Chapter 3 - Intelligence and democratic accountability during the Global War on Terrorism

This chapter explores the evolution of intelligence and democratic accountability during George W. Bush’s Global War on Terrorism (GWOT). Following the 9/11 attacks, the US intelligence community (IC) and its system of democratic accountability faced significant challenges. The attacks drew attention to a clear and present danger faced by Western societies, namely the transnational threat of terrorism. For decision-makers, they also constituted an opportunity for action, allowing them to redefine their position regarding the trade-off between national security and liberal democratic values, and reorganise the US intelligence apparatus. These realignments caused a series of inter-institutional tensions that challenged the US system of intelligence accountability. In turn, while the GWOT constitutes a particular period in US history, it is by no means a parenthesis. From 2001 to 2009, the US intelligence community and its system of democratic accountability underwent a series of processes that are well known to students of US intelligence. In this sense, the context of crisis that followed the attacks also emphasised elements of continuity.¹ This chapter first examines the expanding requirements for, and the use of, intelligence in the GWOT. Even if the US intelligence community did not discover terrorism in 2001,² the magnitude and imminence of the terrorist threat to the US homeland was new to the government. This novelty moved the politics of national security closer to the homeland.³ Furthermore, the Bush administration’s reaction to the attacks, its Global War on Terrorism, put an active emphasis on secrecy and effectiveness, sometimes at the cost of liberal democratic values. On a structural level, the government carried out a reorganisation of the intelligence community and its system of accountability and the effects of this reorganisation remain debatable.

At the institutional level, a series of tensions complicated the sharing of powers that forms the basis of democratic accountability in the US. The state of exception that followed the 9/11 attacks constituted a significant external constraint on intelligence accountability and this new context created cleavages within and between institutions as well as space for executive action and reform. The executive branch tried to push forward its national security

agenda unilaterally and this executive accretion of power in the GWOT did not occur in a new world; neither did it constitute a radical departure from previous practices. Throughout US history, the executive branch has often overreacted when it felt the nation was under attack.\textsuperscript{4} In turn, the state of emergency that followed the 9/11 attacks and the reaction of the administration put intelligence accountability under the most significant strain it experienced since its institutional birth in the mid-1970s. As a result, the context of the GWOT is particularly suited to study of intelligence accountability at its most extreme limits, when its subsistence is the most crucial to the American Republic and its liberal democratic values. The 9/11 attacks can therefore be characterised as a catalyst that accelerated deeper and pre-existing historical trends during a phase of transition.\textsuperscript{5}

**Realigning Intelligence**

The surprise attacks on the World Trade Center and the Pentagon on the morning of 11 September 2001 drastically changed the context in which George W. Bush’s presidency took place. Many experts have claimed that these attacks, unprecedented since Pearl Harbor, marked the beginning of a new era in American domestic and foreign policy and more generally in international relations.\textsuperscript{6} The 9/11 attacks certainly pushed the US government to adopt a new strategic orientation. A few days after the attacks, George W. Bush announced a state of ‘national emergency’.\textsuperscript{7} On 20 September 2001, in an address to a joint session of Congress, the President declared the US would retaliate to this ‘act of war’ and engage in a ‘war on terror’.\textsuperscript{8} The use of the word ‘war’ suggested the administration would resolve American anxieties through recourse to military power. In the following years, the concept of

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GWOT shaped the US national security and foreign policy agenda. Counter-terrorism would primarily rely on the military, which confined the roles of alternative instruments such as the criminal justice system and diplomacy. While it framed some aspects of the US response, waging a war on terrorism (which is a method) conveniently left other options, such as the choice of the adversary (from Al Qaeda to Iraqi insurgents), open. Moreover, the impossibility to gauge success in the GWOT suggested the war could be prolonged as long as the administration judged it necessary.

The Bush administration’s unwavering focus on terrorism reinforced the public sense of insecurity generated by the possibility of new attacks, and prompted a lasting sense of crisis. Framing this struggle as a new kind of war also suggested new sacrifices would be necessary. Since war requires the effective mobilisation of society and terrorism was pictured as an existential threat, Americans would have to exceptionally surrender some of their liberties to the federal government. In addition, it also justified higher levels of government secrecy. Rosemary Foot points out that the language of war has ‘an intimate relationship with the abuse of human rights’ and the Bush administration corroborated this argument by engaging in a series of controversial programmes involving arbitrary arrests and ‘enhanced interrogation techniques’. Despite strong criticism, the advent of the GWOT extended from an initial situation of emergency to an enduring state of exception.

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12 The oxymoronic “lasting sense of crisis” and the idea of a pervasive threat the infiltrates the US society is not without parallels to the Cold War. For statistics about the sense of insecurity within the American population, see: John Mueller, Overblown. How Politicians and the Terrorism Industry Inflate National Security Threats, and Why We Believe Them (London: Free Press 2006) p.2.
of war effectively gave the lead to the executive branch, providing it legitimacy to take full advantage of its position in its relations with the other branches of government. In sum, the administration succeeded in seizing a major opportunity to lead a united nation against an indeterminate enemy for an indefinite period of time.

**Intelligence against terror**

The 9/11 attacks were a wake-up call that highlighted an alteration of the nature of intelligence requirements that had been on-going since the end of the Cold War. The GWOT is an asymmetrical war in which the US is opposed by a complex network of combatants using unconventional means. From this perspective, the US homeland and assets constitute a target-rich environment, where terrorists may find a considerable number of tactical objectives.\(^{17}\) Equally, terrorists make particularly difficult targets for traditional intelligence methods, especially because they favour networks over formal organisational structures.\(^{18}\) This allows them to hide relatively easily within western societies\(^{19}\) and, since the 1970s, terrorist organisations have benefited from the information revolution, the increasing convergence of computers with telecommunications, in order to communicate more easily and anonymously.\(^{20}\) At the same time, governments have lost their monopoly in the area of information technology to the benefit of the private sector.\(^{21}\) In the 1990s, this evolution raised fears that agencies such as the National Security Agency (NSA) might be going deaf.\(^{22}\) Since the 9/11 attacks, US policy-makers and the US intelligence community have been particularly concerned about their vulnerability when facing the nexus between the terrorist threat and WMD proliferation. Some experts have pointed out that obtaining warning on proliferation or small scale terror attacks is extremely difficult.\(^{23}\) These transnational threats pose challenges that significantly differ from the Cold War era, when the intelligence community was targeting a sizeable, relatively well-defined and more visible enemy. As a

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\(^{22}\) For more on this, see: Seymour M. Hersh, ‘The Intelligence Gap. How the digital age left our spies out in the cold’, *New Yorker*, 6 December 1999, pp. 58-76.

consequence, this situation has introduced higher degrees of uncertainty in the intelligence process.\textsuperscript{24}

This new strategic environment has had significant implications for the US intelligence community. Facing the possibility that terrorists may use WMDs on the American homeland, the Bush administration shifted its national security policy from an essentially defensive posture to a preventive one in which threats must be eliminated ‘before they are imminent’.\textsuperscript{25} The attacks placed the intelligence community and its leaders ‘at the center of the storm’\textsuperscript{26} and the demand and the challenges for intelligence multiplied.\textsuperscript{27} At the strategic level, the doctrine of pre-emption favoured by the Bush administration presupposed the ability to know\textsuperscript{28} and consequently increased the demand for accurate intelligence products.\textsuperscript{29} As a result, an increasing number of demands emanated from multiple intelligence consumers: policy-makers at the strategic level, military officers at the tactical level, police forces at the law enforcement level, and civil departments in the realm of homeland security.\textsuperscript{30} In an asymmetrical situation, involving counter-terrorist wars and counter-insurgency campaigns in Afghanistan and Iraq, the US needed to gather and analyse more and more secret intelligence.\textsuperscript{31} In this light it was unsurprising that the CIA played a central role in the planning and running the war in Afghanistan and the wider GWOT.\textsuperscript{32} Moreover, available figures suggest that the budget for the National Intelligence Program nearly doubled from 1998 ($26.7 billion) to 2008 ($47.5 billion).\textsuperscript{33}

\textsuperscript{24} For example, see: Mueller, \textit{Overblown}, pp. 37-8.
\textsuperscript{25} Gill, ‘Not Just Joining the Dots But Crossing the Borders and Bridging the Voids’, p.44.
\textsuperscript{26} George Tenet, \textit{At the Center of the Storm. My Years at the CIA} (New York: HarperCollins 2007).
\textsuperscript{27} Robert Jervis, ‘Intelligence, Civil-Intelligence Relations, and Democracy’, in Thomas C. Bruneau and Steven C. Boraz (eds), \textit{Reforming Intelligence. Obstacles to Democratic Control and Effectiveness} (Austin, TX : University of Texas Press 2007) p.xvii.
\textsuperscript{32} Tenet, \textit{At the Center of the Storm}, p.211.
The strategy followed by the administration also brought to the forefront qualitative changes. Intelligence collection had to be more proactive, consider implausible threats and expand searches to the limit of what is deemed acceptable in a democracy. The IC reinforced its human intelligence collection capabilities to palliate clear gaps. At the CIA the former Directorate of Operations was renamed as the National Clandestine Service (NCS) in 2005 to re-emphasise the CIA position ‘as the center of gravity for HUMINT in our Intelligence Community’, according to the Director of the CIA at the time. Moreover, intelligence and law enforcement agencies were asked to work together and develop agility through networks since ‘it takes networks to fight networks’. Analysis had to be more speculative, engage more boldly with intelligence consumers and rely on a growing set of data. Eventually, covert action was given ‘a new relevance’ and ‘a new legitimacy’ because President Bush wanted senior al-Qaeda leaders ‘dead or alive’, which prompted a resurgence of paramilitary operations. In this context, Special Operation Forces from the Department of Defense took an increasingly prominent role alongside the CIA.


The growth of the need for intelligence in this new fragmented and complex threat environment blurred several distinctions that were established previously such as the geographical differences between global/local threats and the domestic/foreign realms, the legal separation between combatant/non-combatant, the organisational dividing lines between law enforcement/intelligence agencies, and the operational divisions between conventional/unconventional and paramilitary action/intelligence gathering. The recognition that a global network could pose a local threat reinvigorated the international cooperation of intelligence services. Nevertheless, this emphasis on international cooperation compromised the traditionally domestic basis of intelligence accountability and its reliance on domestic regulation. It also dispersed the organisation of intelligence and therefore complicated the monitoring of intelligence activities. Moreover, the domestic threat caused by foreign terrorists collapsed the old distinction between domestic and foreign affairs that had allowed the US government to resolve some of the tensions between national security and civil liberties. The ability of terrorists to penetrate open societies and their indiscriminate targeting of civilians called for cooperation between the civilian actors that could be vulnerable in the American homeland and the government. Thus the government deepened its alliance with the private sector to carry out surveillance at the local, national and international levels. The aim was to create a new ‘information sharing environment’ and the intelligence community increasingly collected information from sources such as landlords, shoppers, and libraries. Since private citizens constitute the quintessential targets

42 Tenet, At the Center of the Storm, p.268.
44 Aldrich, ‘Global Intelligence Co-operation versus Accountability’, p.27.
of terrorism, they were asked to notice any unusual trend or fact to the intelligence community.⁴⁹

All these realignments posed new challenges to the functioning of intelligence. The strategic shift also revealed a series of weaknesses that marred the capabilities of the intelligence community. In a post-Cold War context where the US government had constantly been reducing the intelligence budget, the intelligence community was unprepared to face the exponential demands of the GWOT. Inevitably, the pressure on the intelligence community reached its apex. In the early twenty-first century, the community’s capabilities in the Arab world and South Asia were strikingly poor with analysts and translators in short supply.⁵⁰ Despite a skyrocketing intelligence budget, these new requirements overstretched the intelligence community and meant that agencies were striving to fulfil their increasingly numerous and complex tasks. The growth of the demand for intelligence also led to the multiplication of producers and products, to the point that some experts now point out at overproduction and ‘wasteful redundancy’.⁵¹ In this context, the IC struggled to fuse intelligence information even though this was a crucial ability to operate in a networked environment.⁵²

Uses and misuses of special powers

The pursuit of secrecy

The 9/11 attacks forced key decision-makers within the US government to redefine the trade-off between national security and liberal democratic values.⁵³ Following an unprecedented intelligence failure,⁵⁴ key officials within the Bush administration sought to increase the

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⁵¹ Priest and Arkin, Top Secret America, pp. 81, 85.


⁵³ See for example: Michael V. Hayden, Statement for the Record before the Joint Inquiry of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, 17 October 2002, p.12.

government capability to gather intelligence.\(^{55}\) Legitimate national security concerns with effectiveness were extrapolated and induced sweeping claims of executive authority. The Bush administration’s ruthless reaction to the attacks threatened liberal democratic values.\(^{56}\) This reaction was notably characterised by a significant rise in secrecy. Although the widespread use of secrecy by the US government predated the GWOT,\(^ {57}\) the Bush administration accentuated this problem.\(^ {58}\) The use of secrecy in the Bush administration was analysed at length in a 2004 report which was requested by Rep. Henry A. Waxman (D-CA). This report found that ‘laws that are designed to promote public access to information have been undermined, while laws that authorize the government to withhold information or to operate in secret have repeatedly been expanded’.\(^ {59}\) Original classification activity - the decision to classify a piece of information for national security reasons - significantly increased in the 2001-2009 period when compared to the 1990-2000 period.\(^ {60}\) However, this increase may only account for the understandable multiplication of intelligence activities during the GWOT. The administration also created new categories of protected information such as the designation of ‘sensitive security information’, which complicated public access to government information.\(^ {61}\)

Furthermore, the executive branch restricted the scope of possibilities offered by the Freedom of Information Act (FOIA). In October 2001, Attorney General John Ashcroft eschewed the ‘foreseeable harm’ standard under which executive agencies could refuse to release records under the FOIA. Instead he adopted the standard of ‘sound legal basis’ and allowed agencies to refer to a significantly wider criteria of justification.\(^ {62}\) The National


\(^{59}\) US House of Representatives, Committee on government Reform – Minority Staff Special Investigations Division, Secrecy in the Bush Administration, prepared for Rep. Henry A. Waxman, 14 September 2004, p.iii.

\(^{60}\) See Appendix 4. The figure shows that secrecy was significantly higher during the Cold War, and that a rise in secrecy started at the beginning of the presidency of George W. Bush, before the 9/11 attacks.

\(^{61}\) US House of Representatives, Committee on government Reform – Minority Staff Special Investigations Division, Secrecy in the Bush Administration, p.53.

Security Archives released in 2003 results from a government-wide audit of federal responses to FOIA requests that emphasised divergences in the implementation of Ashcroft’s memo and questioned its application in various intelligence agencies.63 The National Security Archives’ report also sheds light on recurring problems impairing the treatment of FOIA requests, such as a failure to acknowledge requests, lost requests, excessive backlogs, lack of oversight, and inconsistent practices.64 Ultimately, excessive secrecy is hazardous because it may hide wrongdoings committed by the government and its agencies. For example, experts have wondered why key legal justifications produced by the Office of Legal Counsel (OLC) within the Department of Justice were kept secret to most people other than to hide controversial practices such as the use of ‘enhanced interrogation techniques’.65 In such situations, secrecy complicates intelligence accountability because it prevents litigants and wider society from gaining access to pieces of information that are necessary to hold government to account. In this view, secrecy also shields decision-makers from informed criticism. When accountability judgments rely on a few individuals, they inevitably become more subjective.

Spinning the rule of law

On occasion, the Bush administration appeared to view the rule of law as an obstacle rather than an asset in the GWOT. Richard Betts, one of the most esteemed scholars of intelligence, has criticised the Bush administration for its lack of care in keeping operations within the limits of law.66 In the words of two prominent American constitutional lawyers, the preventive strategy deployed by the administration (the use of coercion before the occurrence of wrongdoings) ‘turns the law’s traditional approach to state coercion on its head’.67 The Bush administration’s use of military commissions to try enemy combatants and its legal justification for ‘enhanced interrogation techniques’ also epitomised this stance. On 13 November 2001, the White House issued a military order declaring that foreign citizens

64 Thomas Blanton et al., ‘THE ASHCROFT MEMO’, p.2.
66 Betts, Enemies of Intelligence, p.172.
detained by the US in the GWOT could be tried before military commissions. The rules applying to these commissions allowed the Bush administration to detain both US and non-US citizens for prolonged periods without recourse to courts. As a result there was no formal way to know whether the US was holding innocent people. In order to justify these detentions, the administration created the status of ‘illegal enemy combatant’. Such combatant would not enjoy the constitutional protections afforded to US citizens. Philip Heymann, the James Barr Ames Professor of Law at Harvard, notes that the requirements to become an unlawful combatant were so loose that they could potentially apply to ‘almost anyone whom the administration suspects of involvement with terrorists’.

Additionally, the Bush administration was criticised for ignoring long-standing commitments to norms of ethics and law by adopting a selective interpretation of the federal law against torture. In a series of memoranda, the OLC provided a legal basis for executive agencies to put into practice a number of enhanced interrogation techniques that it distinguished from torture. Some of these memoranda detailed how far interrogators could go to put pressure on prisoners to make them talk. The existence of memoranda suggests that senior policy makers requested a clarification of the line between torture and ‘enhanced interrogation techniques’. The CIA, in particular, made use of ‘enhanced interrogation techniques’ such as water-boarding to interrogate at least three high-value detainees affiliated with Al-Qaeda. According to the former acting General Counsel of the CIA, this ‘kind of

72 Greenberg and Dratel (eds), The Torture Papers, p.xiii; Donald Rumsfeld, Memo 5, Status of Taliban and al Qaeda, Prepared for Chairman of the Joint Chiefs of Staff, in Greenberg and Dratel (eds), The Torture Papers, p.80. In this memo, Rumsfeld asks to be kept informed of the implementation of his order to not apply the Geneva Convention to Al Qaeda and Taliban individuals.
thing’ was ‘never done’ in his previous 25 years of agency career. In this context, the practice of the administration can be seen as a new expression of American exceptionalism. In the words of a former Director of the CIA, the administration followed this path because ‘it worked and we did indeed get life-saving intelligence out of it’. In other words, cruel, inhuman or degrading treatments were accepted by virtue of their effectiveness. This claim of effectiveness has left some experts doubtful. The legalisation of the use of these ruthless techniques also meant that the step towards real torture would be a closer one. Eventually, this step was crossed at the Abu Ghraib detention center where an Army investigation found that military personnel carried out a series of intentional sexual abuses of detainees.

Intelligence contractors were notably involved in some of the human rights abuses committed at Abu Ghraib. On the whole, decision-makers’ relative disregard for the rule of law from 2001 to 2009 raises important questions about the context in which intelligence was outsourced.

**Restricting privacy**

In the aftermath of the attacks, the US government decided to significantly expand its means of surveillance both at home and abroad. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001 revised legal restraints on law enforcement in the domain of critical terrorism-related information. Civil libertarians condemned the act for allowing roving

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76 Foot, ‘Exceptionalism Again’, pp. 709-10.


wiretaps, bringing down the wall between law enforcement and intelligence agencies, extending administrative subpoenas powers, and redefining terrorism to include domestic terrorism. The act allowed for wiretapping internet, and lowered the procedural bar to obtain a surveillance warrant. Section 505 of the act facilitated the FBI’s ability to use national security letters (NSL), a form of administrative subpoena allowing government intelligence agencies to require private sector information pertaining to consumers and their transactions, in national security investigations. With this expansion, the administration shifted away from requiring a standard of probable cause to encouraging ‘fishing expeditions’, in which authorities look for unspecified evidence. This, according to John Ashcroft, reflected a paradigm shift from law enforcement and prosecution to actual ‘prevention’ that is disrupting a scenario before it comes together.

The facilitation of wide-ranging surveillance flirted with the constitutional limits on legal searches provided by the Fourth Amendment to the Constitution, which guards against unreasonable searches. This was the case, for example, of dataveillance or the establishment of electronic databases assembling personal information about US citizens. However, American constitutional law holds that dataveillance is in most circumstances legal. Jeffrey Rosen explains that this situation results from a US conception of unreasonable searches and seizures that was originally based on conceptions of private property. Although the concerns raised by the PATRIOT Act were legitimate, it should be noted that the act also encompassed a series of procedural safeguards such as regular reporting to Congress and by the inspector general of the Department of Justice. In practice, the use of NSL skyrocketed after the PATRIOT Act was passed. In the Fiscal Year 2000, the FBI made 8500 NSL requests. From 2001 to 2006, these requests increased by an average increase of 566%

81 Wiretaps applying to a particular person rather than a specific communication device.
85 Betts, Enemies of Intelligence, p.173.
when comparing every year to 2000. More disturbingly, evidence suggests that the FBI systematically abused its powers by using NSL informally, without proper legal basis. For example, NSL were used to request improper information or carry out unauthorised collection of information. This is particularly concerning since these subpoenas directly restrict the personal privacy of US citizens. In another controversial case, the Department of Justice did not report numerous FBI visits to public libraries despite its obligation to do so. These examples show how the existence of a regulatory framework does not guarantee its application.

The most controversial programme set up by the Bush administration was without a doubt the ‘President’s Surveillance Program’ (PSP). From 2002 onwards, the PSP ‘extended NSA’s authority by allowing it to conduct electronic surveillance within the United States without an order from the Foreign Intelligence Surveillance Court (FISC) when certain factual conditions and legal standards were met’. This effectively took away the independent judicial check from the legal process governing domestic surveillance. A commentator suggests that, by doing so, the Bush administration may have overlooked the separation of powers and, in particular, the requirement of ‘probable cause’ that lies in the Fourth Amendment to the US Constitution. This practice was not completely new, but contradicted the requirements laid by the Foreign Intelligence Surveillance Act (FISA) of 1978. In addition, a government report notes that the NSA programme involved ‘unprecedented collection activities’ such as the electronic surveillance of US citizens over a prolonged period of time. In such situations, FISA usually requires the government to

95 Offices of Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, Office of the Director of National Intelligence, Unclassified Report on the President’s Surveillance Programme, p.38.
obtain a warrant from the FISC. However, the administration considered that an ‘extraordinary emergency continued to exist’\(^96\) and neither requested nor obtained such warrant. This practice has been justified on practical grounds because ‘obtaining FISA authorization was too cumbersome and time consuming to address the current threat’.\(^97\) In the view of some officials at the time, the existing statute did not cover new types of technological collection. It is undeniable that in the 23 years between the adoption of FISA and the 9/11 attacks, communication technologies developed exponentially and became more widely available. Moreover, the Foreign Intelligence Surveillance Court was created to deal with ‘agents of foreign powers’, a distinction that was difficult to apply to transnational terrorism.\(^98\) Equally, officials did not want to directly ask for an amendment to FISA because going through Congress could have raised suspicion from their targets.\(^99\) In order to justify its warrantless surveillance programme, the administration invoked presidential responsibility and authority as commander in chief,\(^100\) but, from a legal point of view, differing interpretations caused serious concerns among lawyers.\(^101\) In the Department of Justice, these concerns led to confrontation between officials from the Department and the White House.\(^102\) A former senior intelligence official argues that, in her personal opinion, the programme ‘was legal because the law was not clear on [its] fourth amendment development’.\(^103\) Whether the programme was legal or illegal remains debatable. In turn, senior officials with knowledge of the PSP, such as Vice-President Cheney, or former Director of the NSA Michael Hayden, repeatedly affirmed that it was a valuable programme, successful in gathering relevant intelligence.\(^104\) Yet, at lower levels, some intelligence officers pointed out that it only remained ‘one tool in the tool box’.\(^105\)

\(^96\) Offices of Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, Office of the Director of National Intelligence, Unclassified Report on the President’s Surveillance Programme, p.6.
\(^97\) Ibid, p.18.
\(^98\) John Ashcroft, interview with Frontline.
\(^99\) Former Senior Intelligence Official B, interview with author, 26 July 2011, Washington DC.
\(^100\) For more on the legal justifications, see: Offices of Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, Office of the Director of National Intelligence, Unclassified Report on the President’s Surveillance Programme, pp. 11-4, 26, 28. Schwarz and Huq, *Unchecked and Unbalanced*, pp. 136-8.
\(^102\) Offices of Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, Office of the Director of National Intelligence, Unclassified Report on the President’s Surveillance Programme, pp. 19-30.
\(^103\) Former Senior Intelligence Official B, interview with author.
\(^104\) Offices of Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, Office of the Director of National Intelligence, Unclassified Report on the President’s Surveillance Programme, pp. 23, 31-6.
\(^105\) Ibid, p.35.
Views continue to differ about the origins and significance of these evolutions. Samuel Issacharoff points out that, when under grave threats, ‘democracies necessarily constrict liberty’. One viewpoint is that the existence of some excesses had more to do with the absence of clear rules. In a similar de-dramatizing way, former Attorney General Ashcroft pointed out that ‘information that is improperly received by the government doesn’t always result in abuse’. However, the growth of the national security state following the 9/11 attacks was worrying for others. The Bush administration’s preventive approach led some experts to consider that there was a risk the US government would re-create a security state. In the words of a former FBI attorney ‘there are situations in which you can raise the level of security without compromising people’s privacy, but I think if you do it on a scale that we announced we were doing after 9/11, yes, there is going to be an impact on people’s privacy’.

**Politicismation and the limits of intelligence**

The use of faulty intelligence by the Bush administration in the lead-up to the Iraq War of 2003 was one of the main controversies that marked the presidency of George W. Bush. Numerous experts have argued that intelligence was misused, or politicised to be more precise, to justify the decision to invade Iraq. Although the essence of intelligence is to serve policy-makers, when intelligence is manipulated to fit outcomes desired by policy-makers, it loses its value. In this context, a common view considers that the Bush administration manipulated intelligence, in particular cherry-picked raw intelligence, to justify a decision that was already made and thereby garner public support for its decision to

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108 John Ashcroft, interview with Frontline.
go to war. In this respect, Seymour Hersh highlighted the creation of an alternative analysis unit (the Policy Counterterrorism Evaluation Group in the Department of Defense) tasked to find links between al Qaeda and Saddam Hussein. The problem with such a unit lies in its raison d’être: a requirement to find evidence which could bias its work. In turn, government’s misuse or misinterpretation of intelligence can jeopardise national security. In the case of the Iraq War, the failings of the NIE that was based on a very limited amount of evidence and read by a handful of senators, and the implacable certainty of America’s most senior officials point to the limits of intelligence. Intelligence is uncertain by nature and only as good as what its consumers make of it. The norm, according to Richard Immerman, is that Presidents pursue ‘policies based on their predispositions, pre-existing beliefs, and often their politics’. In this sense, the use of intelligence by the Bush administration was not inconsistent with historical antecedents.

Reform attempts

Reforming intelligence

The strategic reorientation that followed the 9/11 attacks prompted the US government to launch a series of intelligence reforms. In a time of national emergency, reform attempts epitomised a government’s search for effectiveness and its belief that organisational change could solve intelligence problems. The release of the 9/11 report and its recommendations, in

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115 Betts, Enemies of Intelligence, p.115. According to Betts, the NIE constituted a failure of collection and analysis.
116 Immerman, ‘Intelligence and Strategy’, p.17; Paul R. Pillar, Intelligence and U.S. Foreign Policy: Iraq, 9/11, and misguided Reform (New York: Columbia University Press 2011) p.120.
117 Immerman, ‘Intelligence and Strategy’, p.17.
July 2004, further increased the pressure on the executive and legislative branches to reform the intelligence community and its system of accountability. Most of the debates about reform took place in late 2004, in the middle of the Iraq War and WMD controversy and, for this reason, were particularly intense. With hindsight, the effectiveness of these efforts, whose main aim was to centralise intelligence, remain debated. In addition, while some positive changes were made to the US system of intelligence accountability, none of them fundamentally altered its foundations or palliated its main shortcomings. Following the 9/11 attacks, the initial response of President Bush was to sign an Executive Order to further centralise the management of the intelligence community. The pressure in favour of reform, to respond to the attacks, led policy-makers to adopt the Intelligence Reform and Terrorism Protection Act (IRTPA), which was signed into law only a few weeks after President Bush won the 2004 Presidential elections. This law created the Office of the Director of National Intelligence (ODNI), whose role is to act as principal advisor of the President on intelligence matters and to personify a more centralised intelligence community. The creation of a Director of National Intelligence (DNI) put an end to the dual role of the Director of Central Intelligence (DCI) as the head of the US intelligence community and the CIA. The DNI would now be in charge of the intelligence community as whole and oversee its compliance with national security laws.

Various experts have questioned the effectiveness of this centralising move. James Clapper, the current Director of National Intelligence (2013) and former Under Secretary of Defense for Intelligence, noted in 2009 that the IRTPA ‘did not provide the DNI much more latitude than the DCI had in managing the IC’. The DNI is the head of the IC in practice,
but in reality most of the decision power has remained in the hands of the Secretary of Defense who has kept various intelligence-related responsibilities, especially in terms of budget-making.\textsuperscript{125} Before the IRTPA was passed, the Department of Defense marked its attachment to its intelligence authorities with the creation of the post of Under Secretary of Defense for Intelligence, responsible for all of the Department’s intelligence activities.\textsuperscript{126} Moreover, the role of the DNI was loosely defined by the IRTPA, which left scope for political adjustments. As a result, the CIA, the DNI and the Department of Defense fought for their bureaucratic turf.\textsuperscript{127} Structural reform was not able to mitigate the effect of a longstanding organisational culture of divisiveness and rivalry within the IC,\textsuperscript{128} and the Department of Defense kept its prominent place within the US intelligence machinery. The overall success of the subsequent efforts to enhance cooperation between the CIA and the FBI,\textsuperscript{129} and to clarify the DNI’s powers remains questionable.\textsuperscript{130} Actually, the subsistence of bureaucratic turf wars despite reforms suggests that the creation of new posts may well have added more confusion.

\textbf{Reforming Intelligence Accountability}

The period of introspection that followed the 9/11 attacks pushed the US government to reform its system of intelligence accountability. Since the functioning of the intelligence community and its system of accountability are linked,\textsuperscript{131} when intelligence practices evolve and the community is reorganised, it seems logical that accountability procedures keep pace.\textsuperscript{132} The 9/11 Commission and the Commission on the Intelligence Capabilities of the United States Regarding WMDs both called for reforming intelligence accountability and congressional oversight in particular.\textsuperscript{133} Given its authorities in the realm of intelligence and

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  \item\textsuperscript{125} O’Connell, ‘The Architecture of Smart Intelligence’, p.1667.
  \item\textsuperscript{128} Davies, ‘Intelligence Culture and Intelligence Failure’, pp. 497-9, 503, 517; Philip D. Davies, ‘Intelligence and the Machinery of Government. Conceptualizing the Intelligence Community’, \textit{Public Policy and Administration} 25/1 (2010) p.40.
  \item\textsuperscript{129} US Congress, USA PATRIOT Act , Title V, section 503.
  \item\textsuperscript{130} Clapper, ‘The Role of Defense in Shaping U.S. Intelligence Reform’, pp. 631-2, 635.
  \item\textsuperscript{131} O’Connell, ‘The Architecture of Smart Intelligence’, p.1699.
  \item\textsuperscript{132} Thorsten Wetzling, ‘The Democratic Control of Intergovernmental Intelligence Cooperation’, \textit{DCAF} working paper No.165 (2006) p.56.
  \item\textsuperscript{133} Zelikow et al. (eds), \textit{The 9/11 Commission Report}, pp. 419-21; Commission on the Intelligence Capabilities
national security, Congress bore some responsibility for the events that gave rise to these two commissions. Following the 9/11 commission recommendations, President Bush considered that intelligence oversight ‘must be restructured and made more effective… There are too many committees with overlapping jurisdiction’. From 2004 onwards, Congress made some efforts to enhance its system of intelligence oversight. The Senate, for example, ended its eight-year term limits for the member of its Select Committee on Intelligence (SSCI) and reduced the size of the committee. The end of the term limit allows members with good knowledge of the functioning of oversight to stay longer but also raises the risk of co-optation since committee members will on the whole spend more time interacting with intelligence officials. Moreover, the Senate elevated its intelligence committee to category A status, giving it a new importance. Senators also altered the structure of key committees with jurisdiction on intelligence matters and created an oversight subcommittee within the SSCI and an intelligence subcommittee within the Appropriation Committee. The House Permanent Select Intelligence Committee also created a subcommittee on oversight and a memorandum of agreement was designed to improve coordination and transparency between the intelligence community and the Senate Committee on Appropriations. However, the minority ranking member of the Senate Intelligence Committee considered in 2007 that ‘the need for a better synthesis of the two’ persisted. From this perspective, organisational changes rarely bring about fundamental transformation.

136 Category A committees are the most important. Senator can only sit on a very limited number of them. See: Judy Schneider, ‘Senate Committees, Categories and Rules for Committee Assignments’, Congressional Research Service Report for Congress, 26 October 2006, pp. 1-2.
139 Christopher Bond (R-MO), Opening Statement before the US Senate, Select Committee on Intelligence, Congressional Oversight of Intelligence Activities, Hearing, 110th Congress, 1st sess., 13 November 2007, p.7.
Despite some changes, Congress failed to adopt most of the 9/11 Commission recommendations concerning congressional oversight, in particular those aiming at streamlining oversight around less committees.\(^{140}\) In Congress as well as the intelligence community, procedural reforms were complicated by bureaucratic inertia and partisan battles.\(^{141}\) Eventually, no serious reform of intelligence oversight accompanied the reorganisation of the US intelligence community’s structure. At the level of the executive branch, in 2004, responding to a 9/11 Commission recommendation, President Bush established the President’s Board on Safeguarding Americans’ Civil Liberties located in the Department of Justice.\(^{142}\) The IRTPA then established a Privacy and Civil Liberties Oversight Board within the Executive Office of the President to ‘ensure that privacy and civil liberties are appropriately considered in the development and implementation of [such] regulations and executive branch policies’\(^{143}\). In practice, this board does not have subpoena powers but may request desired information from the Attorney General, offer advice and review regulations, policies, and practices.\(^{144}\) Moreover, Executive Order 13462, signed in 2008, reformed the President’s Intelligence Advisory Board and established an Intelligence Oversight Board to oversee ‘the Intelligence Community’s compliance with the Constitution and all applicable laws, Executive Orders, and Presidential Directives’.\(^{145}\) The establishment of this oversight board sought to enhance the President’s control of the intelligence community. Yet none of these boards enjoy proper subpoena powers, or proper teeth. Eventually, reorganisation attempts were unlikely to significantly change the key processes and dynamics at the basis of intelligence accountability. In fact, infra- and inter-institutional rivalry endured and considerably reinforced the Bush administration’s unilateralist view of its role.


\(^{142}\) Executive Order 13353, Establishing the President’s Board on Safeguarding Americans’ Civil Liberties, 27 August 2004.

\(^{143}\) US Congress, *Intelligence Reform and Terrorism Prevention Act of 2004*, Section 1061 (c)(1)(C).


\(^{145}\) Executive Order13462, President’s Intelligence Advisory Board and Intelligence Oversight Board, 29 February 2008; White House, President’s Intelligence Advisory Board and Intelligence Oversight Board, <http://www.whitehouse.gov/administration/eop/piab> (accessed 6/02/2011).
Institutional practices of intelligence accountability

A unitary executive

The Bush administration’s unilateralist approach to intelligence and national security in the GWOT challenged but did not overturn the historical strength of the American system of checks and balances. From 2001 to 2009, institutional practices were characterised by an empowerment of the executive vis-à-vis the other branches of government and wider society. Following the 9/11 attacks, the executive branch gathered enough support to carry through a series of institutional realignments and pursue an expansionist interpretation of its own powers. This ‘monarchic’ vision of executive prerogatives exacerbated many of the pre-existing problems of intelligence accountability in the US. Nevertheless, while the institutional practice of democracy was under strain, the independence of some elements of the judicial branch and the strength of the civic debate that feeds the American system of checks and balances persisted.

The 9/11 attacks brought to the fore issues of national security, defence and foreign policy, on which the President has traditionally had a constitutional advantage. Acting as the commander-in chief, President Bush benefited from widespread public and congressional support and immediately after the attacks, Congress voted a supplemental appropriation bill of $40 billion for recovery and anti-terrorism. President Bush’s scope of action was further widened by the historical Republican gains at the 2002 mid-term elections which brought about Republican control of both chambers. In this context, President Bush was able to act quickly to unite and direct the effort of the American nation and this constituted a considerable change after his shaky rise to power. Unsurprisingly, national security became Bush’s top priority until his last day in office. This emphasis reflected a general

146 The origin of the unitary executive theory of the presidency can be found in the Constitution which vests executive authority in a single President. This theory offers a basis on which the President can make use of expansive powers to execute laws. See: Tara M. Sugiyama and Marisa Perry, ‘The NSA Domestic Surveillance Program: An Analysis of congressional Oversight During An Era of One-Party Rule’, University of Michigan Journal of Law Reform 40/1 (2006) p.159.
147 Kibbe, ‘Congressional Oversight of Intelligence’, p.33.
148 Schlesinger, The Imperial Presidency, p.x. Schlesinger argues that the more acute the crisis, the more power flows to the President. See also: Michael S. Rocca, ‘9/11 and Presidential support in the 107th Congress’, Congress & the Presidency 36/3 (2009) pp. 272-3.
150 His election was validated by a 5 to 4 decision of the Supreme Court.
consensus that further attacks were likely to follow.\textsuperscript{151} Senior officials were strongly marked by the attacks\textsuperscript{152} and from the shock-event of 9/11 onwards, the early panic ceded the way to anxiety and a strong sense of responsibility.\textsuperscript{153} In the words of the Attorney General from 2001 to 2005 ‘we had a hard time believing that unless we just did everything possible, that we would be able to deter or default or disrupt or otherwise prevent follow-on attacks. […] There were no unworthy strategies at the time’.\textsuperscript{154} The threat to the US homeland required tough counter-measures and this way of thinking fostered a unilateralist approach within the Bush administration. The structure of incentives within the executive branch and senior advisors’ beliefs, predisposed them to govern in a particularly unilateral way.\textsuperscript{155} In practice, the Bush administration pursued a sweeping expansion of presidential power and adopted an uncompromising attitude towards the other branches of government.\textsuperscript{156} At its most extreme, the White House’s unitary vision of its powers overlooked the system of checks and balances at the core of the US democracy.\textsuperscript{157}

Domestically, this unilateralist stance was apparent in the executive branch’s interactions with Congress. The Bush administration repeatedly invoked its positional knowledge and executive privileges in a period of crisis in order to refuse to share information with Congress.\textsuperscript{158} For example, this lack of cooperation marked the 9/11 Commission inquiries.\textsuperscript{159} Similarly, the administration refused to give information on how it

\textsuperscript{151} Bush, Decision Points, p.145; Tenet, At the Center of the Storm, pp. 229-31, 236-7, 305.
\textsuperscript{153} Bush, Decision points, p.151; Clarke, Against All Enemies, p.240; Mann, Rise of Vulcans pp. 313-14; Risen, State of War, p.65; Schwarz and Huq, Unchecked and Unbalanced, p.149.
\textsuperscript{154} Ashcroft, interview with Frontline.
\textsuperscript{156} Some authors even consider that the Bush administration used the 9/11 attacks to put into practice a pre-existing strategy of executive expansion. For a summary and critique of this view, see: David Gray Adler, ‘George Bush, the unitary executive and the Constitution’, in Miller (ed.), US National Security, Intelligence and Democracy, pp. 99-119. On the historical expansion of presidential powers, see: Schlesinger, The Imperial Presidency, passim.
\textsuperscript{157} For the legal construction behind the Bush administration’s unilateralism, see: John Yoo, Deputy Assistant Attorney General, Memo. 1, ‘Memorandum Opinion for the Deputy Counsel to the President’, prepared for Timothy Flanigan, 25 September 2001, in Greenberg and Dratel (eds), The Torture Papers, pp. 3-24. For a detailed summary of the role of the OLC in the legal justification of this monarchical view of executive powers, see: Schwarz and Huq, Unchecked and Unbalanced, pp. 153-99.
was using the powers granted by the PATRIOT Act. This assertive style of presidency was also adopted in other policy areas. For instance, the Bush administration refused to cooperate with some Government Accountability Office’s requests in the energy policy domain. The President also made frequent use of signing statements to interpret new laws and ‘signal his intent not to comply with Congress’s directions’. The administration made an increasing use of supplemental appropriations - for which there is no need of accompanying authorisation, and therefore less oversight - as a way to fund the wars in Iraq and Afghanistan.

Furthermore, the executive branch disregarded the Judiciary’s warrant-issuing powers. In a particularly contentious case, Attorney General Gonzalez approved requests by the FBI to conduct communication surveillance before these requests were submitted to the FISC. The administration also made use of its power to deliver security clearance and refused personnel from the Department of Justice’s Office of Professional Responsibility the necessary clearances to investigate the conduct of the lawyers who had approved the NSA warrantless surveillance program. It was only in 2007, when Michael Mukasey became Attorney General, that the administration granted these clearances and that the investigation began.

In sum, the Bush administration was reluctant to share powers. This behaviour contradicted the US institutional design which, as Richard Neustadt famously points out, is based on ‘separated institutions, sharing powers’.


162 Schwarz and Huq, Unchecked and Unbalanced, pp.91-2; Christopher Hickman notes that many of these statements concerned legislation that had little to do with the war on terror. See: Christopher Hickman, Book Review: Frederick A.O. Schwarz and Aziz Z. Huq, Unchecked an Unbalanced: Presidential Power in a Time of Terror (New York: The New Press 2008), Intelligence and National Security 26/1 (2011) p.33.

163 Etzioni, How Patriotic is the Patriot Act?, pp. 69-70; Schlesinger, The Imperial Presidency, pp. xvii-xviii.

164 Kibbe, ‘Congressional Oversight of Intelligence’, p.32.


Congress and the courts complicated intelligence accountability. While such problems were not new, they were significantly exacerbated during the presidency of George W. Bush.

Internationally, the administration moved away from an initial emphasis on the limits of American interests to an interventionist foreign policy. The 2002 National Security Strategy epitomised this shift when it stated: ‘we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country’. The US status of unique superpower granted it the ability to demonstrate resolve and put that strategy in practice. One year later, the US was invading Iraq with a coalition of the willing and sidestepping the United Nations. The case of the lead up to the Iraq War of 2003 is interesting because it merges unilateralism at home and internationally. Some experts have argued that senior officials’ belief systems became overly sensitive to the few pieces of information that supported their presumptions and that these latter were reinforced by dynamics of groupthink. Accordingly, experts have pointed out that, as early as 2001, some senior officials considered the war in Iraq to be inevitable. Yet competing perspectives persisted among Bush’s senior conservative, neoconservative and liberal advisers. For example, Secretary of State Colin Powell supported a more multilateral approach to the Iraqi problem. However, in this case, dissenting perspectives remained unsuccessful and the US invaded Iraq with a coalition of the willing.

**Congressional acquiescence**

The requirements for intelligence in the GWOT provided Congress with a unique opportunity to assert its role as an overseer of the intelligence community but also constrained it. While intelligence oversight has been considered to provide little or no political reward to representatives, the post-9/11 environment and its public debates on intelligence could have

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raised their interest and triggered their involvement. However that did not happen before, at least, 2006. Congress remained divided and captive of its political environment (sometimes subservient or even complicit in the expansion of executive powers). In the months following the 9/11 attacks, a rally around the flag effect encouraged congressmen and women to embrace an unusually bipartisan approach in support of the administration of George Bush. Representatives were also in a state of shock, a few moments after the attacks, Capitol Hill was completely evacuated and in the following weeks Congress was the target of anthrax attacks which incited its members to vote new procedures for the continuity of government in case of major attack. Working in a situation of emergency, under the threat of new attacks, Congress had to react and on 14 September 2001 passed a joint resolution authorising the President to ‘use all necessary and appropriate force against those nations, organization or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organizations or persons’. John Owens criticises the hasty passage of this resolution, remarking that Congress held no major debate to contemplate its implications for US national security and foreign policy. With the benefit of hindsight, the resolution manifestly provided ample grounds to the Bush administration to support ruthless national security policies. More than a month after the attacks, Congress furthered the expansion of executive powers and passed the PATRIOT Act. No hearings were held, committees provided no report prior to the passage of the act, and only one Senator voted against it.

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172 Issacharoff, ‘Political Safeguards in Democracies at War’, p.192.
179 Owens, ‘Congressional Acquiescence to Presidentialism’, p.172.
Despite congressional support for administration policies, in the eight years of the Bush presidency, the executive branch successfully sought to limit the scope and effectiveness of congressional oversight by denying it access to information. In order to do so, the administration systematically invoked national security concerns.\(^{182}\) For example, the Joint Inquiry into Intelligence Community Activities before and after the Terrorist Attacks of September 11, 2001, and then the 9/11 Commission, faced recurring obstruction from the administration to provide documents or make witnesses available, even though these inquiries were widely supported by both Parties.\(^{183}\) Furthermore, the Bush administration exploited the vagueness of intelligence committees’ procedures to rely more frequently on a ‘gang of eight’.\(^{184}\) In such meetings, staffers are proscribed and the circulation of information is limited to eight ‘key’ members of Congress. In some cases, briefings were reduced to a ‘gang of four’, comprising the Chairman and Ranking Member of the House committee on intelligence and the Chairman and Vice Chairman of the Senate committee on intelligence.\(^{185}\) John Rizzo, the CIA acting General Counsel at the time, remarked that ‘pursuant to orders from the White House, we only were permitted to brief the senior leaders of Congress’ on CIA’s interrogation programme.\(^{186}\) In the case of the NSA surveillance programme, Senator Rockefeller (D-WV) observed that the independence of the SSCI was called into question as its members were ‘continually prevented from having full accounting of pre-war intelligence on Iraq, the CIA’s detention, interrogation, and rendition program, and now, the NSA’s warrantless surveillance and eavesdropping program’.\(^{187}\) Without adequate support, congressmen and women do not have enough expertise to make sense of the sometimes highly technical issues raised by intelligence activities.\(^{188}\) By limiting the circulation of information to and within the Congress, the executive branch effectively weakened intelligence oversight and, although the HPSCI protested, Congress as a whole did not use all

\(^{182}\) Owens, ‘Congressional Acquiescence to Presidentialism’, p.165.

\(^{183}\) Heymann, *Terrorism, Freedom and Security*, pp. 155-6. See also: Gill, ‘Securing the Globe’, p.485. Gill points out that when the committees did hold public hearings the administration was questioned vigorously.

\(^{184}\) See: Kibbe, ‘Congressional Oversight of Intelligence’, pp. 35-8; Schwarz and Huq, *Unchecked and Unbalanced*, p.140.

\(^{185}\) See for example: Offices of Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, Office of the Director of National Intelligence, Unclassified Report on the President’s Surveillance Programme, p.16.

\(^{186}\) Rizzo, interview with Frontline.


\(^{188}\) Priest and Arkin, *Top Secret America*, p.23.
the available strategies - such as logrolling - to pressure the administration and defend its institutional turf.\footnote{For an example of protest, see: US House of Representatives, Permanent Select Committee on Intelligence, Letter to the President of the United States, 28 March 2006 <http://www.fas.org/irp/congress/2006_cr/hpscident032806.pdf> (accessed 30 July 2011).

189} There is some evidence that Congress has tended to shirk its responsibility to systematically oversee the activities of the executive branch.\footnote{Mann and Ornstein, The Broken Branch, p.151-8; Sugiyama and Perry, ‘The NSA Domestic Surveillance Program’, p.149.} In October 2002, Congress voted the Authorization for Use of Military Force against Iraq Resolution and it subsequently failed to seriously check the administration case for a war in Iraq. Paul Pillar, for example, notes that very few representatives actually read the executive summary of the infamous October 2002 NIE on Iraq’s unconventional weapons programmes.\footnote{Pillar, ‘Intelligence, Policy, and the War in Iraq’, p.20.} In 2005, Congress initially reacted to revelations about the NSA warrantless surveillance programme\footnote{CNN, ‘Democrats Call for Investigation of NSA Wiretaps’, 19 December 2005, <http://articles.cnn.com/2005-12-18/politics/bush.nsa_1_warrantless-wiretaps-nsa-national-security-agency?_s=PM:POLITICS> (accessed 2 February 2011).} but the SSCI reached a compromise with the administration and decided not to pursue formal investigations despite the concern raised by the Congressional Research Service.\footnote{Christopher M. Ford, ‘Intelligence Demands in a Democratic State: Congressional Intelligence Oversight’, Tulane Law Review 81 (2006) p.765.} Instead, Congress passed the Protect America Act which amended the FISA in order to allow the US government to conduct electronic surveillance in the US of persons ‘reasonably believed to be located outside the United States’.\footnote{Ofices of Inspectors General of the Department of Defense, Department of Justice, Central Intelligence Agency, National Security Agency, Office of the Director of National Intelligence, Unclassified Report on the President’s Surveillance Programme, p.31; Schwarz and Huq, Unchecked and Unbalanced, pp. 208-9.} In 2008, the FISA Amendments Act furthered the scope of the government’s ability to intercept communications and provided retro-active immunity to the telecommunication companies that participated in the NSA warrantless surveillance programme.\footnote{The immunity was finally voted by Congress after being supported by President Bush. See: Jonathan Weisman and Ellen Nakashima, ‘Senate and Bush Agree on Terms of Spying Bill’, Washington Post, 18 October 2007, A1; George W. Bush, ‘Remarks on Intelligence Reform Legislation’, 13 February 2008, Weekly Compilation of Presidential Documents 44/6, p.185.} According to a former senior intelligence official, this was ‘far more far reaching that anything the terrorism surveillance program allowed’.\footnote{Former Senior Intelligence Official A, interview with author, 8 August 2011, Washington DC.} In addition, Congress passed the Detainee Treatment Act of 2005, and neutralised habeas corpus claims by non-US citizen prisoners at Guantanamo. It also voted the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, which made 14 of the 16 sunset provisions of the PATRIOT Act permanent, indefinitely extending an initial state of exception.\footnote{Owens, ‘Congressional Acquiescence to Presidentialism’, p.163.} Finally, from
September 2001 until the end of Bush’s second mandate, Congress approved intact nearly every appropriation requested by President Bush. All of these examples show that Congress supported some of the most controversial policies of the Bush administration.

Congress did not completely give up its responsibilities and in some areas it was able to bend and restrain presidential power. In terms of law-making, Congress forced the President to accept its proposition for a new Department of Homeland Security rather than a simple office within the White House. When drafting this new law, representatives rejected plans for a national ID card and the Terrorism Information and Prevention System (TIPS), a programme which would have called upon citizens to report any sort of suspicious activity. Congress also opposed the Total Information Awareness programme (a massive data-mining project) and cut the funding for its successor. However, the administration effectively bypassed this opposition thanks to a series of smaller programmes with a similar effect. Additionally, Congress reacted to the Department of Defense’s CIFA programme of domestic surveillance. In this case, some representatives obtained an informal meeting with the Under Secretary of Defense for Intelligence but no hearing ensued. These examples confirm that a limited amount of bargaining continued to mark executive-legislative relations. At the individual level, a series of representatives expressed their disagreement with the executive branch’s unilateralist national security policy. Others such as Reps. Flake (R-AZ), Schiff (D-CA), Inglis (R-SC), McGovern (D-MA), Paul (R-TX), and Mack (R-FA), made proposals to broaden the circulation of classified information in possession of the HPSCI to other committees. Norman Ornstein and Thomas Mann note that minority Democrats often demanded information but were incapable of making good use of it without support from the majority. In this sense, the Republican majority’s support for the administration

203 Owens, ‘Congressional Acquiescence to Presidentialism’, p.155.
206 Ornstein and Mann, ‘When Congress Checks Out’, p.79.
marginalised the effect of oversight on policy.\textsuperscript{207} Furthermore, from 2002 to 2008 Congress organised many hearings on the use of secrecy.\textsuperscript{208} In 2007, it held its first series of hearings on the interrogation of detainees.\textsuperscript{209} Subsequently, Congress clearly expressed concern over the administration’s use of secrecy and judicial deference towards the executive branch.\textsuperscript{210} Nevertheless, commentators have criticised the insufficiency and absence of meaningful congressional investigations in key cases such as the prisoner abuses in Abu Ghraib and Guantanamo,\textsuperscript{211} the President’s Surveillance Programme, the rendition programme, the use of intelligence to justify the 2003 Iraq War.\textsuperscript{212} In sum, representatives expressed concern, complained, proposed alternatives, but rarely constrained the executive branch.\textsuperscript{213} Congress as a whole mostly acquiesced with some of the most controversial policies pursued by the Bush administration.

From 2006 to 2009, congressional efforts to oversee the executive branch policies in the realm of national security intelligence were hampered by inter- and intra-institutional tensions. Following the Democratic Party’s gains at the 2006 mid-term elections, congressional oversight activity rose significantly.\textsuperscript{214} However, from December 2004 to 2009, the intelligence committees were unable to pass intelligence authorisation bills, for the

\textsuperscript{207} Owens, ‘Congressional Acquiescence to Presidentialism’, p.147.
\textsuperscript{211} Issacharoff, ‘Political Safeguards in Democracies at War’, p.207.
first time since their establishment. The bill for Fiscal Year (FY) 2008 was vetoed by President Bush who successfully neutralised a key instrument of congressional oversight.215 Other bills were simply never brought to the congressional floor.216 According to a national security expert at the Congressional Research Service, the congressional failure to pass the bills can be related to partisan tension, mostly on controversial issues concerning the secret facilities at Guantanamo.217 As a result of this congressional failure, intelligence programmes were authorised by defence appropriations legislation.218 In practice the absence of authorisation weakened congressional oversight by leaving more leeway to the IC. In such situation, Congress has less influence on specific programmes. Eventually, in 2007, President Bush successfully took the initiative away from Democrats when he announced the deployment of 30,000 additional troops to Iraq. Subsequently, Congress went on funding the war in Iraq despite Democrats pledge to the contrary during the run up to the 2006 mid-term elections.219 Instead of a retreat, the GWOT expanded to Pakistan and Yemen.

The absence of strong congressional opposition can be explained by a series of factors. The Republican gains at the 2002 mid-term elections limited the role of Congress as a check on executive powers, at least until 2006. On 5 November 2002, the results of the election marked the first time since November 1954 that the Republican Party seized both chambers, and the first time Republicans were serving in the majority with a Republican President. Republican control of Congress allowed the Bush administration to dominate law-making, providing it with the necessary foundations for the GWOT, and critiques have even considered that Republican’s partisanship primed over their institutional identity.220 When the initial rally around the flag effect that followed the 9/11 attacks dissipated221 the recurrence of partisanship clearly constrained the work of the intelligence committees.222 In 2002, Senator Graham (D-FL) left his place as chairman of the SSCI to Senator Roberts (R-KS), a staunch

219 Fisher and Hendrickson, ‘Congress at War’, p.168; Bacevich, Washington Rules, p.184. Bacevich points out that the Democrat’s opposition was based on a critique of how the war was lead rather than why. See also: Owens, ‘Congressional Acquiescence to Presidentialism’, p.167.
To refer to Loch Johnson’s framework, Senator Roberts was a good ‘cheerleader’ of the IC. For example, the senator condemned ‘an almost pathological obsession with calling into question the actions of men and women who are on the front lines of the war on terror’. Congressmen and women’s lack of incentives to systematically oversee national security policies can also explain congressional acquiescence. In times of war, no member of Congress wants to be depicted as soft on terrorism or unpatriotic. Louis Fisher and Ryan Hendrickson offer a similar argument when they hold that, in the realm of national security and defence policies, in most cases since the Korean War, Congress deferred its constitutional responsibility to independently check the President. As a result they consider that partisanship cannot be considered as a significant variable. Amy Zegart and Julie Quinn further find that Congress most serious problem in the realm of intelligence oversight lies with Congress’ electoral incentives. The fact that Democrats continued to fund the war in Iraq after their victory at the 2006 mid-term elections gives some weight to this type of explanation. Overall, in a time of crisis characterised by the exponential use of intelligence and state powers, Congress acquiesced with some of the most ruthless administration policies. In this context, the structural flaws impeding on congressional oversight of intelligence and national security, first of all partisanship and representatives’ lack of incentives to oversee the IC, became more apparent.

Judicial safeguards

The Judiciary effectively limited some of the Bush administration’s most controversial policies and managed to exert some pressure on Congress. This was relatively unexpected since judges have traditionally pointed to the greater expertise of the executive branch in matters of national security, especially in a wartime environment. Moreover, judicial

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228 Zegart and Quinn, ‘Congressional Intelligence Oversight: The Electoral Disconnection’, p.746.
intervention is based on and limited by the mechanisms preserving individual rights. In the aftermath of the 9/11 attacks, the policies pursued by the Bush administration impeded on litigants’ ability to defend their rights. The executive emphasis on secrecy and classification allowed agencies to withhold more documents and indirectly impair access to justice. Defendants can hardly challenge the administration’s wrongdoings when they cannot access key pieces of information. Courts were also limited by the interpretation other branches of government made of the separation of powers. The NSA warrantless surveillance controversy was one of the clearest examples of executive obstruction. The Bush administration bypassed FISA statutes by pursuing a wiretap programme without warrant from the FISC. The administration justified this negligence of FISA statutes by considering that the congressional Authorization to Use Force passed by the Congress on 14 September 2001 granted inherent authority to the President as commander in chief. At least one federal court denounced irregularities and opposed the programme. However, Congress limited the possibility of judicial review by providing retroactive liability to the companies involved in the programme. Eventually, in January 2007, the President abandoned the warrantless wiretapping programme and the administration pursued its surveillance operations under the umbrella of the FISA. The administration also used new legal constructs to avoid the use of existing legal requirements. For example, the creation of the statute of ‘illegal enemy combatant’ allowed the administration to escape its obligations under the Geneva Conventions and extend its powers of detention. In all these cases, the judicial review was limited by the decisions made by the executive and legislative branches of government.

232 For example, evidence used to justify the launch of a foreign intelligence wiretap cannot be accessed by defendants. See: Etzioni, How Patriot is the Patriot Act?, p.52.
233 Betts, Enemies of Intelligence, pp. 174-5.
In a series of cases aiming to protect fundamental human rights, the Supreme Court restrained the administration’s policy and rejected the claim that the President had uncheckable power as commander-in-chief. In *Hamdi v. Rumsfeld* (2004), the Supreme Court invalidated the system of military commissions set up by the administration for trying terrorism suspects. The Court considered that these tribunals required congressional authorisation and should respect the Geneva Conventions. In *Rasul v. Bush* (2004), the Supreme Court questioned the OLC justification of the expansion of presidential power. However, Congress nullified the Court’s action with the Graham-Levin amendment which legitimised the use of military commissions and prohibited enemy combatants from contesting their treatment and detention on the ground of habeas corpus rights. Subsequently, in *Hamdan v. Rumsfeld* (2006), the Supreme Court confirmed the applicability of habeas corpus rights to enemy aliens detained at Guantanamo as well as procedural protections afforded to them under the US Constitution. For the first time since September 2001, limits were put on the notion that the President could determine alone how to defend the country. The President and his administration had no choice but to abandon their unilateral approach and rely on Congress. In 2006, the Military Commission Act codified the process of military commissions and granted some minimum rights to Guantanamo detainees. Eventually, in *Boumedienne v. Bush* (2008), the Supreme Court judged that the Military Commission Act was unconstitutional, and allowed detainees at Guantanamo to petition federal courts on the basis of habeas corpus.

In *Doe v. Ashcroft* (2004) and *Doe v. Gonzalez* (2004), the administration faced challenges concerning its careless use of national security letters. In both cases the plaintiffs considered that, ‘in the absence of more explicit provisions for judicial review and permissible disclosure’, the NSL statutes ‘could not withstand constitutional scrutiny’. In first instance, a District Court considered that the restrictions to civil liberties imposed by

238 For a summary of the relevant points, see: Owens, ‘Congressional Acquiescence to Presidentialism’, p.176; Schwarz and Huq, *Unchecked and Unbalanced*, pp. 184-5.
241 Ibid, p.177.
NSL statutes were indeed not tailored to a particular person, situation and time. In 2005, the USA PATRIOT reauthorisation statutes incorporated new procedural protections which allowed the administration to overturn the initial decision of the court in appeal. In this case the Judiciary gained congressional support since the act included provisions for judicial review of NSL requests, an expansion of congressional oversight and a procedure to lift non-disclosure requirements. In sum, despite the adversarial stance of the executive branch, courts were able to put some limits on the administration’s policies. The Judiciary opposition at the level of individual cases shows that courts can constitute solid ramparts when, in time of crisis, the administration and Congress tended to overstate the case for national security. However, in the view of the administration’s policies, judicial constraints have arguably been insufficient and were certainly overdue. This can be explained in large parts because of the reactive nature of judicial review. In addition, Congress did not hesitate to change the law when judicial interpretations challenged the government policies.

Societal scrutiny

Wider society (individuals, media, interest groups) played a significant role in supporting and restraining US government national security policies in the aftermath of the 9/11 attacks. In the morning of 11 September 2001 most of the casualties were ordinary people. From that moment onwards, foreign policy and national security dominated the nation’s attention. The context of crisis that ensued contributed to the evolution of people’s perception of national security and impacted upon society’s judgment and understanding of what was deemed reasonable at the time. This evolution participated to the redefinition of national security politics and impacted upon the practice of democracy. Ronald Krebs and Jennifer Lobasz argue that the post-9/11 threat inflation effectively lowered political contestation. The bulk of Americans seemed to place unfettered trust in their government and its policies. An opinion poll carried out in the months following the 9/11 attacks showed that a majority of the American people was willing to give up some liberties in order to prevent further

246 Gorham-Oscilowski and Jaeger, ‘National Security Letters, the USA PATRIOT ACT, and the Constitution’, pp. 637-41. The authors point out continuing violations of the First and Fourth Amendments. See also: Greenlee, ‘National security letters and intelligence oversight’, p.198
248 Betts, Enemies of Intelligence, p.165.
250 Etzioni, How Patriotic is the Patriotic Act?, p.4; Rosen, The Naked Crowd, pp. 146-7.
terrorist attacks.\textsuperscript{252} Some observers even argue that public opinion consistently supported President Bush’s national security policy.\textsuperscript{253} Nevertheless, the people did not grant carte blanche to the Bush administration. According to a \textit{New York Times/CBS News} poll conducted four years later, Americans were concerned with the impact of the Bush administration’s ‘aggressive anti-terrorism programs’;\textsuperscript{254} yet this did not prevent them from re-electing George Bush in 2004, despite growing concern about the Iraq war.

As the ultimate democratic accountability holder, society is responsible for the impact of its decisions and those of the people it elected. In 2004, Amitai Etzioni argued that once safety would be restored, public support for the ruthless measures taken by the Bush administration was likely to roll back as fear would decrease. Otherwise, people would grow more and more critical of the security measures taken by the administration.\textsuperscript{255} In this sense, the expansion of state powers in the GWOT also provided society more scope for criticism.\textsuperscript{256} On some occasions, some groups of citizens were able to force the administration to embrace more openness. For example, the families of the victims of the 9/11 attacks managed to ‘publicly embarrass the administration’ and forced it to conclude a meaningful report on the government’s failure to prevent the attacks.\textsuperscript{257} Moreover, the work of media and public interest groups shows that some parts of the society tried to question and provide some degree of scrutiny over the expansion of state powers in the GWOT.\textsuperscript{258} Many of the most controversial policies of the Bush administration were revealed by leaks published in renowned newspapers. In November 2005, Dana Priest revealed the CIA’s use of secret prisons in an issue of the \textit{New York Times}, which led to further inquiries by the Council of Europe and the European Parliament.\textsuperscript{259} In December 2005, James Risen broke the story of

\textsuperscript{252} According to a Gallup Poll cited by Etzioni, in January-March 2002, 78% of US citizens were willing to give up certain freedoms to improve safety and security when compared to before the 11\textsuperscript{th} of September 2001. See: Etzioni, \textit{How Patriotic is the Patriotic Act?}, pp. 17-8.
\textsuperscript{255} Moran, ‘State power in the war on terror’, p.338.
\textsuperscript{257} Aldrich, ‘Regulation by Revelation? Intelligence, the Media and Transparency’, p.17; Ornstein and Mann, ‘When Congress Checks Out’, p.75.
the NSA warrantless wiretap programme in the same newspaper. In 2007, Barton Gellman and Jo Becker chronicled the administration’s systematic effort to expand executive power in a Washington Post series on Dick Cheney’s vice presidency. Similarly, the so-called torture memos were initially brought to public attention thanks to the remarkable investigative work of the Washington Post, Newsweek and the American Civil Liberties Union ( ACLU). David Cole points out that the administration retracted the memorandum authorising the CIA to use waterboarding and other contested interrogation techniques after the Washington Post published its story. Media also acted as force multiplier and agendasetter when spreading the voice of Congress (or lack thereof) during the Iraq War. In turn, all of these scandals damaged the public image of the US government. Public interest groups such as the ACLU and the Electronic Privacy Information Center (EPIC) actively challenged the expansion of government secrecy and powers. The ACLU successfully challenged NSA’s warrantless surveillance programme in a District Court. However, a Court of Appeal later dismissed the case. The EPIC effectively used a FOIA lawsuit to disclose the Bush administration’s abuses of PATRIOT Act authority. The disclosure drew the attention of the Inspector General of the Department of Justice which then led an investigation. Other organisations, such as the Federation of American Scientists (FAS), lobbied Congress and provided testimonies on the growth of government secrecy.

262 Karen J. Greenberg, ‘From Fear to Torture’, in Greenberg and Dratel (eds), The Torture Papers, p.xvii.
Despite all their efforts, media and civil society remain ‘imperfect’ accountability holders. US society struggles at times to set reasonable priorities and mobilise itself around the issues that are most relevant to the preservation of liberal democratic values. Richard Betts points out how the power to access library records granted to the executive branch by the PATRIOT Act generated ‘as much protest as the imprisonment of American citizens without trial’. Nevertheless, small intrusions into privacy such as access to library records appear to be less disturbing than imprisonment without trial. Second, society depends on the information it receives from the executive branch. This problem was exposed in the lead up to the Iraq War when US citizens were not made aware of how uncertain the intelligence supporting the decision to invade Iraq was. In such a situation, it becomes nearly impossible for society to judge what is in the interest of the nation. Media and other outsiders can offer some degree of scrutiny but their view of the work of intelligence agencies is inherently incomplete. At times, this may lead them to act, wittingly or unwittingly, as propaganda tools. This was the case in the lead up to the Iraq War when, unable to provide a critique, media indirectly supported the government’s projection of threat. John Mueller, a political scientist, notes that some media even provided more direct support to the government when over-emphasising the scope of the terrorist threat. In this case, media failed to inform the people reliably. Interestingly, both the Washington Post and the New York Times reviewed their original support for the war in Iraq and admitted that they failed to act as an independent source of scrutiny over the government.

Conclusion

The 9/11 attacks acted as a catalyst for a series of changes within the US intelligence community, though some were apparent after the end of the Cold War. The US intelligence community was tasked to react effectively to the terrorist threat and expanded accordingly but as the US became increasingly involved in the GWOT, key liberal democratic values such as human rights, government transparency, the rule of law, and privacy suffered from the Bush administration’s ruthless reaction to the 9/11 attacks. The US government did not

272 Aldrich, ‘Regulation by Revelation? Intelligence, the Media and Transparency’, p.28.
manage to both protect the American nation and maintain liberal democratic values at the same level than before the attacks. The administration’s interpretation of national security created a zero-sum reality in which more security was achieved, sometimes at the cost of liberal democratic values because it considered that some well-established intelligence accountability mechanisms were restraining its capacity to wage the GWOT and keep the nation safe.

The underlying assumptions of the Bush administration hindered the effective use of intelligence. David Cole and Jules Lobel, two legal scholars, remark that they have not been able to find substantiate evidence to show that arbitrary detentions and increased surveillance actually disrupted terrorist plots. They further criticize the impact the government priorities have had on government financial and human resources. In this sense, spending more money in Iraq instead of fostering defensive measures at home may have prevented a more effective national security policy. That is why they argue that the administration’s policies sacrificed liberty and compromised US national security. This judgment should be considered carefully and given the limited public knowledge of national security matters, it is difficult to judge whether the apparently successful pursuit of security in the US homeland outweighed costs in reduced liberty. Overall, although the security context did justify a redefinition of what was deemed reasonable at the time, the Bush administration went too far because its emphasis on security was at times counter-productive. Revelations of the use of torture by the US government in particular damaged American moral standing in the battle for hearts and minds.

The US standard model for democratic accountability suffered during the presidency of George Bush. His administration expanded presidential power and minimised the participation of the other branches of government in the US system of checks and balances. In practice, executive policies led to a disturbing series of abuses of civil liberties, human rights, and the rule of law. Other branches of government were relatively weak in reacting to some of the most controversial policies led by the administration. All the branches of government (as well as the American people) carry some responsibility for not being able to weigh the costs and benefits of the Bush administration’s national security policy carefully enough. The US government’s understanding of national security during George Bush’s GWOT may have differed from the long-term national interest of the US people by further

274 Ibid, p.17.
damaging the American moral standing. Yet, the time of crisis that followed the 9/11 attacks did not suspend the American system of checks and balances. The system sometimes worked poorly, but it did work to a degree. Moreover, the expansion of state powers during the GWOT was not unrestricted and at times, the executive branch was forced to share powers and restrain some of its policies.

The presidency of George W. Bush does not form a parenthesis in American history. The GWOT catalysed some deep and pre-existing structural flaws of the American system of government. The executive branch refused to share powers with other branches of government, and various components of the intelligence community refused to give up some of their turf when a reform was passed. In addition, intelligence was misused by the administration in the run-up to the Iraq War. Within the legislature, partisanship weakened intelligence oversight and was reinforced by the individualism of some members of Congress as well as their disinterest in intelligence oversight. The bold strategy of the Bush administration usefully emphasises how intelligence accountability and the US system of checks and balances operate under strong pressure.\(^276\) In extraordinary circumstances, the functioning of the American system of government exposed a series of long-known disorders afflicting the American political system of shared powers.

\(^{276}\) For Johnson, the full blossoming of intelligence oversight is most evident in times of crisis. See: Johnson, ‘Accountability and America’s Secret Foreign policy’, p.112.