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INTRODUCTION:

OUR IGNORANCE ABOUT INTELLIGENCE

Richard A. Epstein*

The papers collected in this timely volume of the *Stanford Law and Policy Review* vividly show—and it is a good thing—the extent to which the issues that matter to the academic community are driven by the dominant public controversies of the day. Nowhere is this attention more needed than in dealing with the cluster of issues on what in polite circles is called “intelligence,” but in ordinary language goes by the less ambiguous but pointed words of “spying” or “snooping,” which we do routinely on our enemies and, yes, even on ourselves and our friends. Yet it would not do to speak of the Central Spying Agency, or CSA, when we can preserve the metaphor by the more diplomatic Central Intelligence Agency (CIA), which no one takes as a government branch of Mensa.

Yet no matter what name we pick, the question of intelligence, spying, or snooping has been with us since the beginning of the Republic, and the various terms that we use to describe it shows vividly our collective ambiguous moral attitude toward the entire project. The evident discomfiture that leads to the use of polite language also has other consequences for public discourse—itsself frequently a polite term for partisan squabbling. Painful subjects are best avoided whenever possible. So for long periods of time, the entire intelligence issue (to stick with the polite term for the remainder of this high-minded introduction) escapes systematic public attention because people want to remain blissfully ignorant of the grubby work that relates so intimately, although not necessarily positively, to the preservation of our national security. So long as there are no visible (and risible) systematic crack ups, most people are quite content to leave the entire field in the hands of the experts. Here are two reasons why.

First, any debate over intelligence does not mesh well with an open and robust public debate. The type of information that we need to make judgments

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for domestic purposes turns out in many instances to be exactly the same information that, once disclosed to public debate, will give aid and comfort to our enemies. There is a respectable argument that it is better to keep this information out of the hands of our own citizens than to have it publicly shared with persons who hold hostile intentions toward our safety and survival as a nation. There are few issues on which it could be said, the more that we know, the more vulnerable we become. Hence, at all levels of government, we often conduct the review of intelligence activities behind closed doors and uneasily trust that experts in government will be able to ferret out difficulties in operations and take sensible remedial steps to correct them. There is no question that in times of conflict this impulse gets stronger, not weaker.

Second, the question of intelligence is just plain hard, even for those who have the facts. It is a commonplace observation, which long predates the rise of modern cognitive psychology, that no one does very well in making decisions under uncertainty. The first approximation for any set of sensible decisions is to compare costs with benefits.¹ But the announcement of that (true) platitude raises far more questions for anxious discussion than it answers. The initial response of rational decision makers is to simply multiply the probability of harm by the expected magnitude of its occurrence in order to make some estimate of our expected loss. That approach works reasonably well when the probabilities lie in the ranges of which we are familiar, which for most people is in increments of, say, one percent. Those kinds of odds do fairly well in guiding normal investigative work, but they do not necessarily, or even frequently, work well with various kinds of intelligence activities that more than one analyst has analogized to finding a needle in a haystack. This is of course not just any needle, but information about some horrific terrorist plot that could have massive adverse consequences to large portions of our population. As the analogy suggests, even if we look exhaustively we might not find that needle at all, perhaps because it just isn't there.

Multiplying two numbers (risk and severity) together is supposed to generate "the" expected cost. However doubtful that conclusion, the one indisputable truth is that this whole process is fertile ground for good faith disagreement as to the seriousness of given perils, especially when it is easy to make errors in orders of magnitude on either of these dimensions, even with the simplest model of risk assessment. Throw in additional questions of the variation of risk over time, attitudes toward risk aversion, judgments on the wisdom of different methods to counter risks whose form is not fully understood, and it is clear that assumptions necessarily made on incomplete knowledge (a.k.a. faith) often cloud the judgments of even the ablest of individuals. The form of this inquiry may look like the same inquiry that we

1. See generally RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* (2004) (discussing the use of cost-benefit analysis to evaluate responses to catastrophic threats).

have in running a cost/benefit analysis in the law of negligence or even antitrust. In practice the stakes are far higher, and the knowledge base on which we operate is far weaker. It's no surprise that a strong sense of intellectual modesty steers many sound people away from working so untidy and stubborn an area.²

The combination of these two reasons, and doubtless others, often leads us to keep the problem of intelligence at arm's length, even for long periods in our nation's history. But there is nothing like the widespread perception of systematic failure to shock us out of our collective complacency. Ignorance is not always bliss, especially with two notable failures of recent vintage whose ramifications are still not fully understood. Just about everyone accepts that there was serious breakdown on intelligence over whether the Iraqi regime under Saddam Hussein possessed weapons of mass destruction, and, if so, how many and of what type. Part of the problem was doubtlessly a desire to make the evidence conform to the politics, so that individuals in high places (they know who they were) who were intent on deposing Saddam for geopolitical reasons sought an undisputed public mandate for military invasion. That they could not have had such a mandate if the "only" charges against Saddam were system-wide human rights abuses at home, a bellicose posture with respect to his Middle Eastern neighbors, and the easy ability to disrupt large portions of the world's oil supply. The recriminations and protestations on that issue have not run their course. The rise of domestic feuding, or worse, over the pacification and democratization of Iraq, with its American involvement, gives us a constant invitation to revisit the source of major intelligence failures.

Of equal magnitude are the terrible tragedies of September 11, 2001, and the endless second-guessing as to what sound and proactive intelligence could have done in order to prevent that audacious and deadly attack. The dangers that we fear in this context are not that of geopolitical intrigue, but of institutional rigidities, jurisdictional squabbles, bureaucratic inertia, and some all pervasive sense of incompetence and malaise. There are endless debates as to how far the claims of national security penetrate ordinary social life, and equally inconclusive debates as to what parts of our economic, political, social, and cultural lives are proper objects for intelligence oversight. Unfortunately, the world does not divide itself up into areas that are obvious targets of intelligence activities and those that are somehow beyond its sphere. The problem is only made worse because spying and intelligence are highly interactive games. Whenever we find a new way in which to detect needed information, we can expect our enemies (and in some cases our friends) to adopt new strategies that will diminish the effectiveness of our intelligence initiatives. The half-life of any technological or institutional fix is likely to be

2. See generally POSNER, *supra* note 1, at 92-138 (discussing why policymakers are often reluctant to use cost-benefit analysis to assess catastrophic risk).

quite short in so tumultuous an environment.

Once these issues come to a head, opinion leaders in the nation are no longer happy about our ignorance over matters of intelligence. Symposia, such as this one organized by the *Stanford Law and Policy Review*, count as a welcome response to the difficult problems that we face as a nation. In this brief introduction, I will not attempt to offer any systematic answer to the questions that our authors raise. But it is important to offer some taxonomy of the issues that they have raised for us.

The first class of such issues is *definitional*. Kristan Wheaton and Michael Beerbower take on this ticklish question with a frontal challenge to those who think that questions of national security can be placed into one box separate and apart from the full flow of information generated in all useful pursuits of life.³ They see no obvious field limitations to the business of intelligence, which they treat as the ability to coordinate bits and pieces of information from, as they say, *all* available sources in order to keep pace with our enemies. The job of intelligence is connecting the dots: the more dots, the better.

Next there are the *institutional and structural* issues, which occupy the bulk of this volume. Broad definitions of intelligence, such as that which Wheaton and Beerbower champion, intend consciously to err on the side of inclusiveness. These definitions, however, also expand the available scope of the overall enterprise, and thus put greater strains on the institutions that have to gather, collate and interpret the cascades of information that government officials are now obliged to collect not only from the obvious suspects, but also from all sorts of institutions—banks, insurance companies, telecoms, libraries, you name it. Just how do we *structure* institutions in order to process that information? Many of our contributors take dead aim at different facets of these long-standing structural challenges. In dealing with the current situation, for example, Judge Patricia Wald, who served as a member of the President's Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, discusses our intelligence failure in Iraq, much of which she chalks up to the confusion caused by the failure to create institutional safeguards needed to separate the intelligence analysts' role from the policymakers' function.⁴ To her, the problem has multiple dimensions, which she explores as she also discusses how the struggle over the appointment of John Bolton as our ambassador to the United Nations reflects broader concerns about the politicization of the intelligence process.

The structural theme of interest to Judge Wald, of course, does not arise only in our contemporary setting, so that there is an urgent need to put the

3. Kristan J. Wheaton & Michael T. Beerbower, *Towards a New Definition of Intelligence*, 17 STAN. L. & POL'Y REV. 319 (2006).

4. Patricia Wald, *Analysts and Policymakers: A Confusion of Roles?*, 17 STAN. L. & POL'Y REV. 241 (2006).

modern debates into historical perspective. Our system of divided government, which combines the principle of separation of powers with the related principle of checks and balances, has been a historical constant since the Founding period. While there has been much constitutional transformation of the power of the federal government to regulate economic issues, the structural divisions put in place by the Framers still exert a real influence in the distribution of responsibilities among the various branches of government, so that it is critical to keep some distance on these issues. Michael Warner takes on this historical challenge by offering us a set of parallels between two major legislative initiatives to bring order to our intelligence operations.⁵ He starts with the National Security Act of 1947,⁶ passed in the aftermath of World War II, and then tackles the more grandly named Intelligence Reform and Terrorism Prevention Act of 2004,⁷ enacted in the wake of 9/11. He seeks to explore the institutional and cultural barriers that stand in the path of reform whether we deal with the monolithic threat of world communism on the one hand, or with the more elusive threats from the many hostile groups that operate, often separately and clandestinely, across the globe.

The contrasts between these two acts are also the subject of Martin Halstuk and Eric Easton's contribution,⁸ which lauds the decision of the 2004 Reform Act to eliminate any categorical exemption of intelligence information from the requirements of The Freedom of Information Act, so that the CIA is no longer able to wholly insulate its activities from public scrutiny. The authors conclude that this reform is likely to help prevent repetition of the intelligence fiascos surrounding both the terrorist attacks of 9/11 and the WMD dispute in Iraq.

The Intelligence Reform Act of 2004 is also the more focused inquiry of Craig Lerner, who discusses parallels not across time, but across contemporary social institutions.⁹ One common metaphor of much vogue in policymaking circles is the wall of separation, which need not be between church and state. Lerner focuses on the proper understanding of two familiar walls. The first, under the Sarbanes-Oxley Act of 2002,¹⁰ seeks, broadly speaking, to build up that wall between top management and its audit committee. The second, which is a product of the Intelligence Reform Act of 2004, was intended to break down the many walls of separation that prevented the sharing of information

5. Michael Warner, *Legal Echoes: The Passages of the National Security Act of 1947 and the Intelligence Reform and Terrorism Prevention Act of 2004*, 17 STAN. L. & POL'Y REV. 303 (2006).

6. National Security Act of 1947, ch. 343, 61 Stat. 495.

7. Pub. L. No. 108-458, 118 Stat. 3638.

8. Martin E. Halstuk & Eric B. Eaton, *Of Secrets and Spies: Strengthening the Public's Right to Know about the CIA*, 17 STAN. L. & POL'Y REV. 353 (2006).

9. Craig S. Lerner, *Calling a Truce in the Culture Wars: From Enron to the CIA*, 17 STAN. L. & POL'Y REV. 277 (2006).

10. Pub. L. No. 107-204, 116 Stat. 745.

within the intelligence community. Lerner's thesis is that both efforts at institutional reconstruction may be misguided. Sarbanes-Oxley represents the usual Washington conceit that it has better information about how individual firms should be constructed than does the market. In dealing with intelligence, however, the government is in the very different business of running its own shop, and in his view this congressional effort may well be a misguided effort to force feed changes that may be undermined by extensive bureaucratic inertia on the one hand, while at the same time removing some needed competition between agencies and exposing the whole integrated network to a greater danger of double agents.

His view, however, is far from uncontested. In his contribution to this volume, for example, David Kris takes the position that we are all better off, from the standpoint of both liberty and security, in taking down the FISA wall because the gains from cooperation dominate the other possible effects of the statute.¹¹ Information gains value when intelligence and law enforcement officials are permitted to compare notes, while the larger group of lawyers who watch over the process offer additional protections for civil liberties. The FISA wall is also the object of Dianne Piette and Jesselyn Radack's historical study of FISA,¹² which concludes that the current wall of separation was not built at, or shortly after, the passage of FISA in 1978, but developed out of political struggles that took place early in the Clinton administration. The authors also explain how the history of the FISA wall helps shed light on the current political struggles over the President's assertion of "inherent" executive authority to conduct searches independent of FISA.

The last theme of this material addresses the larger issue of how to run an intelligence system that respects our concerns with *civil liberties*. Once again the FISA wall of separation is the target of much discussion, because of its implications for the privacy rights of ordinary citizens, and the operation of the criminal justice system. In dealing with these issues, all commentators recognize the need for balance between the claims of liberty and security, but often differ (as on so many issues) among themselves as to where the balance should be drawn. The basic theme is set out by Senator Ron Wyden and his coauthors who insist that however real the conflict, the United States possesses the people, determination and ingenuity that will allow us to honor each concern without seriously compromising the other.¹³ A more cautious note, perhaps, is sounded by both Fred Manget and Stephen Schulhofer. Schulhofer

11. David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL'Y REV. 487 (2006).

12. Dianne Piette & Jesselyn Radack, *Piercing the "Historical Mists" of FISA: The Real Story Behind the People and Events Leading to the Passage of the Foreign Intelligence Surveillance Act and the Creation of the "Wall"*, 17 STAN. L. & POL'Y REV. 437 (2006).

13. Ron Wyden et al., *Law and Policy Efforts to Balance Security, Privacy and Civil Liberties in Post-9/11 America*, 17 STAN. L. & POL'Y REV. 331 (2006).

argues that the appropriate balance has not been well struck in connection with some key provisions of the USA PATRIOT Act¹⁴ (Patriot Act) renewal,¹⁵ including those which provided extensive, if not unlimited, powers of government to require the production of records from such institutions as libraries, political action groups, and charitable organizations.¹⁶ Manget attacks this same theme from a somewhat different angle noting the genuine problems that occur in trying to reconcile the imperatives of a silent and nimble intelligence apparatus with the needs for our traditional criminal law process that supplies slow and public deliberative procedures to those charged with serious crimes.¹⁷ In his view, the difficulties arise not solely when the government is pressed to bring criminal charges against individuals held in captivity as a security risk, but also in those cases in which members of the intelligence community are subjected to serious criminal investigations that can interfere with operations and sap morale even if no official charges are brought.

Finally, Tom Lininger argues that state bar associations have an important role to play in preventing federal law enforcement officials from abusing the surveillance powers granted to them by the Patriot Act.¹⁸ According to Lininger, the 1998 McDade Amendment¹⁹ subjects federal prosecutors to the ethical rules of state bar associations. He calls for an amendment of state ethics codes to permit bar associations to sanction federal prosecutors who direct or authorize surveillance activities that violate people's civil liberties.

In a short introduction, I shall not even attempt to hint at my views on this cluster of issues, which are on most issues very much a work-in-progress. As a committed defender of limited government in the classical liberal tradition, there are many areas of human life in which I would like to keep the government at bay. I see little or no reason for state regulation of employment contracts for example, and I cautiously accept only limited forms of land planning. But neither of those strategies works here, for try as one might, intelligence is a legitimate government function—assuming that we have any government at all. At this point, I have no particular point of privilege over the rest of the pack in promoting small government solutions. Like everyone else I

14. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

15. USA Patriot Improvement and Reauthorization Act, Pub. L. No. 109-177, 120 Stat. 192 (2006).

16. Stephen J. Schulhofer, *The New World of Foreign-Intelligence Surveillance*, 17 STAN. L. & POL'Y REV. 531 (2006).

17. Fred F. Manget, *Intelligence and the Criminal Law System*, 17 STAN. L. & POL'Y REV. 415 (2006).

18. Tom Lininger, *Federalism and Antiterrorism Investigations*, 17 STAN. L. & POL'Y REV. 391 (2006).

19. Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified in relevant part at 28 U.S.C.A. § 530B).

have to work through a field that is beset with serious questions: What is the scope of its basic mission? What is the appropriate institutional design to carry that mission out? And, what is the best way to integrate the work of the intelligence system with that of the criminal justice system in ways that have a fair shot at preserving liberty while promoting security? It is an open question whether anyone shall be able to propose any long-term solution that will command universal consent on a matter so fraught with difficulty. But now that we are in our season of open discontent, we must take the risk of public discourse on these knotty problems of statecraft. No longer can we take the posture of that great philosophical muse, David Hume, who concluded after deep reflection that “carelessness and inattention” afford the only solutions to the most tenacious problems of the day.²⁰ Today, the stakes are too high for ignorance to be our institutional response to matters of intelligence.

20. DAVID HUME, *A TREATISE OF HUMAN NATURE* 218 (L.A. Selby-Bigge ed., Clarendon Press 1888).