who were approving Section 215 every 90 days and approving the program initially, they never wrestled with it. In fact, there wasn't even an opinion from the FISA court for many, many years after the program was already operating. So, that's a shortcoming, which is to say that parts of the FISA court could be improved, but it shows the shortcomings of the way it's been operating in the past.

I think there's also an inherent challenge of the non-FISA federal judiciary, which is that judges are randomly assigned to cases. This is an area that *does* call for a lot of expertise, so it's a challenge for a judge to push back on the government's entire national security program when the judge hasn't heard national security cases ever before or has, but very infrequently. I think judges wrestle with that, and it is a real challenge.

The last thing is the Second Circuit case I think maybe broke some ground on standing. As was said before, that's been a real challenge to getting the judiciary involved in the first place, state secrets and standing. But, I think it's encouraging that the Second Circuit found standing in this case for the ACLU to challenge the telephony metadata program.

**PATEL:** Well, it looks like we're very quickly getting into the FISA court, so let's explicitly go there. Judge Robertson, if you had been on the FISA court at the time that the Section 215 Program came up to you, would you think there was a way available to you to make that process more adversarial? What I'm referring to now is the provision in the court's rules of procedures for appointing an amicus. Was that an option? Why has the court used it so infrequently?

**ROBERTSON:** To be quite honest with you, I never even knew that existed and never paid any attention to the notion of amicus. I do not believe, had I been on the Court at that time, that I would have behaved any differently from any of the other FISA judges. You know, in the first FISA case to go up on appeal, the one that had to do with the Chinese wall and that whole issue, Judge Silberman's infamous opinion kind of laid it all out and made it very clear that it is not the business of FISA judges to pass on the intelligence value of anything that's being sought. That is the business of the attorney general and the director of the Central Intelligence Agency, or his or her delegates, but not the FISA court. So all they have to do is certify that there's a substantial intelligence purpose and that issue is off the table. FISA judges are not permitted, by the statute and by that ruling, to look behind the curtain and find out why you're looking for this information.

**PATEL:** But, in the context of the Section 215 Program, clearly at issue was this idea of what is relevant, right? I mean, the statute says you can collect records that are relevant to an investigation. So that seems to me that it's not really about intelligence value as such, but it's interpreting a word that's used in many different laws across our system. So it's sort of a classic legal issue for the judiciary, right?

**ROBERTSON:** Well, there I suspect that the judges on the court were the prisoners of the use of the word "relevance" in issues like discovery. You know, relevance is anything that's conceivably relevant — we'll

decide later if it's admissible — but relevant is a whole big question, and there are almost no limits to what is relevant. That's all I can say about that. If there had been an adversary, there might very well have been a different result.

**PATEL:** So, that brings us right into USA Freedom, which we talked about a little bit this morning. It's the bill that was passed through the House overwhelmingly a couple of weeks ago, and is now potentially up for consideration by the Senate later this week. One of the things that's in USA Freedom is a provision that requires the FISA court to appoint a panel of people who could be called upon to serve as a public advocate at the court's discretion. What do you think, Hina, is that enough? Does that add enough adversariality to the FISA court process to bring it more into the norm of what we'd like to see?

**SHAMSI:** The short answer is no. Of course, I have a little bit of a longer answer. It's predicated on the fact that I'm shaking in my shoes at what Judge Robertson said about it not occurring to judges on the FISA court who had that ability in the initial period. Because in USA Freedom, certainly there's a step in the right direction in terms of including an amicus, an advocate, but it needs to be made far, far stronger. I believe it currently stands that there are three kinds of amici that can be offered: (1) to provide views on privacy and civil liberties, (2) to provide technological views, or (3) anything else — and this is discretionary, which is very little different from what currently exists. So, at the very least, one aspect of making necessary strengthening changes would be to require, especially when there are novel issues before the court, for there to be an amicus offering privacy and civil liberties views *as well as* technical and technological views, because we shouldn't be opening the door to something that's not those things coming before the court. But, I think even that is not enough. I think there should be, in addition to those viewpoints, greater transparency with respect to the court's opinions and what those opinions are about and aimed at. And, even so, I think that still isn't enough because it still isn't an adversarial process. I think that should be done far, far more. Obviously, the issue that is coming up is putting an end to bulk programmatic surveillance, and there's no doubt that is a very good thing — we'll see how that debate ends up playing out, heaven help us — but I think what we've all got to take into account is that what is happening and however it happens has to be the start of a new level of national conversation on these sets of issues, not the end of the conversation on this set of issues. So, USA Freedom still doesn't deal with all sorts of problems that exist with respect to notice in a variety of other contexts.

So, I'm thinking about what judicial review requires, and what an adversarial review requires, and, just to lay it out, there are fundamental problems that we still have to deal with. In civil court there are, at least in theory, three ways in which these surveillance programs might end up being adjudicated: (1) civil claims, which are lawsuits brought by people who have been affected or impacted by these policies. The issues there still remain standing and state secrets, and they need to be addressed. (2) Criminal cases, where criminal defendants might be able to challenge surveillance authorities to which they have been subjected. The problem there is right now notice is only being provided under Section 702 as opposed to various other provisions under which these authorities are being conducted. And even when notice is provided, the information that underlies the surveillance is not provided. I think we've got to clean up those notice and other provisions. (3) The third way in which these authorities may be challenged might be by communications providers who are ordered to provide this information. There again, I think we have issues in that communications providers don't have the same incentives as their customers. They're immunized from any violation of law, and they don't have the same direct privacy interest. Plus, if they were to raise challenges, it would likely occur in this context and still, therefore, be subject to a significant amount of secrecy. So, special advocates and amicus provisions are really good things, but far more needs to be strengthened to address some of these issues.

**PATEL:** But, everything you've talked about has really been within the context of the FISA court structure, right? So basically, you're saying we need to improve the FISA court to make it look more like a regular federal court — at least when we're talking about instances where the court is approving large programs, right? So then, do we need the FISA court? I mean, if we're spending all this time and energy trying to make it look more like a federal court when it's performing a certain kind of function — not the function that it was

originally set up to perform, which is basically orders on surveillance on particular individuals — but these broad programs. So, we're trying so hard to make the FISA court look like a regular federal court, but wouldn't it also be possible to move that function, or to put it in the federal court?

**ROBERTSON:** That's a very good question. I mean, I wasn't present at the creation of the FISA court. Some of the gentlemen here were, but my understanding of it was that it was fundamentally because of the sensitivity of the intelligence process and the sources and methods that were involved that led to this super, super secret operation that worked within skiffs and, you know, certainly not transparent to anybody. In fact, I think probably for the first 20 years of the FISA court, its existence was barely known or understood, and nobody really knew who was on the FISA court. But, if all they're doing is issuing warrants, that can be done. I don't really know these days, because we have plenty of secure facilities, and plenty of secure communications, and all Article III judges are deemed to be clearable — why that is, I don't know, but we are — so you could theoretically move that warrant process into regular chambers of regular judges. But, the programmatic part of it absolutely should be done in a court that has an adversary process.

Now, I take issue with my learned colleague here on whether we need to have it required by law. What is a novel issue? Do we know what a novel issue is? When would that require the convening of a court that has an adversary? I think the FISA judges have the requisite humility and respect for the process that they would invite panel participation. I have suggested on occasion, however, that it be required by statute or rule that to the extent they're dealing with these programmatic things they must have an adversary. I would suggest that if any FISA judge requested it, the court would empanel three judges to consider what one judge considers to be a novel question, and then you'd have a three judge panel, and the three judges would decide whether to invite an adversary in. So there are all kinds of ways to do it, but permanent adversary agencies? No, a panel is good enough for me.

**MEDINE:** We, PCLOB, recommended a panel, but I do think the judges need more of a nudge to get them to appoint outside parties and special advocates to represent the interests of citizens and privacy and civil liberties. There is a process in the court, Rule 11 (not the Civil Rule 11 for sanctions, but the FISA Rule 11), where the government indicates that there's a matter of unusual technology or raises unusual legal issues, and I think that could be an appropriate trigger for the FISA judge to call in an outside party and add them to represent the other side. That may be a program or a new collection technique where it would be better the first time ruling on it to have an adversary to raise views. What we called for is actually having the judges report on how often they appoint an advocate so they can be held accountable, because we don't want to create the structure of an advocate and not have them use the benefit of that advocate in having true adversary proceedings.

I'd also like to mention that I think there is another category for the FISA court to play aside from programmatic approval and warrants, which is carrying out the program where, I think, the FISA court can play an important role, for instance in the 215 program. Even once the program has been approved, under the current rules the judges of the court have to approve each 215 request to determine if there's reasonable, articulable suspicion. I think that might be a hard judgement call for a federal judge who's not part of the FISA system to understand all the dynamics of what the investigations are of terrorist organizations and how this particular request fits in. I think that's one example where the FISA court could play a role and not defer to the federal judiciary in general.

Another is in the 702 program where the court approves the broad program and pretty much is hands off other than yearly renewal. One of the things PCLOB suggested, and I think this will happen, is that the court be provided a sample of targets under 702 and a sample of queries that are done by the government of its 702 databases to give the court the chance to oversee the program, not just approve it initially but to make sure the program is operating constitutionally and consistent with the statute. I do agree also that greater transparency would be extremely helpful here, and I think we might not have had the 215 process if the court had been publishing its opinions for the public to see. Going forward, PCLOB has, again, recommended the

FISA judges write their opinions in a way where they can anticipate them being declassified, so they have a classified section perhaps that has the facts of the case—

**ROBERTSON:** They're not smart enough to do that. Somebody is always going to say "You can't, we have to take that sentence out."

**MEDINE:** Well, at least make that a start, then the government can do the declassification review.

**PATEL:** Do you want to respond?

**SHAMSI:** Just a small point: I think part of the reason we're having the conversation about what is the best means to fix an imperfect fix is because, even though under USA Freedom certain forms of bulk surveillance will be prohibited, other kinds of bulky information gathering surveillance will go on. So we still have the need for a special advocate in strengthened form, because we are not at a point where the court is only fulfilling the purpose for which it was initially established. That's, again, why I think we're just at the start of a conversation and certainly not at the end of it in terms of the magnitude of the reforms that are necessary.

**PATEL:** So, let me ask you a question that came up in the earlier morning discussion which is this idea of having these very complex programs and technologies. How do courts grapple with that? David, you guys have been delving deep into some of these programs which must make your head hurt when you try to figure out what they're doing. Certainly, in some of the FISA court decisions that have come out we've seen the court really getting deep into these very complicated issues. Is our system equipped to deal with that, and are there ways in which we can make it stronger? I'm thinking also of the judiciary over here.

**MEDINE:** I'll start with our board: We have the advantage that we can spend a lot of time doing a very deep dive into how these programs operate. We get briefings from agencies, we review agency documents, we meet with congressional oversight committees, with advocates, with academics, and really can gather information from a variety of sources which allows us to do a legal, constitutional, and policy analysis. That's harder for the court that has a more restrictive set of rules of evidence and what's appropriate for its communications. And the court's focus is narrower: Whereas we can look at the policy determinations, the court is looking at legal and constitutional issues.

**PATEL:** You've seen, I think, some of the FISA court opinions that have come out, and you see Judge Bates, for example, going through and into MCT's [multi-communication transactions] and down to a level of detail. Is there any value in having an independent technological component to advise the court?

**ROBERTSON:** The government does advise the court. It has been suggested, by the way, that if there were an adversary process here, in some way the government would be less forthcoming in what it told the court. I am actually shocked by that argument. I don't accept it, that judges would say, "We won't hear that argument." I don't believe it, and if it were true it would be sanction-able and worse if any government agency were caught being less than forthcoming with the FISA court because there's an adversary present. I can't really accept that argument.

But, as to whether there should be a special agency to advise the court — well they have a staff, they are being advised by the government, and that's what an adversary is for, that's why we should have an adversary. The FISA court is not an administrative agency. It's not the PCLOB, and judges are not administrative agencies. They listen to what both sides say and decide. For judges to review all the bells and whistles and say, "That's OK," "That's OK," "That's OK," without an adversary there is just not — I'm sorry I'm Johnny-One-Note here — it's not what judges do or should do.

**PATEL:** But that is, of course, what the FISA court has been doing, right? When you're looking at Section 215 and Section 702 programs, the FISA court is saying, "Yeah, broadly speaking, this is OK, and you've got



these procedures over here, and those look kind of OK...” Some of what you’re suggesting, David, is this ongoing oversight function, which you, Judge Robertson, objected to in the beginning.

So we want to have somebody looking over the intelligence agency’s shoulder, in a sense, and making sure they are actually complying with the rules that the court has set out. But, Judge Robertson, you’re saying that’s just not a judicial function, so how do we square that circle?

**ROBERTSON:** That’s what Congress is for.

**PATEL:** Right!

**ROBERTSON:** Anybody here from Congress? Fix it!

**MEDINE:** The judiciary, for better or worse, is approving these programs, and because they’re approving them as being both legal and constitutional I think they have a duty to oversee the programs as a compliance matter, as sometimes judges oversee consent decrees. I think in this case they could do that. Judge Wald and I recommended in the 702 report that — there’s something called minimization, which was mentioned earlier, which is a bit of a failure because very little gets minimized in practice—

**PATEL:** So, minimal minimization?

**MEDINE:** Exactly! But, it should be. That’s really, in some ways, part of the constitutionality of the effort, is to minimize U.S.-person communications. One thing Judge Wald and I called for is the FISA court to appoint a special master and have the special master review the government’s minimization efforts. If they fall short, have the court oversee improvement of those efforts until they’re finally in compliance with the procedures and with the constitutional protections. I think that’s a role where the court could be actively involved in overseeing the program and making sure it’s operating properly. That’s really the *quid pro quo* for approving it, is to make sure it continues to operate as well.

By the way, on the ‘less forthcoming’ argument, I couldn’t agree more. The outside counsel will be cleared at the appropriate security level, and the government should trust them as much as they trust anybody with sharing classified information. If there are parts of the program they’re not comfortable talking about, then I agree the program should not be approved on that basis.

**SHAMSI:** I think this entire discussion is taking me back to the place where we started and that we keep coming back to: the importance of an adversarial process. Remember when it was first revealed that there was this metadata program, and there were many claims by government officials talking about how, “actually this is not content,” “metadata isn’t so bad,” until there’s more and more information that comes out from technological experts — including the expert we had in our *ACLU v. Clapper* case, Ed Felten, who the judges found very persuasive — talking about how much information metadata actually reveals. In fact, sometimes it can reveal as much, if not more than, content, about your most personal associations and information. When we think about government collection of information, especially mass collection of information which technology has now permitted, we have to keep in mind what the Fourth Amendment is: a judgement that we do not trust the government to have that much information without real checks and safeguards. One of those checks and safeguards, as technology grows leaps and bounds, is to have technological knowledge to be able for judges and others to understand exactly what it is they are approving. This is something you can do more through an adversarial process and not as much when you have *only* the government’s experts talking about what the privacy and civil liberties implications of certain kinds of technology are.

Over the last couple of decades or so we’ve had a revolution in what the government can collect, how it goes about collecting it, and the challenges that raises for regulation — both congressional and judicial — and I worry that the kinds of debates that we’re having now may, in 20 more years, seem quaint because technology



is going to continue to expand. We need the kinds of knowledge to be able to make sure our laws and constitutional rights are safeguarded in the same way, or we're going to be having these same kinds of debates after more massive violations again.

**MEDINE:** PCLOB recommended the FISA court take advantage of technologists. I know the government sometimes provides technological advice, but the court could go outside and get its own advice, or have the advocate provide that advice. We've been hiring technologists at PCLOB both to help us internally, but also to help us better understand government programs where the collection technology and data analysis have become extraordinarily sophisticated. It's important for us to have both lawyers and technologists take a look at that.

**PATEL:** This brings me to my last question before we open it up to the audience. I was getting ready for this discussion today, and I was looking at this speech Justice Brennan gave back in 1987 which I have had on my desk for many months. One of the things Justice Brennan argues is — and I think everyone can agree with this — the United States traditionally downgrades civil rights in a time of crisis. We've certainly seen that happening cyclically across the last century. But, he says, because of this cyclical nature where the pendulum swings one way then back and forth, we haven't actually developed a very robust way of dealing with civil rights concerns during times of crisis.

One of the things that occurred to me is we are now in this world where we have this War on Terror which has been characterized by many people as a 'forever war.' This is a war, or at least a struggle, that is going to go on for a long period of time. So, how does that impact this dynamic? How does that impact the pendulum swinging back and forth? Because every time we think we've gotten beyond one terrorist group, there sprouts another one that we're concerned about. You know, you've dealt with Al Qaeda, then Osama Bin Laden is dead — who knows how! — and now you have ISIS, and probably three or four years from now there will be somebody else. So, you will be in this constant state of emergency — a lower level emergency, certainly, than the World Wars or something like Vietnam, but is that going to strengthen our civil liberties jurisprudence? Or is it going to mean a constant degrading of those protections over a long period of time? I think it's interesting that an institution like PCLOB can also play an interesting role when you're looking at a longer stretch of lower-level security problems.

**MEDINE:** Hopefully the judiciary sits in the middle of that pendulum and is a check on both sides. Professor David Cole at Georgetown has written an article suggesting that in times of national crisis the judiciary can play that role. We certainly have seen cases in the Supreme Court on enemy combatants, on military commissions, and habeas corpus, and even going back to the steel seizure case, where the Court has played a more centrist role in trying to focus on constitutional concerns. One would hope that in the political process, where things may sway further, the Court would be more focused on the law and the Constitution and not be as swayed by current events.

**PATEL:** Do you think that's really right, David? Aren't you kind of putting a gloss on that over there?

**MEDINE:** Well, I am an eternal optimist. The Second Circuit case is very encouraging: We're in the middle of fighting terrorists, but the court said this is a program that's illegal and the 215 programming should be stopped. Again, I also hope our board can play a role. We're independent, we don't have to clear our views with the White House or the Office of Management and Budget. We're bipartisan, we have three Democrats and two Republicans. So, I hope we can also try to be very fact-based, do clearer, strict legal analysis, and be transparent about our thinking as well.

**PATEL:** Let me push you on that a little bit, too, because the PCLOB has split, right? It is bipartisan, but on some critical issues you haven't actually managed to get consensus amongst your five-person board. So doesn't that just reflect the same kind of tensions that we see?

**MEDINE:** There are challenges, but we've certainly been transparent about our board's views. As I look around town, I don't see the Supreme Court being unanimous every time, and last time I looked Congress wasn't unanimous every time, so I don't think it's surprising that when you invite five people to come in and bring their different perspectives they may see things differently. I think being unanimous sometimes means the least common denominator, and I think it may be *more* important to show our different views and analysis to inform the public debate. Again, it's encouraging that we recommended the end of the bulk collection program, the majority did, and the president adopted it right away, the Second Circuit adopted it, and perhaps on Sunday the Congress may adopt it!

**PATEL:** Perhaps! Judge Robertson, what do you think? As a judge having seen these national security pendulum swings — does the fact that we have this long-running thing, is that going to make a difference?

**ROBERTSON:** Yeah, I think it's going to make a big difference. The suggestion that the judiciary doesn't swing *as* far as the pendulum swings is probably right. We're all Americans and we all swing with the pendulum a little bit whether we think we're doing it or not. Justice Brennan was absolutely right that judges tend to fly the flag in their head and get all patriotic, saying there's danger out there and we have to be aware of danger and so forth, but the longer this War on Terror goes on, the more immune we're all getting to these alarms that are being sent out all the time. I really think we're getting into a steady state situation where everyone's worried about national security all the time, but it's not driving us nuts. I think the judiciary is going to continue to do what the Second Circuit did and find the bottom of the pendulum swing and begin to deal with these national security cases without being stamped by terrorist concerns.

**PATEL:** Hina, are you as optimistic?

**SHAMSI:** I'd like to be, and in some ways I am. I think there are causes for optimism. One of the things Justice Brennan said in that speech was that part of the cyclical nature is once you come out of the emergency, the country regretfully realizes the aggregation of civil liberties was unnecessary. Perhaps we're getting somewhere to that point. I think about recent polling we did, in which a majority of Americans thought more constraints needed to be placed on surveillance authority. Think about the fact that it may very well be that Section 215 sunsets as a result of where we are — that kind of thing is something advocates have long sought, but seemed, unfortunately, far off.

Where I'm a little bit less optimistic and more concerned is the claim of war-based authority. During previous wars we largely understood when wars would come to an end, we had more defined enemies. Here at this point we have very little notion, based on how the executive and Congress, going along with the executive in many ways, define who the enemy is and how wars might actually come to an end. There are claims of war-based authority to use lethal force and to detain far from any traditional battle field. Those authorities have not yet been subjected to the kind of scrutiny courts may be more and more open to. I'm reminded, here, of Justice O'Connor's plurality in *Hamdi* where she talked about how the understanding that informed the Court's decision to say that the detention of an enemy combatant was lawful, albeit subject to review, was that such detention authority might come to an end if traditional notions of war unraveled.

We may be getting to a point where courts are willing to look to those traditional notions a lot more searchingly, perhaps even skeptically. I'm thinking of decisions that have started percolating in the domestic context with respect to domestic authority — surveillance obviously being one, with respect to Americans, but also with watch-listing which has been one of the significant increases post-9/11. Last year a federal judge ruled, for the first time, that the government's redress process for providing redress to people who sought to challenge their black-listing status on the no-fly list was unconstitutional and that the government's Glomar policy of refusing to confirm or deny that people actually were on the list could not stand, despite the government's claims of extreme national security harm occurring if that were to happen — which it hasn't. So, I think there is some real hope and room for hope — I certainly hope so, I feel like I'm in the business of

hope — but I think there is a lot of room for great caution because a lot of claims of authority and extreme authority continue.

**PATEL:** Okay, well, I'm sure there are folks in the audience who have some questions. The hands are going up.

**TIM:** Hi.

**PATEL:** Could you please introduce yourself when you ask your question?

**TIM:** Hi. Tim Sparapani, concerned citizen.

**PATEL:** We like that.

**TIM:** I have two related questions and an observation, and I'll try to be very brief. It seems to be that none of the oversight mechanisms or review mechanisms that we talked about during this panel deal with the problem that Mike German was talking about earlier in the day with respect to the outsourcing of any of the intelligence function to third parties, and in particular data brokers. I'm wondering if the panel could talk about where if at all one would go to get oversight or review of the outsourcing or privatization of that function within the national security apparatus.

And then a related question, which is, if you look at the statute that underlies the authority for the PCLOB, it's actually quite limited, as to the remit of the PCLOB. And so my question along those lines is in relation: Should the remit of the PCLOB be broadened, or do we need perhaps multiple PCLOBs given the breadth of programs that are out there that may in fact need some second eyes on them.

**MEDINE:** PCLOB's jurisdiction is limited to federal counter terrorism program. We certainly have had plenty to keep us busy in our two years of existence so far. There is legislation pending that would expand the board's jurisdiction to foreign intelligence and not to counterterrorism. We haven't taken a position on that but that, at least there are people in Congress who seem to be thinking along the same lines.

I guess my view on the outsourcing question from PCLOB's point of view is that if it's a federal counterterrorism program, maybe carried out through contractors, I don't see why it would not fall within our oversight jurisdiction.

**ROBERTSON:** I have no view on the outsourcing question, but as to the where the writ of PCLOB runs, I suggested at that first meeting that the chairman was talking about that actually PCLOB should be the adversary in the FISA court and PCLOB said oh no, not us.

**MEDINE:** I should say, we said that, in part because we do have another function besides oversight, which is advise, where we give agencies advice as they develop new programs, new laws and regulations, and we hope that this will help them get it right at the beginning and not have to be criticized later on. But it would PCLOB in a challenging situation to have advised about the creation of a program and then challenge that same program in court. And that was, I think, at least part of the motivation why we preferred to have outside lawyers serve as adversaries.

Although I guess the USA Freedom Act has the court consulting with PCLOB in determining which outside counsel to choose and put on the list.

**PATEL:** Do you want to talk a bit, Hina?

**SHAMSI:** Just that I think it is a pressing issue and absolutely needs to be dealt with in multiple ways. The ways that it has come up most prominently I think, as you probably know, Tim, has been in the context of outsourcing to military contractors in war zones where abuses have occurred and lawsuits have been brought. And there's been some but certainly not enough accountability in this context but I think that with respect to intelligence outsourcing in the same way, absolutely far, far more needs to be done.

**PATEL:** Liza?

**LIZA:** Hi, Liza Goitein from the Brennan Center. You talked about the barriers that standing and the state secrets privilege pose to review in regular federal courts of a lot of these surveillance programs and intelligence programs. First of all, I'm just wondering whether all of you agree that that is in fact a problem that needs to be solved and not just sort of an unfortunate feature of our courts that they can't decide these cases.

And if that's true, where does the solution lie? Is it in the judiciary? The judiciary needs to rethink its position on these questions? Or is it legislative? Should Congress be legislating on state secrets on standing? What is the solution there?

**SHAMSI:** Burt already has his hands up, but may I?

**PATEL:** Yeah, please. And then Burt can maybe weigh in as well.

**SHAMSI:** So, let me just start with standing. I think that, you know, in regular cases where you're required to show an actual or imminent injury in fact, it isn't the case that generally you have to show the injury has absolutely occurred, right? And in the surveillance context, however, especially after *Clapper*, there's been far more of a stringent requirement of showing that the injury has happened and has occurred already as opposed to, for example, what we argued in that context, which is that it was absolutely likely that it would occur in the imminent future, and that reasonable efforts had been taken to mitigate that injury. For example

**PATEL:** You're talking about the first *Clapper* case?

**SHAMSI:** Yes, the first *Clapper*, sorry, Amnesty lawsuit. That didn't persuade the Supreme Court on standing grounds, I should add. But that, you know, reasonable efforts had been taken through expenditure on encryption or travel by lawyers and journalists and human rights activists and others who were going to be subjected to that surveillance. And of course it turns out that, you know, a few months later that the Snowden disclosures showed that in fact that was a reasonable expectation.

So one way I think to do it would be for courts not to impose a special standing rule in the surveillance context, especially given a context in which the circular logic of two administrations has been that in order to challenge you have to know that you have been surveilled and show that you've been surveilled but we're going to hide and not tell you whether or not you've been surveilled so therefore you can't challenge.

So I think there's potential congressional fixes that could be made. Steve Ladick has a very interesting article on secrecy and surveillance, talking about how Congress could legislate the kind of injury that could be shown, given the kinds of programs that exist. And so I think that there are real fixes because there are real hurdles, standing is a real hurdle. It has been until very lately the hurdle that has kept these cases from being heard on the merits.

Similarly, with state secrets. You know, one change between the Bush and Obama administration was the internal guidelines that Attorney General Holder established, that purported to raise the threshold of when the administration would invoke state secrets. I come to think of those guidelines as the "albeit reluctantly standard," because the difference it seems to be has been, "we're going to invoke state secrets, albeit

reluctantly,” and that state secrets have been invoked as much, if not more, including very recently, in a very new context, and I’ll just throw this out very quickly, the *Restis v. UANI* case, which is a private defamation lawsuit brought by a businessman against an advocacy group that sought greater sanctions against Iran.

And in this absolutely private lawsuit, the government intervened as a third party to seek dismissal of the lawsuit on state secrets ground. Now, state secrets has been invoked throughout lawsuits based on torture, warrantless wiretapping, racial discrimination, but at least in those contexts we, the American public, had some idea of what the government's interest was at stake. In this case, we have absolutely no idea of why the government would seek to have a suit between private parties dismissed.

So the “albeit reluctantly standard” has taken on new levels very recently, and there has been, you know, not so strong now, but there have been movements for reform, legislative reform of the state secrets privilege, and maybe I ask Burt to address that because it hasn't gone as far as it should and it's necessary.

**PATEL:** Well, why don't we get comments from our panelists and then we'll ask Burt to maybe talk about that. Did you want to respond to the question, Judge Robertson?

**ROBERTSON:** About standing...

**PATEL:** State secrets, I mean do you think that's a problem?

**ROBERTSON:** Well, you know, district judges are modest people who have much to be modest about. They don't understand standing, just as Chief Judge Michele will tell you, they don't understand patent cases either. And with all due respect to you, David, I'm sorry Pat Wald isn't here because she could explain standing to you. Because she sits on a court that talks about standing. We in the district court are taking these blind guesses about what standing is.

If I can digress for 10 seconds I will tell you that now in my private sector life I'm doing a lot of mediation and arbitration, and I realized when I started doing it that guess what, I didn't have to jump through all the hurdles that district judges have to jump through: jurisdiction, venue, and standing, and justiciability, and rightness, and on, and on, and on before you ever get to the merits. You parachute in the merits, you solve the problem, you go home.

That's the way the courts ought to work but they don't, and that's what standing is a very, very complex, difficult, and I'm sorry to say necessary concept. But I don't think you can legislate standing out of the woods and say, well, if anybody is upset about what the government is doing, they can come to court and challenge it. That's a recipe for disaster in the courts. We have millions of suits of people who don't like what the government is doing.

**PATEL:** I think the question is a more precise one, right, so this actually goes back to *Laird*, right, the *Laird* case where it was decided that the chilling effect of surveillance is not a sufficient harm for you to have standing to sue the government in a surveillance program. So in that sort of limited context you might have legislative fix that recognizes that as a cognizable harm for purposes of these kinds of lawsuits, which would, you know, perhaps solve the issue that we've had of this sort of circularity on the surveillance issue.

**MEDINE:** And I think that's a problem that the 215 program exemplifies, which is that the fact that people know that their phone records are being kept by the government chills their First Amendment rights. They're less willing to associate with each other, knowing the government is monitoring them, less willing to talk to the press, to speak, to associate with religious organizations. So I think relaxing the view of what is sufficient chill to create standing is something that could be done either legislatively or judicially, but would certainly benefit the ability of the courts to wrestle with these programs.

**PATEL:** So Burt, I know you have something to say on these issues.

**BURT:** I actually had a comment and a question about earlier issues, but on state secrets, as I said this morning, the House Judiciary and the Senate passed state secret legislation and the only thing I would add is that Attorney General Mukasey and then the Obama administration, after more of an internal debate, opposed anything but a real weak law. And General Mukasey emphasized a Supreme Court case in which he quoted them as stressing that the Supreme Court had always held court should be extremely deferential to the executive branch on national security.

And we pointed out that he left off the end of the sentence which was “comma, except when Congress expressly provides otherwise,” which was from the Justice Department brief in that case. But I wanted to go back to just two points and raise a question. I share David's optimism about the courts. I've been involved for 50 years closely in judicial confirmations and I think there are two things that bend the judiciary's arc towards skepticism.

One, the older generation of judges from World War II who saluted the Commander in Chief, they have left the bench. And secondly, all the revelations from the Pentagon Papers, Watergate, Iran-contra, and so forth, have made judges much more skeptical. There was a deflection from that path as the conservatives got a lot of young, very conservative courts of appeals judges. But now as the far right, if you will, is joining the left on civil liberties issues, I think that path towards more skepticism by judges. Also they have become more comfortable dealing in Article III courts with very classified information.

So I think that arc is bending the right way. But my question goes back to the issue about the FISC and changes in it. If you distinguish between special masters, which Pat Wald made very good use of in FOIA cases when she was on the court — and she was our best witness on state secrets, by the way — if you distinguished that, which judges on the FISC, I assume, have been able to do, from the idea of a counterweight, whatever you call them, I was wondering where you would draw the line.

Because this morning was pointed out the original concept was sort of a magistrate on warrants, but that is *ex parte*. You do not have an adversarial procedure. So I assume when there's a big program or interpreting the scope, you would hope there would be one appointed. But suppose you have a specific warrant investigation that in effect involves complex issues. Where do you draw the line in terms of when you either should mandate or strongly nudge towards an adversarial proceeding, and where it really it is closer to the traditional under the Fourth Amendment *ex parte* warrant proceeding?

**PATEL:** So I'll ask you all to answer that question, but also to sort of maybe talk a little bit, and I think, Hina, you alluded to this issue, which is: In a warrant proceeding you do, in many cases, have a criminal proceeding to challenge subsequently, and what are the differences between that sort of normal criminal model and what we see in the FISA context? And maybe, Judge, would you like to start us off?

**ROBERTSON:** Well, I'm not quite sure where to intersect with all those, with that thinking. If we're talking about special masters, I mean I don't see any utility of a special master in even the complex warrant situation. Because this warrant thing moves fast, you don't apply for a warrant that you're going to use in six months, you want it yesterday. And the warrant application process takes I think a few days before warrants are issued, and there really isn't scope for magistrates and special masters and extensive investigations.

On the programmatic side, however, absolutely there should be some sort of help given. But in my view it should come from the adversary, not an *ex parte* magistrate.

**BURT:** I meant two different things, the adversary talking about Constitutional issues and civil liberties issues, the master as an expert in IT or intelligence intricacies as a separate kind of assistance to the court. So Pat Wald appointed a special master in an FOI case who had been in the Justice Department intelligence area.



And he was able to whittle the government's objections from 80 down to 3 or something, so that's the kind of expertise and arguments that an adversary would make.

**ROBERTSON:** Well, maybe that would work. Maybe it would work. I don't know if it has been or is being tried. It would be sort of, if you can use this word, sort of a creative thing for a judge to do to reach out to get a special master to talk about the details of IT. But I don't reject it, I'd just rather have the adversary hire the expert and have the expert teach you.

**MEDINE:** As I mentioned earlier though, Judge Wald and I made the recommendation. Drawing on her FOIA experience with the special master to review of minimization by the government, where I'm not sure a federal judge is going to sit and look at intelligence files and see if they're properly redacted, or if they have no foreign intelligence value they were destroyed. But that would be an appropriate thing for a special master to look at, a random sample to make sure that minimization procedures were working properly, and then report to the judge and then the judge could issue relief if necessary.

**BURT:** Where do you draw the line on adversary, between a specific warrant in a larger issue?

**MEDINE:** Our board's recommendation was on matters involving novel legal or technological issues.

**PATEL:** That's where you would have had a special advocate, and then you envision that the special master is part of the ongoing compliance review function, right?

**MEDINE:** Exactly.

**PATEL:** Hina, did you want to add something?

**SHAMSI:** Yeah, just a couple of small points that your question raises, Burt, which is just under the original conception of the FISC and how it was justified. It was analogized very closely to a magistrate issuing a warrant requirement, which of course is far from what has subsequently happened. Even in that context, in the criminal context, there is the idea that should there be a challenge it would be brought later on, and that kind of challenge is not envisaged here. And I think I would be remiss if I didn't mention a second part of this, which is the parallel construction problem, right, which is when information obtained through these authorities is provided and disseminated and the government then constructs a case so that notice either doesn't have to be provided or it appears that these surveillance authorizes haven't been relied on, so that the Constitutional issue cannot be raised in the criminal context.

I think the final point here that's worth remembering is for how long notice actually didn't happen. So when in the Amnesty International case, the Supreme Court said who would ever have standing to bring a challenge to these authorities, the solicitor general said, well, a criminal defendant against whom these authorities are concretely used in court.

And apparently what the solicitor general did not know was that the national security division's policy was not to provide notice to criminal defendants. Now we've had notice provided in some cases, still not perfect in part because these cases often plead out, government isn't providing the warrant based information. But that's still a fix that absolutely needs to happen.

**PATEL:** So I think, Fritz, you get the last question.

**FRITZ:** I have one comment and one question. The comment is going back to your original question about whether the FISA court has been a rubber stamp, if you just confine the issue to its warrant function, which was its only legitimate function as we conceived it, I don't know what back and forth there is in the proceedings in front of the court, but clearly the government isn't even seeking warrants of the kind the

Church Committee exposed. Eleanor Roosevelt, the Southern Christian Leadership Conference, the American Foreign Service Society, and Supreme Court Justices, they're not seeking those warrants and hopefully they're not wiretapping those people.

So it's a little unfair to call it a rubber stamp just because they approve at the end of the day most things that do come before them. The question is, Judge Robertson, you said you thought the reason courts have been reluctant, Pat Wald said "extraordinarily deferential" to the government in FOIA cases where national security is claimed and in state secret cases, was because they felt they weren't expert. But courts handle all the time questions where they don't start out as being an expert on the subject.

I thought it's more, it's because they're afraid of being wrong in the national security context and it does help, Lou Oberndorf, predecessor at your law firm, used a special master in a FOIA case in which the Department of Defense was agreeing on something like five percent of the documents, and after the special master looked at them, they ended up agreeing on 80 percent of the documents.

So the question is, what can we do to make judges feel more confident in taking on national security questions.

**PATEL:** I think Burt wants to make a small intervention before we turn it over to our panelists.

**BURT:** This is in response to Fritz. In 1975 Phil Hart got an amendment to the FOIA act which said when there's a court appeal from an agency denial, the judge is directed to make a *de novo* determination of the claim of national security balanced against the purpose of FOIA. Unfortunately, in the conference report language they put in some stuff about deference, so most judges have treated it as a dead letter. But it's already statutory law.

**PATEL:** So I want to give our panelists a chance to make some last remarks. You want to start, David?

**MEDINE:** Well, again, I think there are some institutional challenges in the courts in terms of classified information, deference to the government. But again, I think we have seen the Second Circuit, hopefully some more circuits soon, standing up and boldly expressing their views in favor of civil liberties and the compliance with law. So I guess I remain optimistic. I do think that it's critical to reform the FISA court outside of its warrant function so that it performs more effectively, and I think USA Freedom Act goes a long way toward doing that.

**SHAMSI:** Judge Robertson?

**ROBERTSON:** After you, you're next in line.

**SHAMSI:** You know, just on the Freedom of Information Act, Fritz, I think there is some greater hope than perhaps I started out with. I'm thinking of the D.C. circuit and the Second Circuit both in FOIA lawsuits seeking transparency about the administration's targeted killing policy and the use of drones. You know, one circuit said that it was implausible that the CIA does not have an intelligence interest in the program and the CIA could not invoke a, you know, neither confirm nor deny response.

I think it's very encouraging that the Second Circuit ruled as it did last year where it recognized that when administration officials essentially campaign to convince the public that a program is lawful and effective and wise and seek to justify that, they cannot then seek to withhold the bases for their decisions and ordered the release of a memo that justified the targeted killing of a US citizen. I think far more needs to be done. I think we need not only the legal memos, we need the facts, and the same kinds of reasoning might apply in multiple other contexts where I think there's room for the judiciary to be more skeptical about claims of national security harm, which is essentially what these cases come down to in the FOIA context.

You know, with respect to USA Freedom, I think, you know, there are opinions that are genuinely sort of divided. I think that there's significant reforms that need to be made to that statute. The ACLU has not taken a position for or against it. And you know, it's a step forward but much, much more needs to be done and our thinking is that thinking is probably on balance that it should sunset and we should be able to have a conversation that starts out from basic premises given where we are now, knowing as the PCLOB and the presidential review group and DOJ's inspector general has said that the Section 215 authority has not been critical for stopping any kind of terrorist attack.

And that perhaps is where we are able to have more of reasoned and reasonable and less emotional debate about these kinds of issues.

**ROBERTSON:** I'm back with Fritz Schwarz on the question of whether it's lack knowledge or fear that makes judges fear that they may be wrong, that makes judges defer the way they do. And I see that actually as sort of two faces of the same problem. I may not be smart enough, I may be wrong, I may get somebody killed. All that goes into the algorithm that goes through the judge's head when the judge is making a decision. I like the idea that the confluence of the left and the right on civil liberties is going to make judges more skeptical and give judges a little more room to speak out than they have felt they should.

You know, the truth is, and maybe it's just a generational thing, but the truth is that when you get an Article III appointment for life, you take on a heavy responsibility to everybody. It isn't just you out there swinging away at whatever targets you want to swing away at. There are all kinds of other forces operating on you all the time, and judges do, certainly at the district court level, they tend to be perhaps overly modest. A few have the guts to speak out, and God bless them. Judge Lynch in the Second Circuit. Got bless him. That was a great opinion but it's not going to be every judge all the time. It's just going to be a few.

**PATEL:** Well, thank you very much. And I hope you all join me in thanking our panelists for a really great discussion.

## PANEL 3: EXECUTIVE OVERSIGHT

*Elizabeth Goitein, Co-Director, Liberty & National Security Program, Brennan Center for Justice*

*Alex Joel, Civil Liberties Protection Officer, Office of the Director of National Intelligence*

*Michael Horowitz, Inspector General, Department of Justice*

*Margo Schlanger, Professor of Law, University of Michigan*

*Shirin Sinnar, Assistant Professor of Law, Stanford Law School*

**LIZA GOITEIN:** Welcome back; thank you for hanging in there with us as we move further into the afternoon. I'm Liza Goitein, Co-Director of the Brennan Center's Liberty & National Security Program, and I'll be moderating our discussion on oversight within the Executive Branch.

This panel moves us from external oversight to internal oversight, which is a real one-of-these-things-is-not-like-the-other kind of shift. To begin with, the Constitution creates a system of checks and balances among the three branches of government precisely because the framers didn't think the branches would do a very good job of checking themselves; yet, the federal government has grown so massive and the information disparities between the executive branch and the other branches has grown so great that it's really not possible — or desirable — to leave oversight entirely to the Congress and the courts. In the intelligence area in particular, there is substantial reliance on internal oversight. That's in part due to some of the limitations on congressional and judicial review in the national security context which we heard about on the earlier panels; and in fact when administration officials talk about some of those limitations on external review, they often invoke the level of oversight that happens from within. So this tells us that this internal regime is at least in part being used to *compensate* for a lesser degree of external oversight as well as to compliment that oversight where it exists.

The panoply of overseers within the Intelligence Community is indeed impressive. The NSA's surveillance operations alone are overseen by no fewer than twelve executive branch offices. To name just a few of them, the NSA's Director of Compliance, the NSA's General Counsel, the NSA's Inspector General, the NSA's Civil Liberties & Privacy Office the Inspector General for the Intelligence Community, the ODNI Civil Liberties Office and the Privacy & Civil Liberties Oversight Board. But of course the *existence* of oversight mechanisms doesn't guarantee their effectiveness — quantity does not insure quality. In the last couple of years, a couple of, a series, actually, of FISA court opinions were released showing that the NSA had routinely failed to comply with court orders in each of three major collection programs. Now, on the one hand, it was internal oversight that caught these problems and led to their corrections; on the other hand, these violations were numerous, significant, and widespread, and they continued for years before the Government detected and reported them.

The effectiveness of oversight can of course be impacted by the rules that govern it. So, for example, Congress has authorized the heads of intelligence agencies to block Inspector General investigations involving sensitive national security matters. These kinds of rules and constraints can in theory be changed. There are some more difficult questions potentially surrounding the dynamics of internal oversight and, in particular, how an internal overseer that exists within an organization and within the organization's culture can maintain the necessary objectivity. We've certainly seen some courageous and thorough and rigorous investigations and one example that comes to mind is the reviews of national security letters that were performed by the Justice Department's Inspector General, the former Inspector General, Glenn Fine; but we've also seen Inspector General reports that outsiders have described as white washes and we recently saw the CIA Inspector General step down after antagonizing CIA leadership with a critical report, and that was the report on the Agency's monitoring of Senate Intelligence Committee members who were investigating the Torture Program.

So, these observations raise a number of questions that I'm hoping we can touch on today. Can internal oversight — on which we are increasingly reliant — perform the same functions as external oversight? What

are some of the advantages, as well as the limitations, of oversight from within? And perhaps most important, what changes can be implemented to improve internal oversight? I cannot be more enthusiastic about the group of people that we have put together to discuss these questions and I'm going to introduce them very briefly, but there's much more information on them in your programs.

First, Michael Horowitz is the Inspector General for the Department of Justice, a position that he has held since 2012. I'm going to skip over some of your background — he's held many positions within the Department of Justice, starting I believe as a prosecutor in the Southern District of New York, and he went to Harvard Law School, but I'm still glad he's here.

Margo Schlanger is a professor of law at the University of Michigan. Her research and teaching focus on civil rights and civil liberties and how to induce large and complex organizations to respect them. She also importantly served in 2010 and 2011 as the presidentially-appointed Officer for Civil Rights and Civil Liberties at the Department of Homeland Security.

Next we have Shirin Sinnar who's an Assistant Professor of Law at Stanford Law School. Her scholarship focuses on the role of institutions in protecting individual rights in the national security context and she's also worked as a public interest attorney with the Asian Law Caucus and the Lawyers' Committee for Civil Rights of San Francisco.

And finally, we have Alex Joel who has been the Civil Liberties Protection Officer for the Office of the Director of National Intelligence since 2005 — ten years!

**ALEX JOEL:** Ten.

**LIZA GOITEIN:** Ten years. I almost said fifteen — ten years. In that capacity he leads the ODNI Civil Liberties and Privacy Office and reports directly to the Director of National Intelligence. So I'm going to start right in on questions for the panelists and my first question is for Inspector General Horowitz. Michael, what has your experience taught you about the advantages and the challenges of oversight from within? And I'm sure we'd all love to hear actual examples, if you're in a position to give them.

**MICHAEL HOROWITZ:** I've certainly learned a lot in three years now on the job as the Inspector General. I spoke at length with Glenn about his experiences as IG and some of the issues and challenges he faced and I've now seen it up close and directly myself. We released a 215 Report, a follow-up report on NSL, a follow-up report on some of the other authorities out there. We've issued a 702 Report — unfortunately so many of those are not public in the full way we would like them to be out there. We've talked about that a little bit as well. There are a number of challenges, but I think a number of very positive reasons why an IG's office can have an impact, and I think you've seen some of that over the last ten plus years with what our Office has done. We are, of course, within the Agency, and one of the things we have to make sure we keep in mind in everything we do is what the AG expects of us, which is to be independent — we may be *in* the Agency but we're independent of the Agency. And so we talk about the Department — if you look at our reports, you'll see us referring to the Department or the Department of Justice and then there's us, the OIG, we very much try to keep the two separate.

We'll talk about this in further, about access. Being within the Department, we should have complete, unrestricted access to all the records we need to do our work. That has been an issue over the last five years for our office; I've testified at length about it. It began just before Glenn left, it continued during the acting IG's tenure and it's continued for the last three years as I've been IG. We have ultimately been able to get all the records that we asked for but it has been a struggle in a number of areas including some of the national security reviews that we've done. But one of the advantages in the way we are set up is that we should have complete access to all of the records in, for example, the FBI's possession as we're doing these reviews of their national security authorities. Another advantage we have, the staff that we have that has done this work

has been with us for many years, they develop an expertise. We understand the Department from being within the Department and that continuity is very important. The folks that have worked on the most recent 215 Report worked on prior reports, worked on 702, worked on some of the other reports. We have a continual knowledge base that I think is a significant advantage, and we have an understanding of the organization and the culture of the organization and have some idea going in of the struggles we're likely to face, the pushback we're likely to hear, on a substantive level and the procedural level, but I think we bring that as well.

We also have access to people, which is a very significant part of what we do. We have the right to interview and to compel, if necessary, interviews of all DOJ employees and we generally have not had difficulty getting people to speak to us voluntarily. We usually haven't had to use the authority to compel, but we have had on occasion difficulty getting folks who have left the Department because we don't have the ability for people — staff — that have left the Department of Justice, to compel them. We don't have for example, testimonial subpoena authority although that is in both IG reform bills that are pending in Congress so there are limits to what we can get in terms of testimonial information from individuals who've left the Department. But for staff that are still within the Department — employees that are still within the Department — we have a right of access — they have to speak to us. We can compel their testimony if they refuse to speak to us; it is a termination offense within the Department.

**GOITEIN:** So before I go into Margo, I want to ask you a little bit more about the access issue that you mentioned because I think that's very important and I'd like to give you some more time to flesh out what issue has been.

**HOROWITZ:** So what occurred back in 2010 is the FBI Office of General Counsel took a completely different legal position than had been taken in the eight years prior to 2010. In 2002, just to rewind, in 2002, we first got authority over the FBI and the DEA, when Attorney General Ashcroft extended our jurisdiction to cover both organizations. In 2003, Congress codified that decision and during that eight year period, in the various national security reviews we did and other reviews that we did of the FBI, we got access to documents. There's always tension, there's always a back and forth about volume, scope — all the things that occur in any process that involves requesting large scale, large amounts of documents, but we never had interposed to us a legal objection. It was all based on sensitivity, security issues, how we were going to maintain records, whether we really needed 50,000 records — is there any way we could refine the request — those sorts of things. It was never about, "Do we have the legal authority to get the records?"

That changed in 2010. The FBI Office of General Counsel took the position that with regard to a variety of categories of records — specifically at issue at the time was Grand Jury Title III Wiretap information and Fair Credit Reporting Act information — we were not entitled to get access to under the IG Act. Which... section 6(a) of the IG Act provides that Inspector Generals — I'm just paraphrasing now — should get access to all records that they request. It's pretty clear. The FBI's position was because the IG Act post-dated the three statutes that I referenced, and since the IG Act didn't reference that it was overruling or limiting the authorities, the limitations, that exist in those other statutes, those other provisions apply still — the IG Act didn't override it — and therefore, we were subject to the same limitations that others were on the Grand Jury, Title III Wiretap and Fair Credit Reporting Act information. That seemed to Glenn, the acting IG, and myself, an interesting, novel change in position when, if you all look you will find that in 2010 nothing happened to the law! The law didn't change; no regulations changed; no policies changed. The legal position of the FBI changed. So even through for eight years we had gotten grand jury material, we had gotten wiretap information, we had gotten Fair Credit Reporting Act information, all of a sudden the FBI decided that those decisions that had previously been made were wrong. It's our view — remains our view today — that nothing had changed, the law remains as clear today as it did in 2010 or 2002, and in the intervening years when we got all of that information, yet the FBI changed its position. To give you an example of how that affected the work we did, we were in the middle of the NSL review that we released last year. And in 2009, when we began that review, we asked for Fair Credit Reporting information and we got it. In 2010, as we were doing a



field visit, we found out when we arrived in the office that they weren't going to give us the information that we had seen a year earlier because their legal position had changed in the intervening year. You will see this in our report, if you look in our report, because we've made public all of these issues, that resulted in a nearly year-long delay in our work.

**GOITEIN:** Wow.

**HOROWITZ:** While this issue was pending, and remains pending to this day.

**GOITEIN:** What I found interesting about this dispute is that there were I think forty-seven Inspectors General who signed a letter to Congress, not only supporting your position but also, sort of intimating that maybe this was a more widespread problem — maybe not that particular legal claim, but that there were issues with access to information that Inspectors General more broadly had. Is that a fair characterization?

**HOROWITZ:** It is, and I think what we have seen as a community, most IGs fortunately have not faced the argument that the law prohibits them receiving information; what most IGs I think have struggled with — including us and other examples in other areas — is getting timely access to records. Dealing with all the frivolous, baseless arguments that we face sometimes, in getting our work done and getting access to records.

**GOITEIN:** Right. So Margo, Jack Goldsmith, the former head of the Justice Department's Office of Legal Counsel, wrote a book, *Power and Constraint*, and in this book, he argues that intelligence oversight is actually at an all-time high, particularly within the Executive Branch, because of the sheer number of lawyers and compliance officers and others who are devoted to internal oversight. Is he right about that? And, if so, can we all just relax and go home?

**SCHLANGER:** Well, as a matter of basic fact, yes, he is right about that — there's no question that there are more people inside the Executive Branch now whose job is to check up on their colleagues than there have been before. The IG's offices are bigger and there are more of them. The Offices of Compliance exist now and they didn't used to or, where they did used to, they've moved up in the organization chart. In the IC in particular, there's been this little mini-trend of these offices of civil liberties and privacy like the one that Alex heads, like the one that I used to head, so that there have been new people whose job is in part internal check. Most of them are less independent than the IG's offices — the IG's offices have some unique independence, and we'll talk about that, but the answer is, "Yes, there are more people doing that." The thing about these lawyers, mostly— and even in the offices where they're not explicitly practicing law, they are mostly lawyers — the thing about all these lawyers is that this is good for law following because lawyers are good at reading laws and understanding what they require. So if you have an agency that's interested in following the law, that agency's going to have to have some lawyers, unless the law is really simple which, you know...

**GOITEIN:** It is not.

**SCHLANGER:** Right. So, this is a necessary change, it seems to me. Agencies where the lawyers used to be, you know, banished to out buildings — they are now in the headquarters and so on and you can read about that in various memoirs and so on. Or there's a passage in the Church Committee Reports where, I can't actually remember who this was, who was this? It was Senator Mondale asking the question but I don't remember who he was asking, but he said, "Well, did it ever occur to you that this might be illegal?" and the answer was, "What?" Seriously, that was the answer, "What?" "Well, you know, illegal, like *against the law*." and the answer was, "No, I don't remember us ever discussing that issue." I don't think you'd have that conversation any longer, and that's the reason.

Lawyers, I don't mean to say that lawyers are an unmitigated good and I'd be interested to know how many of us here are lawyers, but we are not an unmitigated good. We can use our lawyerly skills against rule-following,

too, right? So lawyers — there's nobody better at interpreting rules out of existence than a good lawyer. There's nobody better at reinterpreting what looked like plain English words to discover that they contain unfathomable ambiguity that we didn't even see when you read them the first time. Lawyers have excellent *rule-not following* skills, too. Even when lawyers — and I think of those things as you know, somewhat acting in bad faith — but even when lawyers operate in *good faith*, it is a core commitment of the legal profession that you're counseling your client, as opposed to your own ideas about what should happen, and that one of the things that you do as a lawyer is you create and then explain the space that is available to your client, and that's good faith, that's before we get to interpreting rules out of existence and finding ambiguity when there is none. Lawyers are professionally pre-disposed, I think, to talking about floors. They want to give their clients as much space as possible in which to carry out their clients' mission, and that's actually their job as lawyers. I'm not talking about bad faith lawyering. I'm not talking about finding ambiguity where there is no ambiguity. I'm talking about finding ambiguity where there is some — have you read FISA? For example?

**GOITEIN:** Yes

**SCHLANGER:** It's a tough, complicated statute, you know? So, what I think is true is that all of those lawyers do a lot for creation of a floor of rule-following, and I am on the optimistic side of this. I see people in the audience right here who have told me that I'm crazy, but I don't think I'm crazy, I think this is right. I think that all those lawyers create a floor for rule-following. I think they depress the floor a little, but I think nonetheless they create a floor and that's really important. But I don't think we should fool ourselves: *they don't do more than that*. The lawyers are not about achieving the right balance between liberty and security. It turns out that laws sometimes do that and sometimes they don't! And lawyers don't reform laws; lawyers are about *implementing* laws. The Fourth Amendment itself is not — the Fourth Amendment itself when adjudicated there are a lot of signs in a lot of opinions that talk about deference. So if what we're interested in is not mere compliance but the right balance, the right policy, the right operations — I don't think we should expect that from lawyers alone, although I do think we can expect enforcement of a slightly depressed floor.

**GOITEIN:** But, no, is that a role for overseers? Because what you've just described — finding the right balance — is to me is a very interesting concept of oversight which I think a lot of people would look at that word or that concept and think, "Well, compliance is what you're looking for; you're looking for the floor" with overseers. Do overseers also have a role in sort of looking to see whether that right balance is being struck?

**SCHLANGER:** So I think that someplace, somehow, there have to be a lot of people whose job it is to figure out what the right policy is — a lot of people. So let's think again, since this is a Church Committee day, let's think about the Church Committee, right? The Church Committee didn't stop by saying, "Huh! There's no statute that bans assassination, so I guess it's okay." That actually wasn't the way the conversation happened, right? The Church Committee proposed a drafting of, implementation of, and enforcement of a set of — maybe I shouldn't have started with assassination, but, in some other areas — a set of new rules. And I think that's a crucial part of an oversight function and I think — and have written, as you know — that that has to happen both within the executive branch and between the executive and congressional branches. I think that the congressional branch can only be expected to re-jigger the rules every once in a while in sort of a spurt of attention. Maybe this is a sign of the age that we currently live in and in a different age, I would have different ambitions for the Congress. But that's my ambition for the Congress, that every once in a while something will startle it into passing a statute.

**GOITEIN:** Maybe on Sunday.

**SCHLANGER:** Maybe on Sunday. And reconfiguring the rules some. And then in between — and maybe in addition — I think it is the job of the executive branch to not only faithfully execute the laws, but to do so in a way that is as effective and civil liberties-protective as it can be, consistent with carrying out the laws and carrying out its obligations. And so I think there should be policy shops within the Executive Branch and

they could be called things like, *Offices of Privacy and Civil Liberties*, that do some policy work. And you're going to ask me other questions later, I imagine, where I can elaborate on that, but they could be called other things, too. They could be called policy offices, they could be called lots of stuff, but somehow, inside the Executive Branch, the downside of lawyers is that sometimes the lawyers say, "Yeah, that's legal" and *that's legal* which I call the *Can we...?* question substitutes for *That's a good idea!* which is the *Should we...?* Question. *Can we?* and *Should we?* are not the same questions! And this is something that I tell my fifteen year olds often. I think the Executive Branch needs to act on that insight and needs to know that just because something is legal — *under current law*, which may well change if, you know, Congress passed laws — that just because something is legal doesn't mean it's good. And they should ask often, "Is that a good idea?" And that *Is that a good idea?* entails taking very seriously both the effectiveness of the proposed course of conduct AND the downside negative impact of the proposed course of action, as far as both intelligence and civil liberties. So I think that — I don't know if you'd call that oversight exactly — but I do think that there is a really important role that in order to get that kind of activity in Congress, in the executive branch, we need to create an ecosystem where there's a lot of people ginning up a lot of information and a lot of ideas that are kind of cross-fertilizing and communicating, all in secret. No, not all in secret — but mostly in secret because I think that's inevitable — where they can talk to each other and sometimes the *Should we...?* question gets asked in a really rigorous way, inside and outside the executive branch and so some of these offices that you're calling compliance offices, I might call them policy offices instead and say, "That's actually their unique role." I think the IGs do some of this; I think the IGs do more compliance.

**GOITEIN:** And I like your Church Committee example to sort of combine those functions.

**SCHLANGER:** Yes.

**GOITEIN:** It was oversight and recommendations together.

**SCHLANGER:** So yes. So that's that ecosystem idea and what it does is, I've kind of written about this idea of intelligence legalism, which is an idea that all of a sudden, rule-following substitutes for virtue. And, you know, rule-following is not bad. I'm in favor of it, it has some downsides, but I'm in favor of it. But it's not the same as virtue, or if you want to sound a little bit less, you know, Greek. Maybe, it's the *Can we...?* question is not the same as the *Should we...?* question.

**GOITEIN:** Yep! Anyway, we're going to come back to that I think in a little bit. Shirin, I wanted to ask you another question about Jack Goldsmith and his book — which I just want to say that I did actually invite him to be on the panel but he had another commitment — but in his book he says that the presence of Inspectors General and other internal overseers has actually had the net effect of expanding, rather than constraining, executive power because Congress and the courts and the public feel more comfortable entrusting the Executive with broad authority where these overseers are there. Do you think that's right? And if so, is more power but more oversight a worthwhile tradeoff?

**SINNAR:** Right. So in a sense the question is an impossible one to measure, right? This idea of whether on net, the effect of internal oversight is to increase or moderate executive power. Clearly, there are two dynamics at play. So, one dynamic is that internal oversight can — and I think in notable examples and instances has led to limits on national security excesses and, in fact, increased and reinforced the stringency of external review. So, you know, we mentioned one example earlier, the National Security Letters review by the Department of Justice IG from 2007 to 2010. And I think that's a very good example of where, first, the reviews exposed a practice that had been essentially unknown outside the FBI — this practice of using exigent letters to obtain phone records under false premises and outside standard legal processes. And, in doing so, it not only led to a curtailment of that particular practice, but also led the FBI to adopt more stringent internal oversight mechanisms, to make a more robust internal compliance program and so forth, as well as triggering a more extensive public debate around those issues and additional congressional scrutiny.

Similarly, internal oversight has led in particular areas to an increased willingness on the part of courts to move forward with civil rights litigation. So, we see a number of examples where in responding to motions to dismiss constitutional challenges, courts have looked extensively to information that's come out of IG reviews to say, "Look, there's actually quite some evidence that policies have not been implemented in the way that they should...", and encouraging them to go forward with constitutional review. So I think there's that dynamic, in auditors having an incredibly important role in both public transparency on these issues, and then in promoting this broader dialogue, and reinforcing external oversight. And of course, at the same time, we see that the presence of internal oversight is used by both courts and members of Congress to say, "well, it's okay to delegate broader discretion to the executive, and the fact that we have IG oversight or other forms of internal control is a reason for us to be less concerned..." And we've seen that in multiple legislative debates over the years, so you look at any major piece of legislation over a number of years: the FISA Amendments Act, the Patriot Re-authorization Acts from previous iterations of that process. In all of these debates there are plenty of comments from legislators saying, "Well look! We're inserting this provision for IG oversight; therefore it makes acceptable this broad delegation to the executive." I think at the end of the day, in response to the question, there's no set answer.

What it means is in my mind is at least two things: first, that paying attention to what these internal executive institutions are doing and holding them accountable and showing that they are, in fact, effective at what they do is incredibly important. For every example of a DOJ IG which sees its role as staunchly independent and frequently looks to issues of civil liberties and civil rights, there are other examples of IGs who see their roles as less of an independent term and they often end up coming across more as defenders of their agencies rather than offices that are taking a very critical view. There are some IGs who say quite directly that, "Individual rights concerns, human rights concerns, that's not really part of what we do; that's not part of our core mandate..." And I heard that directly from some IGs whom I interviewed a few years ago in part of my research.

So, holding these institutions accountable and making sure that we are not just establishing organizations without seeing that they're actually being able to be effective is crucial. In the second punch, the last thing I'll say is that I think it's important to distinguish between what these offices can and can't do and I think Margo's comments go to that as well. Some are mostly about doing compliance and looking at the implementation of policies. Others are particularly useful in pushing back against claims of government secrecy. But to my mind, none of these institutions can really compensate for what Margo might say is the lack of Constitutional floor-setting. So, to the extent that courts are sitting on their hands or that Congress is not legislating, that floor does go quite a bit down and maybe we can talk more about this afterwards, but I have some skepticism about the ability of very internal, sort of subservient, offices, framed as whether they're civil liberties offices or policy shops, to effect substantial policy change where they're not able to leverage sort of a public discussion, or be in greater communication with the public. So, I think there are some real concerns about that and additional concerns about cooptation for offices that are ensconced firmly within a national security establishment structure.

**GOITEIN:** And your point about getting the information out to the public goes back to what Michael was saying about some of the battles he's had to try to get reports declassified and available to the public.

**SINNAR:** Absolutely!

**GOITEIN:** Alex, your turn! The intelligence community exists for the purpose of gathering intelligence whether it be, often, through surveillance or through the exploitation of human sources. This is an undertaking that is inherently invasive of privacy and inherently secretive. Your job is to promote privacy and transparency. It seems like decks are stacked against you. Why should we nonetheless expect you to succeed?

**JOEL:** So first of all thank you for inviting me. I do want to get to that question, but thank you for inviting me, and I am a personal fan of the Church Committee report. I have a photograph of Senator Church and Senator Tower on my desk, the famous one where he's holding up the pistol.

I've read though key volumes several times. I've learned to be careful about saying which ones I think are the key volumes because there's a lot of people — a lot of authors here — who will argue with me about which ones are the key volumes. And we teach it, we have training that focuses on the Church Committee and the lessons that we've learned from the Church Committee. So in many ways, the framework that we've been discussing over the day, at least in my opinion, is an outgrowth of the lessons that we've learned from that whole experience with the Church Committee. I think I was mentioning to Loch Johnson, Director Clapper himself — the Director of National Intelligence — has very strong and vivid personal recollections of that era, is very concerned that we not repeat the mistakes that were uncovered by the Church Committee. So thank you for this opportunity — it's very important.

So, why should you think I will be successful? Well, you shouldn't base it simply on me, individually. As is very evident by the fact that this is a Church Committee event, Congress didn't suddenly invent the idea of a civil liberties and privacy function in intelligence when they created my position in the Intelligence Reform and Terrorist Prevention Act in 2004. It was very much embedded — as I've just described — in the lessons that we learned. And those lessons are now manifested in a lot of the institutions that you guys have been talking about. So we are a relatively new thing, the Civil Liberties and Privacy function, but obviously we've had a lot of lawyers and in fact, the Church Committee Report said we should have more lawyers, so I'm sure at the time the Offices of General Counsel took that and ran with it to say, "Yes! We need more lawyers!" And we have a lot of lawyers throughout the Intelligence Community. So these things are very well-lawyered. We have Inspectors General — you perhaps have spoken more directly to them about, some of them, about how they view their roles than maybe I have, but it's always been my assumption that they are an integral part of this framework. You absolutely have to have independent Inspectors General with access to the information they need to do their jobs. So that's another piece of the puzzle.

We, of course, have other agencies outside of government. There's a Privacy and Civil Liberties Oversight Board, so we heard a lot from David earlier today, we work very closely with the Privacy and Civil Liberties Oversight Board to make sure they have all the information that they need to do their jobs. We've heard a range of things about Congress and the intelligence committees — oh! I also meant to mention the Department of Justice is a department full of lawyers and is very focused on making sure that we are doing things the right way in the intelligence community.

And we also work closely, of course, with the intelligence committees and the judiciary committees when we are called for by the various reporting requirements. In my view that level of oversight has been granular. I know that there's a range of opinions about how effective the oversight is from the intelligence committees and what more could be done. A lot of people have a lot of different views on that. In my experience, having been doing this for a decade, we feel very closely overseen by the intelligence committees. People are up there all the time with briefings. We're providing all kinds of information and reports and they're weighing in, making line item by line item decisions on budget matters and things like that.

And then, of course, the judiciary. It was great to have Judge Robertson up here on the panel. Other judges have also been speaking out about their experience in the Foreign Intelligence Surveillance Court and I've said this before, and other people have said it, in my experience anyway, it is by no means a rubber stamp. They are rigorous; they are careful. They have a staff that asks a lot of questions and we spend a great deal of time keeping the Foreign Intelligence Surveillance Court informed. If there are compliance incidents, those are promptly reported. If the Court gets concerned about a compliance incident, they will write a sometimes blistering opinion, some of which we now have released and people can see them. So, in my view, they are a very real, tangible, presence that we must respond to, and we are required by law to respond to, and we feel are a very important part of the whole system.



As for me personally, one of the things that I focus on is making sure that I have a seat at the table. I'm there with Director Clapper, with other intelligence community leadership, to make sure that they are provided the civil liberties and privacy perspective. And where do I get that perspective? I mean some of it I do from reading and everything. Some of it I do — a lot of it I do — from trying to talk to advocates, trying to arrange for sessions where the advocates can come in and speak directly to intelligence professionals, which I think is the most helpful to have that engagement.

I'll just close by saying, I recognize that even though we have this system of many layers — what I call many layers and many players — and it's very complicated, it is not a perfect system. There are things that we can do to improve it. As you know, the Administration supports the USA Freedom Act and that will include changes to the FISA court. It includes additional transparency requirements which we support. We have been doing a lot to promote transparency. Director Clapper has directed me to coordinate the efforts of the intelligence community to enhance transparency and we understand we need to be more transparent for public accountability.

It is inherently difficult for an intelligence community to ingrain within their culture the need for greater transparency. The whole culture, the whole system, is structured around making sure that we keep our sources and methods secret, so that we can be more fully effective. As I've said before, a fully transparent intelligence service will be a fully ineffective one and we might as well not have one. So to the extent we're going to have one, they need to be able to keep secrets and, really, a lot of the Church Committee structure, or the structure that we created following the Church Committee, was an effort to provide controls and oversight in a classified environment where people could speak in trusted spaces to other cleared people, bring forward all the information they can. The Church Committee, of course, was a lesson in transparency because a lot that information was made public, and we really need to figure out how to do that better, and so that's what we've been working on.

**GOITEIN:** And I just want to back up something that you were just talking about which is this idea of more outreach and more conversations with the civil liberties community, which is something that I've actually been very impressed with. What your office has done and the amount of times that we have actually had a seat at the table to talk to you.

**JOEL:** Right.

**GOITEIN:** At some point hopefully that translates into changes in policy, but that aspect of it has certainly been significant. I don't want to put words in your mouth, but do I hear you saying that we should expect you to succeed because it's not just you?

**JOEL:** Correct.

**GOITEIN:** Because there's more of an ecology of oversight that you are a part of? Is that?

**JOEL:** Very well put. You can put those words in my mouth.

**GOITEIN:** I just wanted to make sure that I was understanding you. So, okay, I'd like to go back to Michael and go back to fundamentals here. The Constitution, which as I mentioned, as we all know, relies on the three branches to check one another. By entrusting and relying on Inspectors General to check their own agencies, are we putting our eggs in the wrong constitutional basket? Are you performing a role that Congress and the courts really should be performing?

**HOROWITZ:** I think our role is very different from what Congress and the courts perform. I think structurally that isn't what we were set up to do. We're there to be the internal watchdog. We're there to be



within the organization, but independent of the organization. We have within the DOJ Inspector General's office, four hundred and fifty people working for us. We have about thirty lawyers or so doing the oversight we've talked about, much of it in the intelligence community and that space. The reports that we've put out, those are the ones being done by the thirty or so lawyers in our Oversight and Review Division. And that's what we're there to do. We're not there to substitute for congressional oversight. We're not there to substitute for judicial oversight — it would be a mistake to think that that's our role. Having said that, we also report to Congress. If you look at IG Act, there are a number of provisions that require us to report to Congress. I am regularly briefing members of Congress. I'm regularly testifying before Congress about our work and making sure they're well informed about what we're doing so we have dual reporting responsibilities. We have responsibilities to report to our agency leadership and we have responsibilities to report to our congressional oversight committees. But we're independent of both. And we have to absolutely, both in practice, in perception and in reality to make sure that we've kept that independence.

**GOITEIN:** Does anybody else have any thoughts on this question of how we should think of internal oversight within the sort of constitutional scheme of separation of powers?

**SCHLANGER:** You know, one of the metaphors that's used often, and I think Loch Johnson used it, is this idea about oversight is the police model or the police-on-the-beat kind of model versus the fire alarm model. One of the things that Congress needs if it's going to do an oversight job is, it needs to know who to ask. Now, one method is internal secret sources — that we also heard about this morning. But another method is for there to be offices within the executive branch that Congress asks to report to it. Particularly, to report triggered by certain things. So when I was at DHS — I don't think you have the same statute — but when I was at DHS, one of my requirements under my foundational statute was that if I gave advice to the Secretary, I had to report — not... it had to reach a certain level of formality and so on — but certain kinds of advice had to be reported and the agency's response to that advice had to be reported, and that's actually quite useful to the Congress. In some ways, it's intimidating to the person in the role because it means if you give advice you have to report it to the Congress and so it has a complicated kind of reverberation. Nonetheless, it can be quite useful to the Congress that wants a fire alarm — that they can say, "Wow! Is this the kind of issue that somebody gave advice on and that advice was rejected?" And so you get sentences that you've read that say, "Even the department's internal office-of-whatever said that they shouldn't do that..." And that actually turns out to be quite useful to Congress. So I think that Congress is a *they*, not an *it*; the executive is a *they*, not an *it*; everybody, it's all about this complex web, this ecosystem, of action and reporting and compliance. So it's not an either/or, although the dynamic that you talked about, that Shirin talked about, is real, right? But it's not generally an either/or; it's a both/and. These kinds of offices help Congress do its job better.

**GOITEIN:** Michael, you want to...?

**HOROWITZ:** I think something to understand and appreciate is how different Alex's office and my office are. We're both in our agencies, but for example, I don't have a seat at the table and I don't want a seat at the table! I have monthly meetings with the Attorney General and the Deputy Attorney General but it's just the OIG, and either the deputy or the Attorney General. I'm not in management meetings. I'm not part of management at the Justice Department. We've purposefully not gone to regular meetings at the department because I'm not there to give advice informally. I'm giving it— when we make a recommendation, it's in a report. Assuming it's not classified, it's public. That's how we speak and that's how we work and yet we're both within, structurally on an org chart, the executive branch and within the agencies.

**SINNAR:** And if I could just make a point about institutional design, I think there are these different roles of internal institutions. So when we're talking about oversight mechanisms or internal institutions within the executive branch, there is a spectrum from those that have more of an internal advice function and those that have more of an external review function, an auditing function. I think what's really interesting is when you put those two together within the same institution and actually it might be interesting hearing David Medine's view on how that works, but then, I mean, there's actually some tension between those two roles. Right, so,

you release a public report that's very scathing of particular programs within the intelligence community and then you're also involved in meetings with those same agencies to proactively kind of design policy on a set of issues and so the dynamic of putting both those functions in the same institution I think creates interesting challenges.

**JOEL:** So, if I could just piggyback on that. I absolutely hear what you're saying, it is a challenge, and I won't speak for David and he can talk about the Board as much as he, or as little as he, wants on that topic. But from my perspective, it's very helpful to have an institution like the Privacy and Civil Liberties Oversight Board available to provide both advice and oversight, so that duality of function can be very, very helpful. These are people brought primarily from outside, or entirely from outside, who have a capable staff, and we can consult them in a classified setting — a setting that the intelligence officials trust — for advice to make sure we avoid problems. Because ultimately, we want to avoid those problems; to get to the policy kind of function, which is, "How do you structure and design activities so that they are in fact appropriately addressing all the privacy and civil liberties issues?" And you can only do that with people getting involved earlier and providing advice rather than waiting for the problem to happen. I understand what you're saying about keeping those functions separate versus together. I just wanted to say that in this particular case, I think it's helpful.

The other thing I just wanted to point out is that some that a lot of times the executive branch function as it responds to oversight from Congress or the need to keep the court appropriately apprised of all the issues that might arise for their orders, is a resource demand on the executive branch. That it takes, particularly for the intelligence community, the people who are most knowledgeable and have the greatest expertise on a particular activity that somebody might be reviewing, be it the board or the court or the committees, are the same people who are actually implementing those activities from a national security perspective. So you are pulling them away from that work in order to provide, information and briefings, which, in my experience — I know that you've had the different experience recently at the FBI — in my experience, they are willing to do, but we just have to recognize that there is a requirement. It's a draw on their limited resources and one function that offices like mine can serve is to help manage that, help structure it, so that we can find ways to provide the information that's needed while still allowing the subject matter experts to do their main jobs.

**GOITEIN:** Okay. I have a question I'd like to throw open to any and all of you, which is just, quite generally, we are kind of having an inquiry today on how to strengthen oversight in various different areas and so the question I have is, where do you see the gaps? And what do you think can be done about them? Where are there shortcomings in internal oversight? Some of which may be inherent and then maybe nothing to be done about them. But then where do you see the potential to really strengthen internal oversight? And anyone should feel free to jump on in!

**SINNAR:** Yeah. Just a few things I would throw out there. One is that so, you know, we mentioned the differences among IGs. Some differences are just you know, due to individual leadership or culture of institutions, and so forth. But the fundamental statutory formal legal distinction that remains is that some are not presidentially appointed. So, for example, the NSA IG is not appointed by the President. And I think that is something, if we're looking for very specific things where we might want to consider a change, could be something to do. In the past, there was a point at which CIA had only an internal IG and then after Iran-Contra, there was a push for making that position a statutory one subject to — which was presidentially appointed. And similarly, when you are not reporting to the NSA head but to the president, that might create at least more of an opportunity for that position to view itself in more of a staunchly independent fashion. A second thought on that is even when — so, the Privacy and Civil Liberties Oversight Board has done I think some wonderful work — but when we think about capacity and the fact that this is, you know, an institution that has one full-time person, four part-time board members, a budget that I think is now a little bit above three million, which is where it was a few years back — and just thinking about that in comparison to the \$50,000,000,000 in the intelligence community, we're still talking about a very striking mismatch between review and what is being reviewed.

**GOITEIN:** So resources.

**SINNAR:** Yes, so resources.

I'll just mention one final point where I think that there's something to be done: I think it's incredibly important when there are statutory mandates for IGs to conduct particular reviews, or to assign them, as the DOJ IG has, a kind of ongoing role in reviewing questions of individual rights. Because many IGs do not see that still, as something that's within their ambit. There are some that say, "fraud, waste and abuse." That's a number of things, but I think to the extent that Congress — to the extent that it legislates at all — could provide more specific mandates that make explicit a role in reviewing a certain set of issues of which we have concern. I think that would be an additional area for improvement.

**SCHLANGER:** So I'll speak to kind of one more layer towards the internal, away from the IGs. The issues in internal compliance shops, or policy shops, and how they balance that role, what they have to do, the challenges to them, are a combination of expertise, commitment and influence. And the expertise one is relatively easy, actually. You wouldn't think that expertise would be easy, but that one's relatively easy. But commitment and influence — the more committed to a value that is a constraining value rather than a primary mission value.

**GOITEIN:** So privacy versus surveillance.

**SCHLANGER:** Yes.

**GOITEIN:** For example.

**SCHLANGER:** For example. The more committed you are to that constraining value rather than the primary mission value, the more antagonistic it is possible for the relationship to get. And so there's two ways for an agency to deal with that kind of idea. One, they can hope, and help, the commitment erode and they can, so that the people in the office can kind of get the — it's the equivalent in the State Department of what they call *clientitis*, right? So, they can lose the very reason why we have them, which is that they're actually supposed to represent the different — a slightly different value set than the agency as a whole. So they could lose the commitment OR they can lose the influence, and they can be tamed by having no authority and no influence, right? So if you're going to maintain, inside an office like that, both commitment AND influence, then that needs to really be carefully considered. And I think there are a set of policy tools that offices like that can be given. They can be mandated certain kinds of roles, access to materials, access to information — not in the same way that you have and not in an investigation kind of a way — but in a, sort of, what they need kind of a way. They can be mandated to have clearance functions of various types, that if the office objects to something that it goes up a level before it can be decided that kind of way.

**GOITEIN:** So, not security clearance but...

**SCHLANGER:** Oh, no, no, no.

**GOITEIN:** To clear policies, to clear documents.

**SCHLANGER:** No, if they don't have security clearances they're *toast*.

**GOITEIN:** Right.

**SCHLANGER:** They've got to have security clearances.

**GOITEIN:** Okay. Just clarifying.

**SCHLANGER:** I'm talking about clearance within an executive secretariat kind of a functionality, right? Sometimes this is called coordination, but clearance: they can be authorized to do some of the kinds of things that Alex was talking about where — this is for the commitment rather than the influence idea — that where they have a set of fairly structured interactions with folks who share the assigned commitment to kind of keep it in there, right? To keep it salient for them, because it's very easy in the IC to just kind of be in the IC. I mean, you walk into a building that nobody else can come into and you do all of your work in this skiff, you know? And it's just very easy to get *clientitis*. So if you think of these offices as boundary-spanning offices instead, and you think it's actually part of their role to have significant engagement with civil liberties advocates, and to be part of bringing the views of the civil liberties advocates into the agency in ways that can be managed. And other ways, too, if offices like that hire from civil liberties organizations to the extent they can. Or if they think of that, if they share across government, that's another way of reinforcing commitment. You're trying to create a reference set for people inside offices where most of their colleagues are assigned to a different mission and it's very important to always keep in mind — and to really think fairly strategically about influence and commitment all the time: how can we reinforce influence and commitment? What can we do to do that?

**GOITEIN:** Margo has a wonderful article on this that you should all read and it's called —*Offices of Good?* What's it called?

**SCHLANGER:** Oh, so the one about the IC is called, *Intelligence, Legalism and the National Security Agency's Civil Liberties Gap*.

**GOITEIN:** The other one, the *Offices of Goodness* one.

**SCHLANGER:** *The Offices of Goodness*.

**GOITEIN:** That's the influence and commitment one.

**SCHLANGER:** Yeah, that's true. *Influence Without Authority in Federal Agencies* — that's what it's called. *Influence Without Authority*.

**GOITEIN:** But it's actually quite optimistic, despite the way it sounds.

**SCHLANGER:** It is! It says it's possible to have influence without authority. But I think that needs to be really considered, like, no fooling! In statutes, that kind of thing.

**GOITEIN:** Yeah, what do you think, Alex? I mean, what are the gaps? You are in this role now — what are the gaps that you perceive? What could be done to make you more effective? To make your job more effective? What tools would be helpful?

**JOEL:** I have to think about that one. So, it's a very complex ecosystem, to use your term. There are a lot of players, a lot of different moving parts, a lot of people focusing on different aspects of the issue. So that complexity is something that we have to manage and there's a couple of ways of going about it. One is to just cut through it and simplify; so, impose a new structure, "This is too complicated; let's figure out a new way to do it." Another one is to recognize that complexity exists, that it serves important purposes, that it's good that our offices are different. It's good that I'm different from the lawyers. But, I'm not the intelligence person doing the job, so how do you carry out all of the work that we have to carry out? How do you find how to maintain that balance between national security and a protection of privacy and civil liberties in a very complicated environment — it's complicated legally, there are a lot of different rule sets for doing that type of activity. And the oversight structure is also complicated. So, one answer that some people tend to have is,

"Let's create a new entity; let's create something new." And that's fine. Like, we support the idea of an adversarial voice to bring diversity of views to the FISA court. But let's think through what — it would be very helpful to me, personally, if people thought through, "What are the downstream implications?" They're going to have to get clearances; they're going to have secure space; they're going to have to have secure staff — or are they? I don't know. I mean, we're going to have to think through all those issues. That's just an example. And then how are they going to interrelate with all the different players? So, if we could have greater recognition of all of the moving parts when people start proposing different things, that would be very helpful to me. When people enact a new rule, if there was a clearer statement of what the rule should be, that would also be very helpful.

**GOITEIN:** But then what would the lawyers do?

**JOEL:** And people should recognize the resource constraints. So, yes, if we can do additional layers of reporting — the transparency effort that I'm currently working on is very important and good — but it's competing in a world of limited budgets with other priorities. And so if you add, for example, more reporting requirements to more committees — someone's going to have to write those reports — we're going to have to tax the people working on the stuff to prepare for those reports. That may be well and good, but I just want people to recognize that if that's the downstream effect, we're going to have to make sure that the resources are appropriately allocated and if you want more people working on these oversight efforts, which is actually what I would think is certainly fine — I'm happy getting more staff and other people getting more staff — it's either the total pie goes up or in a limited pie, those resources get shuffled. So what are the trades? So those are the kinds of the things that to me, what would be most helpful is a greater recognition of all of those issues as we go forward.

**GOITEIN:** Did you want to speak to this at all? What would make your job easier?

**HOROWITZ:** A couple of things. Obviously, the access issues — not only the legal issues that I mentioned before and having that resolved and being able to move forward and get records without lawyers jumping in with all the legal objections they want to raise — but timely access to records; getting them promptly. And if that means us having to get direct access into records as more and more systems are now electronic, we've got to think of ways to get access in a more timely fashion so we can do our work more timely. There's nothing, I tell you, more debilitating to our staff than spending months trying to do the work, and plow ahead and ask the hard questions, and not be able to get the records so they ask those kind of questions.

Resources are an issue. We have four hundred and fifty people in our OIG — that sounds like a lot but the Justice Department has 100,000 plus employees, a \$20 billion budget or so, and we look at everything within the department, or almost everything within the Department. So, there are always resource constraints, always resource issues for us. I think the other thing is we try very hard to follow up on our recommendations — not just put them out there and hope they get implemented. The reason you see the next NSL report, the next 215 report, all of the other follow-up that we've done in, not only in the national security area but in all the other areas we do those, is so that people don't forget and the FBI and others in the department know that we continue to watch over them. But having the follow-up that occurs with oversight hearings in Congress, whether there's follow-up through the administration, that would be obviously very helpful for us. And then, finally, there is the bill in the Congress, in both the Senate and the House, that would give us testimonial subpoena authority, much like we have documentary subpoena authority. And I think that would be something that would help us with former employees who we can no longer reach if they retire or leave just before we want to question them.

**GOITEIN:** And what if anything could be done about the issue of getting reports de-classified in a more timely way and getting them out to the public?



**HOROWITZ:** And that's a very significant question. One of the challenges we face is: we don't have the authority to declassify — it goes through the intelligence community. And usually, frequently, our reports touch on agencies beyond the FBI, so we're not only dealing with the FBI, we're dealing with other intelligence community agencies over which we are not the Inspector General. It doesn't help us often with the FBI even, but we at least have that relationship with them, and we work with them and we sit with them in the sense of — when I say “work with them” — trying to get these de-classified. And the biggest challenge we have in this area is often getting to the final stage. It's an iterative process. It's almost like there's an effort for it to be a negotiation, and it's not going to be a negotiation from our standpoint. We try and take a very principled approach to what we think should be declassified and what we end up with is, oftentimes, the first version coming back to us of proposed declassification being classified at a higher level than some of our earlier reports that were public. And then us — our shop — having to be the ones that go back, marshal the evidence, marshal the information, and say, "by the way, did you know that the CIA director or the DNI or the FBI director or others testified about the following. And here's what's already out there." Or, "Here's what's been reported publicly." And it's *that* process that takes months if not over a year.

**GOITEIN:** It's such a waste!

**HOROWITZ:** It's a very significant challenge. And there needs to be, and we've been talking with the leadership at the department about how we can move this along better, because this cannot continue.

**GOITEIN:** All right, I'm going to interpret the mood lighting as a sign that I should move on to questions from the audience. I do know that David Medine — I believe is still here — and I did want to give him the opportunity — is he here?

Oh, there he is, hi! I just want to give you the opportunity, if you'd like, to talk a little bit. I consider you, and we've got three branches of government, you are closer to internal oversight than you are to congressional oversight or to legislative oversight, even though you are in fact an independent office. What can you tell us about your experience? I know, open-ended question. But whatever you have in mind.

**DAVID MEDINE:** Okay, one thing I thought I might address is the point raised earlier about our relationship between oversight and advice, which is when we have both of those mandates. I think, as Alex has said, hopefully, our advice is valuable to the agencies as they develop new programs. And we also, as Margo said, we have something in our statute that requires us to notify Congress if an agency comes to us with the proposal and we say, "Don't do it!" and they do it anyway. We're working out the relationship. And one thing is that oversight is proactive — we can oversee whatever we want. Advice is reactive — they have to come to us and seek it. So we have to create an atmosphere where they're going to want to come to us, and so we're working out that dynamic. But I think where we're going to probably end up is, just because we give advice doesn't mean we can't do oversight on that same area or that same project. But the thing that we would not do oversight on is, "Why didn't you follow our good advice?"

But the oversight will be, looking at the law and the policy and so forth, did you end up with a good solution despite our advice? Or, hopefully, consistent with our advice. So, it's a challenge to have both functions, but I think, as we develop more expertise in this area and working relationships with both advocates and the intelligence community, I think we can provide value on both sides.

**GOITEIN:** Any questions? People down in the front, and in the back.

**STEVE WINTERS:** Steve Winters. I wondered if the panel felt there were any lessons that could be drawn from this couple of decades of experience with the Freedom of Information Act? There is a law school here in DC that has a very good program just sort of tracing how that works in practice or doesn't work in practice. There you have this sort of internal situation, too, because each department has to have a FOIA compliance officer, and apparently the experience is that some branches of government just don't like to



respond to these things particularly well and you get a very bad experience. And others are much more forthcoming for whatever reason. So are there any lessons to be drawn from there because that program probably hasn't worked out as originally conceived?

**SCHLANGER:** I think that the FOIA system is a really important part of — I keep calling this an ecology or an ecosystem — but I think it's a really important part of it in a few different ways. One, it enables the public to be a part of the system where otherwise you'd have to sue somebody. I mean, no, you already have to sue them because you have to sue them to get them to answer the FOIA requests, but it's a very different kind of lawsuit. So, a function where in the closed world of the IC, which used to be more closed is less closed now. So just a couple of weeks ago, the CIA AG Guidelines under 12333 were released — that's pretty cool! And that means that people can read them and can then say, "Hey, we think those are great in these three respects but kind of pathetic in these other ones, and wouldn't it be a good idea since you're re-drafting them anyway?" — because everybody's on the CIA to redraft, well everybody's on everybody to re-draft their AG Guidelines — "wouldn't it be good to change them in this way?" And so it enables a public conversation from FOIA that couldn't happen. The other thing is that the FOIA stuff interacts with these internal offices in a way that's really interesting. So one of the most interesting sets of FOIA'd materials are the IOB reports.

**GOITEIN:** Intelligence Oversight Board.

**SCHLANGER:** Yes, which are pretty much all available.

**GOITEIN:** Could you just tell people what those are, because they might not know.

**SCHLANGER:** I get this wrong sometimes, but the IOB's inside the Executive Office of the President and there's a set of reports that are both routine and reactive, both, that have to go to the IOB. And so, various kinds of non-compliance, not with FISA so much as with 12333, some of those non-compliance incidents go to the IOB, and those reports have been FOIA'd. There's a lot of information in them. So it's an internal oversight office that generates the material which then gets released into the public by way of FOIA and that's a really important dynamic as part of this.

**GOITEIN:** I think your point is that it's not working very well, right? Or, sorry, go ahead Alex.

**JOEL:** I was just going to piggyback. In some ways you should ask that question to the people submitting the FOIA requests, but FOIA is an essential part of how we're dealing with enhancing transparency. It's particularly challenging for the intelligence community, because of the classified information, so we've been working very closely with FOIA officers in trying to figure out how to manage their set of issues, and also working with external open government folks and are going to want to do that some more. But there's a couple of things about FOIA that I think are important to understand: one is that it's a forcing mechanism and that's good and bad in terms of, from the inside, how you manage your own priorities. So your priorities are being set by the litigation deadlines, which are coming in because of whatever FOIA request is the first in the queue and it's going to be the first to get to the court and has a litigation deadline so you're —with limited resources — you're on something of a treadmill to answer the next FOIA litigation. So when I come in and say, "wouldn't it be great if we would have greater transparency?" And they say, "That's fine, Alex, as long as you take care of these FOIA requests in our queue." Those FOIA requests have increased post — in the last couple in the last couple of years, as you can well imagine — so that queue has grown longer and the people are running harder and harder to release those documents. The other thing about FOIA, is that you look for records, you look for government documentation that already exists. I can't create an explanation that I think would be transparent and understandable, so as a result you get a lot of technical documents with redacted text inside of them. They can be very difficult to understand in context and oftentimes, the FOIA requestor is a particular researcher or subject matter expert, they may understand it because it fits within all the prior releases, but if it's posted for the general public, it's hard to make some sense of it — what does this mean? It's a document sort of in isolation. So it's an essential part of what we need to do for transparency, but not

enough. I mean we have to figure out ways to better explain ourselves, with context, and in the manner that is more understandable to the public.

**GOITEIN:** I don't whether to call on — you guys take turns.

**WILLIAM MILLER:** Could I ask the panel how they would respond to the previous panel in which a case of agency abuse was very graphically described? How would you help her?

**GOITEIN:** We're talking about the first panel of the morning when Dianne Roark was speaking about — were you folks here? Does anyone who was here want to respond to that?

**JOEL:** So to me, when somebody has a concern about the legality or the appropriateness of a program, it's essential that we have a mechanism in place to give that person, and I'm not speaking about that situation specifically because I'm not familiar with it other than.

**MILLER:** Well, I'm speaking about it.

**JOEL:** But I can't, I'm not trying to address the specific facts, I'm just going to give a more general answer which is: It's really important for us to put in place trusted mechanisms that employees can rely on to bring their concerns to the appropriate folks. So the two things that we are focusing on internally are making sure that people understand what those trusted mechanisms are, and making sure we have safeguards against — to protect that employee from possible retributive acts. And I'm not saying that's working perfectly — there are challenges in making sure that that works correctly. I also think it's important to understand that in some cases if the person who is the best person to receive the information, the concern of the employee, already knows of the program and has approved of the program, it's unlikely that that person is going to change his or her mind. So the other angle that we are going to be pursuing is to what extent can transparency help in that regard? To what extent can an employee request that this be made public in some way through authorized channels? And so there is a mechanism in the Executive Order for declassification review — this is the Executive Order on classification. So we're looking at that, exploring that, is there a way that we can streamline that process so that an employee who has a concern about something and says, "I want this to be transparent; I understand all the people involved have already reviewed and approved it but I think the American people should hear about it." To what extent can we put in place a declassification review process with that.

**GOITEIN:** All right and I'd like to go back up there.

**QUESTION FROM THE AUDIENCE:** Hi, I'm a student here at NYU. I'm studying International Relations in the Master's Program. I'd be curious to know if any of you in your research or your own work or maybe by looking at other countries and trying to look at this comparatively, have you ever seen another country that strikes a better balance, in your opinion, between civil liberties and security, maybe? They have a wonderful security situation in terms of homeland security, but have more expansive civil liberties in terms of strengthening oversight. And maybe you could talk a little bit about that country and how, or maybe it's a group of countries, and how that can possibly be a model of something that America can aspire to?

**SCHLANGER:** I think it would be lovely if there were a country out there from which we could learn how to strike that balance better and there may well be countries that in their operations strike it better. I don't really know how I would know that, honestly, but, I don't know how any of us would know that. But, I don't think there are countries that are experimenting more than we are with the oversight mechanisms. Actually, when you talk to people from other countries — we've all been talking about the failings of our system but they are somewhat astounded at the degree, the levels and variations of oversight. So, no, the answer is no.

**GOITEIN:** Of course, we know less about the other side, right? I mean, I suspect there are no countries that are experimenting more with methods of surveillance than our country is. I'm not talking about breadth of surveillance necessarily and I'm not talking about whether human rights are protected or anything like that, but in terms of capability to conduct surveillance and to try to build back doors and that kind of thing, my understanding is that the intelligence community in the United States is better resourced than the intelligence agencies of all the rest of the world combined! So I think it's a little bit apples and oranges sometimes when you try to compare to other countries but, I realize that question was not necessarily posed to me. Let's see, there are lots of folks with their hands up. Back there with the orange, peach shirt.

**LARA BALLARD:** Okay, yeah. I'm Lara Ballard. I'm at the State Department so I work with some of these guys, and I agree with your answer to the last question. Comparative surveillance laws are something I'm actually looking into and studying and I've found none better. I would say Germany's fairly comparable, but Germany's laws were somewhat inspired by ours, starting with the National Security Act of 1947. But the question I wanted to ask — because we can always make ours better — with regard to internal oversight, we've talked a lot about the challenges of oversight with respect to the need to handle classified information responsibly. But nobody has really drilled down on the substantial differences in handling that is required for top secret versus secret. This is something I run into. I'm just a person who is normally part of these policy deliberations, if there's going to be a broad-based policy — it has to be somewhat broad. I have a Top Secret clearance, I've had one for many years, and I have two computers at my desk. One I can process information from class unclassified up to SBU, so I can email Alex and we can exchange ideas and stuff. I can switch over to the other computer and go up to Secret but if I want to process Top Secret information, I can't do that electronically because you have to be on the JWIC system to do that. So if I want to handle Top Secret information, I also have to keep it in a special safe. I can only discuss it in a special room. So I'm often going over to INR — which is our Intelligence Bureau — maybe you have a weekly reading session and they'll bring out a few hardcopy things of interest to you and most of them really boring but if you did happen to take notes, you have to leave the notes in the room. So I'm wondering, to what degree does that create sort of a separate ecosystem for policy deliberations and to what degree does that present a particular challenge for oversight going back to Alex's concern about the sort of downstream effects? I mean, if you're gonna set up a bunch of people to play an adversarial role in this process, handling Top Secret information, it's actually more logistically challenging than you might even think.

**JOEL:** One of the lessons from 9/11 was that we needed to share information better across the intelligence community itself and then with other government agencies. And so we have been working very hard on that and one of the initiatives under that is to write to release. You try to write things to a lower level of classification so that more people can see it. Now that doesn't mean that that happens on a regular basis and also what could happen is you could have one paragraph in a larger document that is Top Secret — as you pointed out, that means that entire documents has to stay in the appropriately certified and accredited systems for that document. So hopefully one of the things that we'll work on in our transparency initiative that certainly would help address that is to really take another look at these existing policies that we have for information-sharing, and then find new ways to make sure that people are actually implementing those policies so that the situation that you describe doesn't come up as often.

We have to recognize that people talk about secrecy and overclassification — we have to keep secrets, but at the same time, we have to do it appropriately. It's human nature to try to avoid risk. And the risk that I think someone else mentioned is that a risk of not properly classifying a document could mean that you have given away some secret and that's a big problem and all the kinds of issues you guys have been talking about in other forms would come about. So there's a natural human tendency to make sure that you are erring on the side of marking the documents that you're working on classified, and then there's also a legal reason or if I'm trying to protect this as the core secret and I give everybody information all around in this particular area — a large circle, except for that hole — then it's more likely that an adversary will infer what your secret is. And so therefore, there has been a strategy and an approach, and it's evidenced by Glomar, right? Can't confirm or deny over a range of activities, to prevent that sort of gaming by an adversary, so that they can infer what the

secret is based on the information you've released. So that's something that's we're also going to have to address, but the bottom line is that it's an important issue and we have to figure out how to find ways to appropriately classify the information.

**SCHLANGER:** I just want to add one thing, which is that this actually the benefit of the internal oversight technique. The benefit is that you get everybody properly cleared, you give them all access to a skiff — you actually put their desk in the skiff. So that they have a computer there and they don't have to put their stuff in a safe. And then they can do their jobs in the right environment if they can actually do it. I think one of the major obstacles to congressional oversight is the sort of, “only in a skiff, only in person, you can't bring any staff, you can't take any notes, you can't...” All of those *can'ts* are really inconsistent with the way that members of Congress actually function, but they're not inconsistent with the way that people in executive agencies function, right? People in executive agencies work in buildings with no windows without strenuous complaint. You can do a Top Secret, SCI, kind of environment and still have internal offices, and I actually think it's one of the reasons that there's been this push on creating such offices, rather than being a disadvantage.

**HOROWITZ:** And that's certainly the case with us.

**GOITEIN:** Yeah and there's no “need to know” issues; there's no issues with internal overseers being told they don't have need to know and can't be read into, I mean that's...

**SCHLANGER:** Well I wouldn't say no need to know; I would just say it's manageable.

**HOROWITZ:** The irony of the access issues that we've had, beginning in 2010, is we've had access to among the most sensitive documents in the FBI. We did the post-9/11 review; we did the President's Surveillance Program review, which at the time was among the most classified programs in government. We had a skiff; we have a skiff near my office. We have a skiff where the lawyers are that have done these reviews. We have access to the records. That's not the challenge. It's an inconvenience, it can delay things, it can cause other issues but it's not really a core problem that we have.

**GOITEIN:** I think we have time for one more question.

**QUESTION FROM THE AUDIENCE:** Thanks so much for this panel. I have a lot pressure now because I have the last question.

**GOITEIN:** Make it good!

**QUESTION FROM THE AUDIENCE:** I really enjoyed just sort of hearing a bit about the different — frankly what we have is sort of different models represented on the panel and with David's shop at PCLOB in terms of executive internal oversight and Shirin referenced the phrase “institutional design.” I guess my question would be, or I'd ask you to imagine you have a magic wand, and based on your experience if you could share with us what you think are the core elements in terms of institutional design of a strong oversight mechanism for the executive? And also based on your experience what are the oversight mechanisms in your shops that have been set up that are frankly challenges to being an effective internal oversight agency?

**GOITEIN:** Any order.

**JOEL:** For magic wand answers, I defer to...

**SINNAR:** Yeah, right. I think by setting it up as a magic wand, then it's too high a bar, right? Because there is no magic wand. But that said, to my mind, some of the reviews that we know have been incredibly important are those that have pushed back against government secrecy and so this not — I'm actually not

answering this at the level of exactly how you do that — but, certain features. So for instance, independence — the idea that you do not need to go through the White House before you testify to Congress on a particular issue or submit your reports for clearance. You know, those kinds of elements, anything that can — whistleblower protections — I think the whole basket of mechanisms that can improve transparency are really crucial because for me, that goes back to the idea that at the end of the day we need Congress, courts, the public to be more informed in order for them to have a role in setting what the rules ought to be in the first place.

The one other piece that I want to say is that I really feel that there is much more that public advocacy organizations — civil rights, transparency-minded, organizations on the outside — can do. We've talked about the need for police-patrol continuous oversight, not just the fire alarm oversight, and I think that applies as well to the civil rights advocacy community — that to the extent that external organizations are watching continuously what the internal institutions are doing, rather than just reacting when the CIA IG steps down, because of problems with — you know, or so forth. I think that level of external accountability on the overseers is incredibly important.

**GOITEIN:** Alex, we're watching you.

**JOEL:** I want to know what Margo—

**SCHLANGER:** I, you know, I agree with that. I think that the closest thing there is to a magic wand is public discussion, and so as much public awareness on the level of policy as we can create is good. And then the public — which is really channeled through organizations that develop expertise and context and attention and so on, they can really pay attention to what hopefully are their allies within government and what those people are doing and hold them to account and hold their feet to the fire. The other thing that I would say is that we need to not allow the executive to substitute legality for virtue and I think that's really, really important. We need to, when somebody stands up and says, "I don't know why you're complaining! It was legal!" You need to say, "You didn't answer my question!" That, if it was legal, and maybe it wasn't legal, right? And this is the argument that I have with Liza fairly often but, maybe it wasn't legal, but if it was legal, that doesn't mean it was good! And we need as a public to hold the executive branch to account for doing the right thing — not just the legal thing. And those two things are, for me, what I would say.

**HOROWITZ:** Just briefly, in terms of internal watchdog, I think you've got to have independence. For example, my position, I can't be removed by the Attorney General. I can only be removed by the president. You have to have transparency. You have to be able to be transparent, which in some instances is harder than others for us, but that is one of the principles we stand for and we strive for and we continually try to accomplish. We have an independent budget line. We can't have our resources taken away from us by the agency because they don't like what we're doing. So we have that ability, even if we might need more resources, our budget line is separate from the department's budget line. And, in addition to access to information as I mentioned, we need to and — you mentioned whistleblowers and we haven't really talked much about that — but we need to have employees be comfortable, within the Justice Department — I'll speak for my agency — coming to us with information. Whether they call themselves whistleblowers or not, we need people to come to us with information if they have concerns about how programs are operating, whether they're in compliance with the rules and regulations, with the practices, whether they're being abused, that's something that's very important and something we've worked very hard to do before I got there. I've certainly tried to re-double our efforts in that regard. It's very critical that employees be willing and able to come to us. It is one of the advantages of being internal because if you look at study after study on individuals, employees — whether they are in non-government agencies or government agencies — what you hear over and over again is they want to get it right within their organization. They want to go to their supervisor and get it right. And if they can't have that happen, the next step, if they keep going up the chain, but they can always go to another entity that's within their organization, that's independent, but still isn't going outside. And they need to know that they can come to us.

**GOITEIN:** And you've argued for stronger protection.

**HOROWITZ:** And we've argued for stronger protections as an OIG for whistleblowers.

**GOITEIN:** Yes, Alex, are you good or you want to say—

**JOEL:** I'll just say, in my view, if I had a magic wand, now that I've had time to think about it,— we would be having more appropriate — more transparency, with the caveat that it be appropriate transparency while protecting secrets so that the public debate that we're having here and that we've been having over the last couple of years continues and is better informed and focused and nuanced on the things that we are actually doing — or considering doing — rather than some speculation about what we might be doing. We're concerned, it's certainly appropriate to raise those concerns and I agree that the civil liberties advocacy engagement is important — we should make that a very much an ongoing process so that we can have a better dialogue about what it is that we're currently doing and what the concerns are about those actions as opposed to speculation.

**GOITEIN:** So we've gone a little over time. We are not going to take a break before the next panel — I want to make sure you all know that, we're just going to push you through. So I want to thank the panelists for being here.



## CLOSING PANEL

*Michael German, Fellow, Brennan Center for Justice*  
*Hon. Paul Michel, former Church Committee staff member*  
*Peter Fenn, former Church Committee staff member*  
*Patrick Shea, former Church Committee staff member*

**MIKE GERMAN:** We wanted to have one final panel, again recognizing the important work of Church Committee staff, and to throw it out there: What we got right, what we got wrong, what did we miss, what we did not talk about, and what do we have to do next. So let me introduce you.

First it's Judge Paul Michel. He was the former assistant council to the Church Committee, and one of the things that has fascinated me about the year I've spent working with these incredible people is how incredible their diversity of experience is, both before and after their Church Committee experience. He was an assistant Watergate special prosecutor, he worked in the public integrity section of the Department of Justice, he was nominated by President Ronald Reagan to the Federal Circuit Court of Appeals, and became the chief judge in 2004, before he finally retired in 2010.

Peter Fenn was the Washington chief of staff for Senator Frank Church. Among other things, he founded and was executive director of the Center for Responsive Politics. He is a self-described operative — political operative, not intelligence operative — and now runs Fenn Communications.

Patrick Shea was the former assistant to the staff director of the Church Committee. He has one of the most diverse careers — you should look to his bio for all of it, but he was on the President's Commission on Aviation Safety and Security looking at the TWA 800 disaster, he was the national director for the Bureau of Land Management, and the deputy assistant secretary for Land and Minerals.

Thanks very much to all of you for participating. So, what did we get right, what did we get wrong, and what do we do next?

**MICHEL:** Well, my submission is that the courts have a significant role in all of this, along with all the other actors providing oversight, guidance, and policy input. The FISA Court is not the whole story. It's an important part of the story, and the improvements discussed here today would make it even better, but I think there is a growing and very significant role for the regular courts as well. In the final analysis, legal rights are meaningless unless they're enforceable, and that really means the courts have to be available and effective. I think that the attitude of the judiciary — the level of understanding, the level of skepticism — has changed markedly just in the last year, for all the obvious reasons: these dramatic disclosures of what was going on unbeknownst to all of them and all of the rest of the citizens in the country. So I think things like standing, executive privilege, state secrets, all these doctrines that have been used in the past to avoid reaching the merits are losing power and losing power fast.

So, I predict the courts will do a much better job in the next few years than they have recently. With respect to dealing with secrets, the courts actually have a lot of experience. I worked on a case involving stealth aircraft technology before the words "stealth bomber" ever entered the lexicon. We knew how to clear courtrooms, have classified storage devices, worked with the Defense Department officials. So, the idea that judges can't do it because it involves highly classified stuff is, I think, not really sound. Now, to the extent that some level of specialization might be useful — there are about 1,000 federal trial judges and about 200 federal appellate judges in 94 districts in the 50 states, that's a lot! There is a model that we could use if some degree of specialization was thought to be essential. There was something called the Temporary Emergency Court of Appeal, which was staffed by regular judges from around the country on special assignments, somewhat like the FISA Court, so you could have that model used again.

I think the biggest problem is that the advance of technology, especially electronic technology, and its utilization by the intelligence community has been so rapid that the law and lawsuits have not kept up with it. The Fourth Amendment was, obviously, written in a completely different technological era, and, as valuable as the Constitution and the Bill of Rights protections are, they're not really adequate because of this rapid, rapid advance of technology. It's advancing even more rapidly now than in recent times. So, I think what's needed to make the courts more effective is for Congress to define some red lines, if we want to use that expression, which intelligence agencies are not to cross with respect to collecting and analyzing data about Americans who are not the target of founded concerns about being terrorists or criminals, or whatever. If Congress would do that, the effectiveness of the courts would rise even further. You know the core competence of judges is, they look at the law and look at a set of facts and say, "was it legal or was it not legal?" They can't duck the issue — they have to decide the issue and they will decide the issue. But if the law is clearer, then the outcomes could become more predictable, more consistent, fairer, and more effective. That provides guidance for all the actors in the executive branch and even provides help to the legislative branch. So, what we need is for Congress to get in the game and work in a tag team fashion with the courts — and no one else can do it! You can't count on the executive to make a judgment for the whole society in a democracy, a republican form of government. Really, Congress is the only legitimate body to assess these competing considerations and strike a balance. They're not perfect, nobody's perfect, but they're the right people to do it, and I hope that they will. They're certainly moving in that direction.

The last thing is, we've talked a lot about some of the output of the Church Committee, but there were a lot of statutory reforms that we haven't really talked about. For example, limiting the IRS from being abused for political purposes, that was enacted in statutory form and so were some other reforms. There's more that can be done in that area as well. There was an effort to develop a charter for the FBI, which was done cooperatively by the FBI and the Justice Department and was mostly written by Inspector John Hotis and me. It got way down the track with approval from the Carter Administration, the attorney general, the director of the FBI, and at the last stages it got pulled from consideration. I think there's good potential to enact charters for the key agencies that would set a broad framework within which specific statutes, guidelines, and oversight can take place, and be more effective than it has been before.

There's also a good role for guidelines but, again, guidelines have to take place in a context, and the context most broadly has to be set by Congress and statutory reform. That's the single biggest thing that we need to improve the quality of the restraints on the intelligence community's activity. I actually think — having spent many years as a criminal investigator involving public corruption, as you have heard — that the intelligence agencies will not only be able to observe appropriate civil liberties, civil rights, and privacy interests, but will actually become more efficient and more effective against real terrorists if we move in this direction. So, it's not a question of "give up safety so we can have privacy." You can have both, but it takes smart laws and constant updating, because the whole thing is a moving target. The technology's changing a mile a minute! So Congress has to get into the act. The courts need to step up — I think they are, I think they will, and I think that, like Congress, there's a special role for judges. They're appointed for life, they're not political, they're like monks in days of old — they're removed, they're very independent, they're very detached, they're not emotionally wrought up in the dispute — they're fallible like all other humans, but if you have to pick who should be a referee on whether something is legal or not legal, given what the statutes say and what the Constitution says, there's no better alternative than federal judges. So let us play our role, let the Congress play its role, and we can advance this ball a great deal very rapidly.

**GERMAN:** As a federal law enforcement officer, an FBI agent, I can say I agree with you entirely. I never found bad guys by investigating people who were innocent, and I think that's something that's missing in this. Peter?

**FENN:** Mike, first of all, my hat goes off to you, the Brennan Center, Fritz, and the whole staff. This has been an incredible day. You've done so much work to prepare for it, and I know you're going to do a lot of

work after it's over, but this is a public service. And it comes at the right time, even with us "gray hairs" up here trying to make sense of some of it!

I come from the political, public side of this. In addition to the time spent on the Church Committee and in Senator Church's office, I've worked for three decades to elect candidates to office. One of the things that concerns me a lot is how to bring the public into this. How do you move the ball down the field when you've got some very complicated issues, when a lot of it's secret, when people haven't studied it and thought it through, and when you have — I hate to say it! — elected officials who tend to act very quickly when push comes to shove, and they may not make the best decisions on Sunday when they vote on this. I wrote a column, partly at your urging, where I said, I think we have got to get it right. It's really difficult when you pass the Patriot Act in the heat of passion, and folks who are not terribly competent on some of these issues — read: the Congress — are making some of these decisions.

So, there are two things that a lot of us have talked about. Politically I understand they're tough, but folks should call for a new Church Committee in Congress made up of people on the intelligence committees and the homeland security committees, people who have a real interest, understanding, and passion for this subject. We need them to step back and look at it. At the same time, my view is — and I've expressed this in the White House, because as a political consultant somehow I get in there, and I've said to folks, you should have a Simpson-Bowles type of commission to look at the intelligence agencies. They should have subpoena power and really solid, good people on it, real serious folks and serious staff, and we should begin to look at some of the questions that Paul just laid out. We should look at what we need to do with the FISA Act. We should really look at what the roles of certain judges are. We should take a real good, hard look at what the executive does with IGs and whistle-blowers. If we are shutting down, in this country, people who are concerned and have moral questions about what our policies do, if they're looking and they can't come and say, "We're torturing people overseas. They just destroyed these tapes — they should not do that," then we're in real trouble. Because when you're spending \$70-80 billion dollars including the military money — over 107 thousand staff people in the intelligence field now, plus the contractors — and they're building this multi-billion dollar facility again, in the state of Utah, to suck in all this information that they gather — somebody who has questions shouldn't have to travel to Russia to let it all out! I mean we should figure out a way to make these people not pariahs, but folks who are doing their jobs.

I'm not a waif, and I'm not a political idiot, so I know that the second Church Committee isn't the easiest thing to get done, or a Presidential Commission, but I hope if this president doesn't do it the next president does and gets really serious about it.

**GERMAN:** And I think that's why you're right. It's the public education part that is so important and that we're trying to accomplish here with your help, because once the public puts that pressure on the politicians, whether it's the executive branch or the—

**FENN:** And I will tell you one quick thing: Just about an hour ago I did a little interview with Steve Scully from CSPAN, the wonderful folks who are here taping this, and Steve played a two minute byte from Frank Church from 1975 on "Meet the Press" — I'm sure it'll be on CSPAN — and I thought to myself, "Holy cow! He could have said that yesterday!" Talking about looking inward, precisely your words about what's going to happen with our technology, that it's getting greater and greater. So the public needs to think a good deal more of—

**GERMAN:** And we have a Rethinking Intelligence project that if Fenn Communications wants to help out with—

**FENN:** Pro bono! I'm old enough I just do pro bono stuff anyway.

**GERMAN:** Patrick?

**SHEA:** Mike, I hope you will become the next director of the FBI. It would be refreshing.

**GERMAN:** Sorry, I don't think that's likely!

**SHEA:** In Utah if I can help somebody I say I will oppose them, so I'll oppose you! Then I do want to thank Fritz and Bill Miller. Fritz Schwarz, he and I have not always had a harmonious relationship when I was on the Committee. And Bill—

**FENN:** Hell, Pat, you haven't had a harmonious relationship with your friends who have worked for you!

**SHEA:** When Peter helped me on the campaign, my opening line running for governor as an Irish Catholic Democrat in Mormon Utah was, "I'm from the government and I'm here to help you." And in 1992 that got the same response as it would today, unfortunately, and I think about what just happened to me yesterday when I arrived. In 1969, the first year I was here in Washington working as an intern for Senator Moss, a Democrat from Utah. I landed at Dulles, a new airport at the time, and I kept thinking of John Kennedy's, "Ask not what your country can do for you, but what you can do for your country," and Martin Luther King's statement, "I have a dream." There was this positive, aspirational aspect to government. People believed that we could make the difference. The other day when I got into Reagan Airport, all I could hear was the House of Cards theme music. I think that really captures what's happened in these 40 years: we've let Hollywood, in many ways, define what we consider to be a political reality. As a criticism of the intelligence community, I think they watch too many movies and don't get enough experience. Some of the people we worked with, like Seymour Bolton and Walt Elder, had actually been in the field. Seymour had been captured in the German war, put in the prisoner-of-war camp, and organized it. Senator Church had been an intelligence officer in China, so they had firsthand experience.

The idea in the 21st century that we have a war on terrorism, which is an oxymoron to me, it's absolutely ridiculous. It needs to be, and should've been since 2001, a police action. The police are under better control than the military, because Ike Eisenhower, who's emerging as one of my favorite presidents, understood the power of the military industrial complex. And when you're talking about billions of dollars and political appointees — I was a Presidential-appointee, Senate-confirmed — the average life of the one of them is 18 months. I can remember at the Bureau of Land Management, where I got to deal with wild horses, a senior official who supposedly reported to me, looked at me and said, "Look, I'll be here long after you're gone, so I'm not going to do that." So, I think we need to think about an eco-system, but the problem I see with the eco-system that has developed in this "security state" is that it's a monoculture. In biology, monocultures don't survive very long. They do come in as an invasive species, they do take over the landscape, but then they fail because there's a lack of diversity. Now, each time I've worked in Washington — and it's been seven different times — I've had a letter of resignation, or I had a conversation with Peter where, after I told one member of the Committee that he was just not really with it, Senator Church reminded me that's not a way a staff person talks. I go back outside to the Potomac Village, and I think in the Potomac Village there are each of these tribes that are more interested, and this was certainly true in BLM, in defending their turf against, for instance, the Forest Service, or Fish & Wildlife Service, or DOD, CIA, NSA — that they're all sort of mixed together.

The other thing, Margo I don't know if you're still here, but the one thing I really would disagree with you on is more people in the pie. When I came to Washington in 1969 there were 2,500 staff people in the Senate, today there are over 10,000. In the House there were 10,000, now there are over 30,000, and that 10,000 included the Library of Congress. So we've had this explosion of staff on the Congress side, and I would suggest to you, with all due respect, Your Honor, I do agree that the courts are a very good place to adjudicate conflict, but you need to have a Congress that's going to be a congress and I don't think — I mean, the joke when I was in BLM was that there's only one system now: appropriation process. The

authorization committees don't matter, but the appropriators, man, you kiss their ring because they control your budget!

So, the only place I do want to talk specifically about the Church Committee is, I think we have a unique opportunity, and I think we took maybe three quarters of that opportunity. We did prove to the public that there were abuses that were going on, whether it was assassinating foreign leaders, COINTELPRO, or NSA probes, but in my judgment what we didn't do, which was a missed opportunity, was set up a predictable budgetary process and make sure that the chain of command was traceable. Because we concede, even today, that the agencies are so good at fluffing over things like who's responsible for spending those dollars or who's going to be accountable. At the CIA, Walt Elder was a historian, and every time there was a covert operation he had to write up a history report where he interviewed the people there and determined whether they were successful or unsuccessful. I think that kind of accountability, first internal to the executive branch and then in some way reviewable by an independent body — I think since *Citizens United*, I'm not convinced Congress is going to be independent because of the moneyed interest. When I ran for the Senate against Orrin Hatch — and I ran on the “bus theory”: he had to get hit by a bus before I could get elected — when somebody hands you a check for \$10,000 or \$20,000, it's not because they like your curly hair or your Irish demeanor. It's because they want something out of you. And now there's unlimited spending, and unfortunately Peter makes good money off of this—

**FENN:** Pro bono now!

**SHEA:** Yeah, pro bono! But it's a system that is broken, and we need to have some accountability.

Finally, the most important thing is, I teach at the University of Utah, and it's interesting to me to see — I've been teaching for 35 years now — how events that were very real in my life — Watergate, for instance, the impeachment of President Nixon — are now as relative to my students as World War I was to me when I was their age. And you could ask me at their age what I thought about World War I, and I could give you some very general ideas, but we're failing in transferring the sense of responsibility. Some people have said — Tom Brokaw's book, *The Greatest Generation* — I'm afraid if we don't change our way, we may be known as The Least Generation.

**GERMAN:** I said this last night, and I'll repeat it here: As a young FBI agent, having read and internalized the reports that you guys worked so hard on really set me on a course to keep the straight and narrow, and it was so nice to hear Alex Joel say that he has copies at his office. I think it's very important, and there are a lot of employees within these agencies who want to do the right thing and want their agencies to be effective and efficient. We have to figure a way to empower them and to make sure that they're able to work within the system so it can work well. The commitment of this group of people for over 40 years now is inspirational. Thanks very much for the work that you've put in and continue to put in, and I'm going to continue calling you!

So thanks very much to the Church Committee staff. Fritz Schwartz and Bill Miller, if you wouldn't mind standing. And, of course, thanks to Vice President Mondale and Senator Hart for coming this morning, that was a terrific addition to the program. Thanks to all of you for coming, and thanks to CSPAN.

Good night, everyone.



## VI. ENSURING EFFECTIVE INTELLIGENCE OVERSIGHT; THE PROBLEMS OF SECRET RECORDS AND RECORD DESTRUCTION

*Athan G. Theoharis*

*Professor of History at Marquette University, Former Church Committee Staff Member*

The creation of secret records and record destruction policies have in the past undermined effective oversight of the U.S. intelligence agencies. Secret records differ from classified records in that their purpose is to preclude the discovery of controversial or illegal practices, including through the undiscoverable destruction of such records. Some of the Federal Bureau of Investigation's (FBI) secret records and record destruction policies did become known, as were some of those of the Central Intelligence Agency (CIA) and of the National Security Agency (NSA). These practices were uncovered during the investigation conducted by the Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities (the so-called Church Committee) in 1975-1976.

Testifying before the House Judiciary Subcommittee on Civil and Constitutional Rights in February 1975, Attorney General Edward Levi disclosed that the former FBI director, J. Edgar Hoover, had maintained a secret office file. Hoover's Official and Confidential File, Levi disclosed, included important information about FBI programs and procedures and as well "derogatory information" about prominent Americans, including members of Congress.<sup>1</sup>

Hoover's Official and Confidential File proved to be an invaluable research source for the Church Committee. This file provided insights into FBI wiretapping, bugging, and break-in practices, sensitive FBI programs, and some of the targets of FBI surveillance. The Church Committee's staff review of these records, moreover, led to its further discovery that the former FBI Director had maintained a second secret office file--a Personal and Confidential File—and that this file had been destroyed by his administrative assistant, Helen Gandy, in the months after his death. While a destroyed file cannot be reconstructed, when reviewing the contents of Hoover's Official and Confidential File the Committee staff discovered that in October-November 1971 Hoover had ordered Gandy to transfer eight folders from his Personal and Confidential File to his Official and Confidential File. A review of the transferred folders confirmed that these were not personal records (private correspondence, Income tax forms) but involved official policy. Indeed, one of the transferred folders, the Black Bag Jobs folder, recorded Hoover's creation of a special records destruction system, Do Not File, to preclude the discovery of the FBI Director's authorization of "clearly illegal" break-ins.<sup>2</sup>

Hoover's secret office files and the extant Black Bags Job folder were not, however, the sole discovered instances of FBI secret records and record destruction policies. During its 1975 hearings into the destruction of Hoover's secret office file and FBI recordkeeping practices, a House subcommittee uncovered two additional special record and records destruction practices. The first involved Hoover's institution of a special records policy in 1940 to govern memoranda "written merely for informative purposes which need not be retained for permanent filing." Such memoranda were to be prepared on blue paper (in contrast, memoranda which were to be permanently maintained were to be typed on plain white letterhead stationary) and contained the following caption on the bottom: "Informative Memorandum—Not to Be Sent to Files Section." Should such memoranda "reach the Files section," Hoover further instructed, they were to be "returned to the Director's Office for appropriate disposition." When Justice Department officials in 1942 unknowingly required the use of blue paper for intra-departmental communications, the FBI paper color was changed to pink with the following notation on the bottom: "This Memorandum Is for Administrative Purposes—To Be Destroyed After Action Is Taken and Not Sent to Files." Pink memorandum, Hoover stipulated, were to be used whenever information was reported "solely for the benefit of the Director which



will possibly be seen by the Director and other officials and eventually be returned to the dictator [of the memorandum] to be destroyed or retained in the Director's office." Then, when an extant pink memorandum was publicly compromised during the trial of Soviet spy Judith Coplon (documenting an order to destroy the Coplon wiretap logs in view of the "imminence" of her trial), senior FBI officials were instructed to replace pink memoranda with "personal notes or informal memoranda" prepared on white non-letterhead paper containing no printed destruction order. FBI officials should use "informal" memoranda, Hoover ordered, whenever reporting sensitive information and these memoranda were to be maintained either in the office file of the writer or sent to the FBI Director's office.<sup>3</sup>

The Subcommittee had also uncovered a copy of an October 1941 memorandum in which the FBI Director instructed senior FBI officials that FBI Assistant Director Louis Nichols would maintain a "confidential file" in his office under his (Nichols's) "direction and supervision." This file would supplement Hoover's own Official and Confidential File and FBI assistant directors were to use "discretion" when "designating material to be included" in Nichols's Official and Confidential File.<sup>4</sup>

FBI officials did not inform the Church Committee of the existence of the Nichols file or the blue/pink/informal memorandum policy. I subsequently filed a Freedom of Information Act (FOIA) request for the Nichols file. Its contents proved to be as sensitive as Hoover's office file. One example: memoranda recorded that FBI agents broke into the New York office of the American Youth Congress (AYC, a radical youth organization) in January 1942 and in the process photocopied Eleanor Roosevelt's correspondence with AYC officials. Briefed on this discovery, Hoover ordered that the First Lady's correspondence "be reviewed and analyzed." The resultant analysis was "set forth in a blue memorandum" sent by FBI Assistant Director D. Milton Ladd to Hoover along with "the developed photographs [of the First Lady's correspondence] and the roll of negatives for whatever disposition deemed advisable." Significantly, while the memoranda reporting the break-in, Hoover's briefing, his order, and two copies of the photocopied correspondence (with the second copy maintained in the Eleanor Roosevelt folder in Nichols's Official and Confidential File) remain, the referenced blue memorandum does not—thereby precluding an understanding of the FBI's analysis and whatever action, if any, had been taken.<sup>5</sup>

The Hoover and Nichols office files and the records documenting the blue/pink/informal memoranda policy, however, are not the sole extant records of senior FBI officials' secret office files and record destruction practices. Another office file, maintained by FBI Associate Director Clyde Tolson, and another formal record destruction policy decision were subsequently and inadvertently discovered in 1981.

In January 1980, Judge Harold Greene, ruling in favor of the plaintiffs in *Americans Friends Service Committee et al v. William Webster et al*, ordered the FBI and the National Archives to develop and submit for his approval an FBI records disposition plan that would ensure the preservation of FBI records of "historical value." In response, Archives officials established a special task force to review FBI files and solicited the outside counsel of selected librarians, historians, and political scientists. The resultant records plan drafted by the Archives and the FBI was approved by Judge Greene in 1985.<sup>6</sup>

As one of the consultants to the Archives task force, I specifically recommended that the proposed FBI records disposition plan ensure the preservation of all office files of senior FBI officials, basing this recommendation not only on the known existence of the Hoover and Nichols office files but on an FBI memorandum I had acquired in response to one of my FOIA requests. This memorandum recorded FBI Assistant Director D. Milton Ladd's response to Hoover's December 1948 query where three March 1946 pink memoranda had been found: in the Tolson File.<sup>7</sup> Acting on my recommendation, the Archives task force thereupon obtained two sensitive FBI memoranda.<sup>8</sup>

In one, FBI Assistant John McDermott reported on an unanticipated problem precipitated by Senate Majority Leader Mike Mansfield's directive that the FBI (and the other intelligence agencies) cease their normal record destruction until the Church Committee had completed its investigation. McDermott then pointed out that

the extant Tolson File (comprised of records dated 1965 through 1972, and not dating at least from 1946) “should have been destroyed” pursuant to a March 1953 order of FBI Director Hoover “since they were never intended for inclusion in the Bureau’s permanent records collection.” Accordingly, McDermott proposed that the extant Tolson File be retained “in the [FBI’s] Special File Room . . . until at least the Senate hearings are concluded.”<sup>9</sup>

McDermott’s admission, in turn, led to the production of Hoover’s March 1953 record destruction order. Troubled by the failure of senior FBI officials to regularly destroy the contents of their office files, the FBI Director ordered senior FBI officials to “periodically” review the contents of their office files and “destroy them as promptly as possible”—stipulating that FBI supervisors do so every 90 days and FBI assistant directors every six months.<sup>10</sup>

FBI officials did not alert the Church Committee to the existence of the (partial) Tolson File or to Hoover’s March 1953 record destruction order. In any event, I filed an FOIA request for the Tolson File. Its contents proved to be as sensitive as those of the Hoover and Nichols office files. A November 1970 memorandum, for example, recorded Hoover’s report on his telephone conversation that day with Nixon White House aide H. R. Haldeman. Haldeman had called on behalf of President Richard Nixon, to relay the President’s request “for a run down on the homosexuals known and suspected in the Washington press corps.” The White House aide then identified a specific reporter and expressed Nixon’s interest in “some of the others rumored generally to be [gay] and also whether we had any other stuff that he, the President, had an interest in what, if anything else, we had.” Haldeman had prefaced this request by noting that the President thought that “I [Hoover] would have it pretty much at hand so there would be no specific investigation.” Nixon assumed correctly as the requested report was hand-delivered to the White House in two days.<sup>11</sup>

Significantly, while the memorandum recording this sensitive White House request and that the requested report was hand-delivered to the White House in two days are extant, the copy of the report is not. Its destruction, as such, precludes an understanding of the names of the reporters whose sexual activities the FBI had already monitored.

Are these examples of FBI special records and record destruction procedures relevant to understanding the current policies of the FBI (and other intelligence agencies)? Why was Hoover emboldened to create written records of the Do Not File procedure and of his sensitive communications to senior FBI officials, given the possibility that they could be (and were) retained? Hoover’s willingness to record his own controversial (and illegal) decisions was not simply due to the deference that the FBI Director commanded at the time, and his success in preventing access to FBI records. His creation of such sensitive written records instead derived from his administrative interest in monitoring a nationwide bureaucracy in order to ensure compliance with his rules and priorities.

The Tolson File similarly promoted Hoover’s centralized and tightly controlled administrative system. This file consisted of memoranda written by Hoover and addressed first to Tolson and then to various FBI assistant directors (who would have had the expertise or responsibility over the specific issues raised in the FBI Director’s memorandum). Its purpose ensured Tolson’s ability to act as Hoover’s gate keeper. Briefed on the specific matter, the identified assistant directors would report back to Tolson on their handling of the referenced matter with the FBI Associate Director then reporting their actions to Hoover.

The Do Not File and Tolson File records promoted Hoover’s bureaucratic interests by ensuring that FBI agents and senior officials at FBI headquarters both fulfilled his requests and complied with his established rules. Why, then, did Hoover transfer the Black Bag Jobs folder from his Personal and Confidential File to his Official and Confidential File (thereby ensuring its preservation) and why were only the 1965-1972 memoranda in the Tolson File not destroyed?

Hoover would have reached the mandatory retirement age of 70 on January 1, 1965. But instead the requirement was waived under a May 8, 1964 executive order of President Lyndon Johnson. Thereafter, Hoover's continued tenure was dependent on the will of the president. The heightened scrutiny by the media and Congress during the late 1960s and public concerns over potential threats to privacy rights led Hoover to reassess his earlier authorization of the series of abusive practices conducted since 1940 and to issue a series of restrictive orders in 1965-1966 banning break-ins, mail intercepts, and trash covers and imposing numerical limits on FBI wiretaps and bugs.

For instance, penned on the bottom of the July 1966 memorandum describing the Black Bag Jobs transfer procedure is the notation, "No more such techniques must be used." Hoover repeated this order in the second memorandum contained in the transferred Black Bag Jobs folder. In this January 1967 memorandum, the FBI Director complained that "requests are still being made by Bureau officials for the use of 'black bag' job techniques," and then reiterated that "I do not intend to approve any such requests in the future and, consequently, no such recommendations should be submitted for approval of such matters."

Hoover's concern over his possible vulnerability also led him to ensure the retention of the post-1965 contents of the Tolson File thus preserving records documenting that his actions were done pursuant to White House authority. The November 1970 memorandum illustrates this benefit in that it provided both cover and leverage—President Nixon could not risk the disclosure that he had asked Hoover to brief him on the sexual activities of prominent Washington-based reporters.

Has the exposure of secret records and record destruction practices, combined with the establishment of permanent congressional intelligence committees, of the office of inspectors general within all federal agencies and departments, and of the president's civil liberties commission, precluded the recurrence of these record practices?

The recent controversy over former Secretary of State Hillary Clinton's e-mail practices suggests that high level officials remain committed to ensuring that their controversial or abusive decisions cannot be uncovered. Her use of a private e-mail account separate from the State Department's records system and further admission to having destroyed only her "personal" e-mails when belatedly turning over her e-mails to the Department resembles the actions of FBI Director Hoover. Such a comparison, however, remains speculative as it is not based on a review of relevant records. Congress's current investigation of this matter, however, should be broadened to include an examination of the record practices of intelligence agency and senior Administration officials.

## ENDNOTES

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<sup>1</sup> New York Times, February 28, 1975

<sup>2</sup> U.S. Senate, Select Committee to Study Governmental Operations with respect to Intelligence Activities (henceforth Church Committee), Hearings on the Huston Plan, Vol. 2, 94<sup>th</sup> Cong., 1<sup>st</sup> sess., 1975, pp. 278-282; Hearings on Federal Bureau of Investigation, Vol. 6, 94<sup>th</sup> Cong., 1<sup>st</sup> sess., 1975, pp. 351-356. U.S. House, Subcommittee of the Committee on Government Operations (henceforth House Subcommittee), Hearings on Inquiry into the Destruction of Former FBI Director J. Edgar Hoover's Files and FBI Recordkeeping, 94<sup>th</sup> Cong., 1<sup>st</sup> sess., 1975, pp. 36-64, 173

<sup>3</sup> House Subcommittee, Hearings, pp. 141-145, 156-170

<sup>4</sup> House Subcommittee, Hearings, pp. 154-155

<sup>5</sup> American Youth Congress folder, Official and Confidential File of FBI Assistant Director Louis Nichols

<sup>6</sup> For a brief summary of the case and its resolution, see Gerald Haines and David Langbart, Unlocking the Files of the FBI: A Guide to Its Records and Classification System (Wilmington: Scholarly Resources, 1993), pp. x-xi, xvi-xvii

<sup>7</sup> Memos, Hoover to Tolson, Tamm, Ladd, and Clegg, March 19, n1946; Hoover to Tolson, Tamm, and Ladd, March 20, 1946; and Hoover to Tolson, Tamm, and Ladd, March 21, 1946; all in Alger Hiss folder, Official and Confidential File of FBI Director J. Edgar Hoover (henceforth Hoover O&C). Memos, Ladd to FBI Director, December 10, 1948 and December 13, 1948, both in FBI file on Alger Hiss ###1478 and 1479

<sup>8</sup> Letters, Charles Dollar (National Archives) to Athan Theoharis, November 19 and December 11, 1981

<sup>9</sup> Memo, McDermott to Jenkins, June 11, 1975, FBI 66-17404-94

<sup>10</sup> Memo, Hoover to Tolson and eleven other named FBI assistant directors, March 19, 1953, FBI 66-2095-100

<sup>11</sup> Memo, Hoover to Tolson, Sullivan, Bishop, Brennan, and Rosen, November 25, 1970, Tolson Fil



BRENNAN  
CENTER  
FOR JUSTICE

*at New York University School of Law*

161 Avenue of the Americas  
12th Floor  
New York, NY 10013  
646-292-8310  
[www.brennancenter.org](http://www.brennancenter.org)