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Legal Perspectives on Creating and Implementing the ODNI

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A Question of Authority

Perhaps no other newly created government structure confronted the immediate operational and strategic legal and policy challenges like those faced by the Office of the Director of National Intelligence in its early years. Others in this edition have covered the compromise and jurisdictional turf battles involved with the creation of the DNI structure and legislation,

reflecting debates going back many decades. As someone involved in virtually every meeting discussing the DNI structure from concept to implementing legislation to serving as general counsel to the first three DNIs, I would be remiss if I did not offer a few observations on that process.

First, the process was influenced—or hobbled by, depending on your perspective—by the question of

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Legal Perspectives on Creating and Implementing the ODNI

how the national intelligence agencies would be affected by creation of the DNI. Primarily this centered on the question of the DNI's relationship to the Defense Intelligence Agency, National Imagery and Mapping Agency (today NGA), National Security Agency, and (to a lesser extent) National Reconnaissance Office. But developments in 2002 and 2003 had already effectively limited consideration of a full set of options in determining the DNI's authority.

At the request of Secretary of Defense Donald Rumsfeld, in 2002 Congress created an under secretary of defense for intelligence as part of the National Defense Authorization Act for Fiscal Year 2003.^{a, b} Rumsfeld followed up the legislation by directing in 2003 that the USD(I) would exercise “authority, direction, and control” over the agencies and would be the “single point of contact” for all other government agencies on intelligence matters.^c

Any attempt at creating a “Department of Intelligence” that included DOD intelligence agencies under DNI direction would have to confront entrenched opposition from Rumsfeld, Vice President Dick Cheney, and congressional committees with primary jurisdiction over DOD.

Ultimately President George W. Bush did not want to pursue such a controversial option and instead chose a path that resulted in the ODNI, with all the compromises and ambiguity entailed in what is essentially a matrix structure. This matrix provides certain responsibilities and authorities to the DNI, while leaving overlapping or other authorities and responsibilities with department heads containing IC elements.

Second, although legislation and presidential direction set the overall framework for authorities and responsibilities, actual implementation of IRTPA was more frequently a discussion of policy, culture, and organizational change, not an exercise in legal interpretation. In some cases, IRTPA may have limited certain options, but that in fact was rare given the lengthy list of responsibilities provided to the DNI, matched with less clear authority. With the support of the DNI, we were careful to ensure that policy issues were not turned into mythical legal issues.

Third, the challenging matrix structure set up by the IRTPA placed even greater emphasis on the importance of the support of the president, the president's senior national security team, and the Congress for a unified national intelligence enterprise.

Fortunately, Bush and his team were strong supporters of DNI John Negroponte and subsequently Mike McConnell, and Bush's public and private shows of support for the DNI were critical in the formative years of the ODNI.

Finally, there was no illusion that building a unified national intelligence enterprise would be a short-term project. IRTPA made fundamental changes to the IC that had been discussed—and resisted—for many decades. We expected that progress would perhaps be measured in some cases in years and decades. The DNI, however, did not have the luxury of time to admire problems of organizational structure because it immediately confronted both short-term and long-term critical operational and leadership issues. Legal issues were at the heart of a number of them, and they were not just the typical struggles with organizational structure, budget, authorities, and mission definition. Instead, a number were the subject of intense national controversy and operational importance.

One primary reason for the creation of the DNI was the lack of a single leader pre-IRTPA who could both recognize critical intelligence deficiencies and galvanize the IC and national leadership to address critical issues. The leader

a. <https://crsreports.congress.gov/product/pdf/IF/IF10523/10>. Stephen Cambone was confirmed as the first USD(I) in March 2003; he served in the position until December 31, 2006.

b. 10 USC 137

c. SecDef Memorandum, April 18, 2003, Subject: Office of the Under Secretary of Defense for Intelligence.

Legal Perspectives on Creating and Implementing the ODNI

of a department that contained IC elements (like DOD, Treasury, and State, for example) is not primarily focused on intelligence issues; any IC issues compete with the many other pressing departmental issues. The DCI in theory could have fulfilled such a role, and there are some historical examples related to budget and other issues, but as discussed elsewhere in this edition the DCI was tasked with other competing priorities, including the daily challenge of leading the CIA's global activities. No one involved in the creation of the DNI could know how quickly the DNI leadership would be needed or how this theory would be put into practice.

Addressing FISA

A main focus for Negroponte and McConnell was obtaining the authorization and implementation of one of the most important intelligence tools in history: the Foreign Intelligence Surveillance Act. To this day, FISA is critical to protecting the United States from the greatest threats it faces. FISA provides a substantial amount of the daily intelligence informing the president and national security leaders. The operational capability obtained by the DNI in 2008, after almost three years of daily work, from FISA-related legislation remains critical to protecting the country 16 years after its enactment.^a

Deficiencies in FISA were known since at least 1990, but they remained unaddressed through a combination of ignorance, bureaucratic inaction, and fear of controversy. Without the DNI's leadership to address these deficiencies and obtain new collection authorities, it is highly unlikely these issues would have been addressed and the country would remain significantly more vulnerable to attack. Any history of the DNI must account for this accomplishment, including the massive effort and personal attention it required from the first two DNIs.

Tackling EO 12333

Other legal issues confronting the ODNI were not quite as dramatic, but they played a role in many of the other DNI initiatives. The National Counterterrorism Center and its collocation by 2010 of more than 30 intelligence, military, law enforcement and homeland security networks in one place to facilitate robust information sharing and access to a variety of related databases. This required working through a web of laws, regulations, and guidelines governing the use and distribution of each piece of information. Locating NCTC—and its lawyers—in the DNI enabled a concentrated focus on these issues and made this information-sharing possible.

The rewrite of Executive Order 12333, the “charter” and a foundational legal document for the Intelligence Community, was another challenge requiring involvement by Bush, his national security team, department heads, and IC leaders. This was identified by McConnell as one of his top priorities. Many attempts since 1981 had been made to update EO 12333, and each was unsuccessful. Opening up to discussion the roles and responsibilities of the IC was a difficult subject that would lead to inevitable disagreements in the Cabinet that would require the president to personally resolve, a situation no other administration had wanted to address. IRTPA's changes to the structure of the IC highlighted the need to update EO 12333, and McConnell pushed addressing this foundational legal document for the IC.

Ultimately the ODNI played a critical role in drafting the rewrite of the EO 12333 and working to resolve disagreements over IC roles and responsibilities. This included provisions in the EO enhancing the DNI's authorities, clarifying roles between agencies (particularly in the domestic and foreign spheres of intelligence operations), and aligning the missions of IC elements. As with FISA legislation, the DNI was able to gain the support and personal involvement

a. See also this author's statement before the Senate Committee on Homeland Security and Governmental Affairs, “The Lessons and Implications of the Christmas Day Attack: Intelligence Reform and Interagency Integration,” March 17, 2010.

Legal Perspectives on Creating and Implementing the ODNI

of the president in support of this important initiative.

Numerous other initiatives, discussed elsewhere in this issue, required close teamwork on legal issues with the policy teams. These high priority initiatives ranged from the implementation of joint duty, security clearance reform, deployment of technology in innovative ways, critical work that culminated in Comprehensive National Cybersecurity Initiative, and other

classified matters.^a In each case, the legal approach was to ensure that policy issues did not get turned into unnecessary legal issues. As noted by the WMD Commission, a classic way in the IC to resist initiatives was to declare certain policy options as out of bounds because of unspecified or unexamined “legal” issues.^b Fortunately, the DNI general counsel’s office was staffed with experienced legal officers with a range of intelligence,

defense, justice, law enforcement, foreign affairs, and White House experience. This experience enabled in many cases the clarification and narrowing of any “legal” issues so that the maximum range of policy options could be identified and raised for decision. This approach was particularly critical in dealing with a DNI who had many responsibilities but ambiguous authority.■

a. See Melissa Hathaway, “Integrating the IC’s Cyber Security Mission” earlier in this special issue.

b. See *Report to the President of the United States, Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction* (March 31, 2005), 335.