March 12, 2009

The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program

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The Architecture of Accountability:

A Case Study of the Warrantless Surveillance Program

Kathleen Clark¹

This article identifies mechanisms that help to hold the federal government’s executive branch accountable for complying with the law, and shows how claims of national security secrecy undermine the effectiveness of these accountability mechanisms. It identifies four distinct stages in the process of accountability, and sets out a typology of accountability mechanisms based on their location inside or outside of government. Some are entirely internal to the executive branch; others are located within the executive branch but include some Congressional involvement. Others are entirely external to the executive branch. To examine in greater depth how these accountability mechanisms work in conjunction with each other and how claims of national security secrecy undermine these mechanisms, the article conducts an in-depth case study examining how these mechanisms operated regarding the National Security Agency’s warrantless domestic surveillance program. It shows that many of the accountability mechanisms were thwarted by claims of national security secrecy.

TABLE OF CONTENTS

I. Meaning of “Accountability” .................................................................................................. 3
II. Typology of Accountability Mechanisms for the Executive Branch.................................. 4
    A. Accountability Mechanisms that are Entirely Internal to the Executive Branch .......... 5
    B. Accountability Mechanisms that are Entirely External to the Executive Branch ........ 8
    C. Accountability Mechanisms Located in Executive Branch but Based on Congressional
       Action ........................................................................................................................................ 12
       1. Congressionally Created Mechanisms Within the Executive Branch .................... 12
       2. Congressionally Created Mechanisms Within the Executive Branch That Involve
          Outside Actors ....................................................................................................................... 17
III. A Case Study in Accountability: The National Security Agency’s Warrantless
    Surveillance Program ................................................................................................................. 19
    A. The NSA’s Warrantless Surveillance Program ................................................................. 19
    B. Executive, Congressional and Judicial Checks while the Surveillance Program Remained
       Secret ......................................................................................................................................... 20
    C. Congressional, Judicial, Executive and Public Responses to the Disclosure of the
       Program ..................................................................................................................................... 22

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D. Implications for Executive Branch Secrecy Claims ................................................................. 26
IV. Conclusion ........................................................................................................................ 27
Appendix: Executive Branch Officials Prosecuted for Misleading Congress (1949-present) .... 28

Several Democratic members of Congress and human rights organizations are calling for establishing a “truth commission” to investigate the Bush Administration’s interrogation and warrantless surveillance policies. Others advocate criminal investigation and even prosecution of Bush Administration officials who authorized these policies. Republican legislators and some commentators oppose any commission or criminal investigation of Bush Administration policies, arguing that they would constitute an attempt by those currently in power to criminalize their policy differences with their predecessors.

Is it necessary or appropriate to hold Bush Administration officials accountable for their actions through a criminal or commission investigation? This article contributes to the debate on this issue by placing it in a broader theoretical context, and examining the degree to which other accountability mechanisms operated effectively during the Bush Administration. Commission and criminal investigations are just two of the many mechanisms that can hold the executive branch – and its officials -- accountable for violations of the law.

Part I of this article explains, on the level of theory, what is meant by legal accountability, and it identifies four distinct stages of accountability. On a more concrete level, Part II identifies some of the most important mechanisms that hold the U.S. executive branch accountable for violations of the law, and sets out a typology of those mechanisms. Part III examines how those mechanisms operated with respect to the Bush Administration’s warrantless surveillance of domestic communications. While at least one of those mechanisms -- the legal opinion function -- eventually held the executive branch in check, most of the mechanisms did not operate effectively in connection with the warrantless surveillance program. The executive

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5 This article does not address international mechanisms that attempt to hold the executive branch accountable for illegal conduct, such as the International Committee of the Red Cross or the possibility of foreign prosecution of U.S. officials who commit war crimes.
branch’s claims of national security secrecy undermined the effectiveness of these accountability mechanisms.

I. Meaning of “Accountability”

In general, “accountability” refers to the requirement that one account for one’s actions to someone else. The subject of this accounting might be one’s compliance with legal norms, an employer’s norms, social norms or moral norms. This article focuses on legal accountability: whether the federal government’s executive branch complies with the law, and what mechanisms ensure such compliance. To adequately describe a legal accountability mechanism, one must identify:

- who must give the account (the accountor)
- to whom the account is given (the account-holder)
- the type of information that is provided
- the processes that will be used
- the possible consequences available.

The focus of this article is the executive branch, but for purposes of this article, the accountor may be the executive branch, a particular agency within the executive branch, or an executive branch official. Some accountability mechanisms -- such as a civil lawsuit - can operate directly against the executive branch or indirectly on the executive branch through an officeholder. The account-holder may be another governmental body, such as an Inspector General, a Congressional committee, or a court, or may be an outside institution, such as the press.

The process of accountability has four distinct stages. This article refers to the first stage as informing: the accountor provides information relating to its conduct. This informing can occur through self-reporting, where the accountor voluntarily provides this information, or through discovery, where the account-holder is able to obtain the information from the accountor. The second stage is justification, where the accountor attempts to provide a justification for its conduct. The third stage is evaluation, in which the account-holder’s evaluates of that justification. And the final stage is rectification, an account-holder’s ability to impose a penalty or a remedy when it is dissatisfied with the proffered justification.

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8 While legal and moral accountability are distinct concepts, they are interrelated in sometimes complex ways. For example, a government employee’s willingness to blow the whistle on allegedly illegal government activity may be tied to that employee’s moral outrage at the particular misconduct.
11 Other writers have divided the accountability process differently. Rob Jenkins refers to both discovery and justification as “answerability.” Rob Jenkins, The Role of Political Institutions in Promoting Accountability, in
Rectification may serve any of several distinct purposes: incapacitation (preventing the office holder from engaging in similar activity by ousting him from office), deterrence (punishing the office holder in order to deter him or other office holders from engaging in similar activity), compensation (paying those harmed by the illegal conduct for the costs they incurred), and symbolic expression (authoritatively stating that what occurred was illegal). Some accountability mechanisms include multiple stages of accountability. Civil lawsuits, for example, involve discovery, justification, evaluation and rectification. Other mechanisms, such as the Freedom of Information Act and mandatory reporting statutes, involve only a single stage.

II. Typology of Accountability Mechanisms for the Executive Branch

This section identifies some of the mechanisms that can hold the executive branch accountable for complying with the law. While it does not attempt to describe every such mechanism, it sets out a typology of these mechanisms, based on their location, ranging from those that are:

(A) entirely internal to the executive branch (such as legal opinions from the Office of Legal Counsel);
(B) entirely external to the executive branch (such as investigations by congressional committees); and
(C) located (at least partially) within the executive branch, but acting pursuant to a Congressional mandate.

The various accountability mechanisms can build on each other, such as when the leak of a controversial Justice Department memo and investigative journalists’ news stories led to more intensive Congressional scrutiny of executive branch treatment of prisoners, or can interfere with each other (such as when an investigating Congressional committee grants use immunity to a witness invoking the Fifth Amendment, and that immunity undermines the ability to prosecute that person). In evaluating the effectiveness of the various accountability mechanisms, we need to be cognizant of the fact that a mechanism may be effective even if it operates at only one of the five phases of accountability. A Freedom of Information Act disclosure will not by itself remedy illegal activity by the executive branch. But such a disclosure may nonetheless be an

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15 United States v. North, 910 F.2d 843 (D.C. Cir. 1990), modified, 920 F. 2d 940 (D.C. Cir. 1990) (vacating Oliver North’s conviction because prosecution witnesses had reviewed his immunized testimony before the Congressional Iran-Contra committee); United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991) (reversing John Poindexter’s convictions on the same grounds); *Final Report of the Independent Counsel for Iran/Contra Matters* (1993) (noting that the Court of Appeals decisions “makes a subsequent trial of any congressionally immunized witness virtually impossible.”) (quoting United States v. North, 910 F.2d at 924 (Wald, J., dissenting)).
integral part of the entire accountability process if there are other mechanisms that evaluate the
government’s justification for its action and can seek a remedy for any wrongdoing.  

A. Accountability Mechanisms that are Entirely Internal to the Executive Branch

In a 2006 essay, Neal Katyal indicated that he would outline “a set of mechanisms that
create checks and balances within the executive branch,” and he identified four such
mechanisms:

• overlapping jurisdiction among departments (e.g., State and Defense Department) which may
cause them to have competing conceptions of proper policy;

• requirements that the executive branch report particular information to Congress;

• civil service protection for most employees, insulating them from partisan political control;

• a dissent channel for State Department employees who disagree with current policy.  

The first three of these mechanisms have their origin in Congress, not in the executive branch.
Congress sets out in statute the jurisdiction of each of the cabinet departments, so jurisdictional
overlap is the result of Congressional action.  Congress also created civil service protection and
the reporting requirements, which usually require that the information be delivered straight to
Congress.  So while these three mechanisms are located in the executive branch, they are by no
means purely internal to the executive branch.  Only the State Department’s dissent channel is
purely internal to the executive branch, established by Department regulations rather than by
statute and with reports staying within the Department.  

This section identifies several
additional accountability mechanisms that are entirely within the executive branch and help
ensure that it complies with the law.

An internal executive branch practice that serves as an accountability mechanism is the
practice of obtaining a legal opinion about questionable conduct prior to engaging in that
conduct.  The Constitution indicates that the President can require a written opinion from the
head of each department, and Congress has required the Attorney General to provide legal
advice to the President and other department heads.  

A Justice Department regulation delegates
this responsibility to the Office of Legal Counsel.  

Legal opinions can help ensure that the
government act within the limits of the law.  Thus, the executive branch’s practice of obtaining
legal opinions from the Office of Legal Counsel – opinions that are authoritative within the
executive branch – may in general help to ensure that the executive branch acts consistently with
the law.  This ability is most clear when an agency wishes to engage in particular action, requests
a legal opinion from OLC, and learns that the proposed action would be illegal.  In this context,
OLC is the accountholder and the agency involved is the accountor.  This opinion-writing
function partakes of several different stages of accountability: self-reporting (when an agency

“multi-channelled approach to public accountability,” and noting that “there is no reason to expect any one
institution to fulfil all the functions of accountability”).
17 Neal Kumar Katyal, Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within, 115
18 See 2 Foreign Affairs Manual 070.  The dissent channel is limited to dissent on substantive foreign policy issues,
and is not for concerns about alleged violations of law.  Id. at 071.2.
21 28 C.F.R. 0.25(a).
provides OLC with information about its proposed conduct), discovery (if the Justice Department seeks additional information about the proposed conduct), justification (if the agency has provided an argument for the legality of its proposed action) and evaluation (when OLC evaluates that proposed justification and decides whether the proposed action is legal).

While courts and commentators generally assume that allowing a client to keep legal advice secret helps to ensure that clients comply with the law, recent history shows that such secrecy can be perverted to facilitate wrongdoing and undermine legal accountability. In 2002, OLC issued a legal opinion concluding, among other things, that despite Congress’ enactment of a criminal law prohibiting torture, executive branch officials could nonetheless legally torture prisoners as long as the President authorized it. Both during its drafting and after it was issued, this opinion was closely held within the executive branch. By limiting its internal circulation, the Bush Administration was able to limit internal dissent and delay the leaking of its improper conduct, two accountability mechanisms that will be discussed below.

During that time, the Bush Administration was able to rely on the opinion as the basis for its policy of torturing prisoners allegedly connected to al Qaeda, and effectively immunizing government officials from later prosecution for their actions. Eventually, the Washington Post obtained the opinion and on June 14, 2004 published it on its website. There was an immediate public uproar because of the opinion’s dubious legal justification of torture and extreme claims about executive power. Nine days after the Washington Post published the opinion, the Justice Department officially withdrew it. But until it was leaked, the secrecy of that opinion enabled the Bush Administration to subvert this accountability mechanism, transforming it from a mechanism preventing illegality to one enabling it.

Another accountability-related practice involves conducting an internal investigation to determine whether there has been wrongdoing. An agency official investigates allegations of wrongdoing: interviewing witnesses, gathering evidence, analyzing the legality of the conduct, advising another executive branch official about factual and legal conclusions and recommending a response. In many executive branch agencies, Congress has created a specific office – the Inspector General – to conduct such investigations of alleged wrongdoing. But even those agencies that lack an Inspector General (such as the White House) conduct internal investigations. For example, during the Clinton Administration, allegations surfaced that the Secretary of Agriculture Mike Espy had violated the law by accepting gifts from agricultural

22 Restatement of the Law Governing Lawyers Conduct, § on Attorney-Client Privilege.
24 See sections on internal whistleblowing and anonymous leaking, infra.
27 See, e.g., Julie Mertus and Kathleen Clark, Torturing the Law: The Justice Department’s Legal Contrortions on Interrogation, WASH. POST, June 20, 2004, at B03.
30 Internal investigations occur in the private sector as well, and federal law has given private sector organizations an incentive to engage in and set up an institutional structure for such internal investigations in order to ferret out wrongdoing. See, e.g., Federal Sentencing Guidelines for Organizations; Sarbanes Oxley.
31 See discussion of Inspectors General, infra.
interests. President Clinton responded by directing the White House Counsel to investigate. That office outlined Espy’s conduct, but indicated that the President did not need to take action against Espy because Espy had already “reimbursed the cost of questionable transactions,” reimbursed private parties for the cost of questionable gifts, and announced his resignation.\footnote{In re: Sealed Case, 121 F.3d 729, 735 (DC Cir. 1997). These allegations against Espy also led to the appointment of an Independent Counsel. \textit{Id.} at 734. See discussion of the Independent Counsel, infra.}

An example of a national security-related internal investigation is the 1973 CIA’s investigation of its own illegal conduct. Prompted by press reports that the CIA had provided assistance to Watergate burglars, CIA Director James Schlesinger sent a memorandum to all CIA employees, directing them to report on all CIA activities that “may have fallen outside the CIA’s charter.”\footnote{James R. Schlesinger, Memorandum for All CIA Employees (May 9, 1973) (available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/schlesinger_jewels.pdf).} This investigation resulted in a nearly 700-page report detailing illegal activities.\footnote{National Security Archive, \textit{The CIA’s Family Jewels} (available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB222/index.htm). This report became known as “the family jewels.” CIA Releases Two Collections of Historical Documents (June 26, 2007) (available at https://www.cia.gov/news-information/press-releases-statements/press-release-archive-2007/cia-releases-two-collections-of-historical-documents.html) (indicating that this collection of documents is referred to as the “Family Jewels”).} One advantage of this kind of purely internal executive branch investigation is that because it is commissioned by a high-level executive branch official, claims of national security secrecy will not prevent the investigator from gathering the relevant information.\footnote{Compare discussion of security clearance issue stymieing Justice Department Inspector General’s investigation of NSA’s domestic spying operation, infra.} But a downside is that the results may be closely held within the executive branch. Most of “the family jewels” were kept secret for more than three decades, and some of the information is still secret.\footnote{David Corn, \textit{Where’s the CIA’s Missing Jewel?}, TheNation.Com (June 26, 2007) (available at http://www.thenation.com/blogs/capitalgames/208296).}

An internal executive branch institution that has the potential to serve as accountability mechanism is the Justice Department’s Office of Professional Responsibility (OPR). OPR was established in 1975 by Attorney General Edward Levi in response to the many “ethical abuses and misconduct by Department of Justice officials in the Watergate scandal,” and investigates allegations relating to the professional ethics, competence and integrity of Justice Department attorneys.\footnote{U.S. Department of Justice Office of Professional Responsibility Policies and Procedures (March 7, 2006) (available at http://www.usdoj.gov/opr/polandproc.htm); Office of Professional Responsibility Organizational Chart (http://www.usdoj.gov/jmd/mps/manual/pr.htm#orgchart).} If OPR finds misconduct, it recommends a range of punishments for the attorney’s supervisor to impose and “ordinarily” informs state bar disciplinary authorities of its finding.\footnote{U.S. Department of Justice Office of Professional Responsibility Policies and Procedures (March 7, 2006) (available at http://www.usdoj.gov/opr/polandproc.htm).} In the past, OPR disclosed summaries of the cases where it found professional misconduct and issued annual reports with statistical data. But under the Bush Administration, OPR stopped providing such summaries, and its last annual report was for the fiscal year ending in September of 2005.\footnote{Richard B. Schmitt, \textit{More Scrutiny, Secrecy at Justice}, L.A. TIMES, at A14 (July 6, 1008) (noting that in 2001, the Justice Department reversed its policy of publicly disclosing summaries of cases where OPR found professional misconduct); OPR website (http://www.usdoj.gov/opr/reports.htm) (last visited Feb. 16, 2009).} Critics of OPR engages in long delays during its investigations, lacks the independence necessary for it to investigate alleged wrongdoing, and provides a convenient shelter for Justice Department leaders who want to prevent the more independent Inspector
General from investigating misconduct by lawyers.\textsuperscript{40} There are news reports that OPR is investigating the OLC lawyers responsible for the notorious torture opinion described above. But as of this writing, more than 4 years after that opinion became public, OPR has yet to complete its investigation.

It is difficult to assess the effectiveness of OPR because it usually keeps the results of its investigations secret. When it does make disclosures, it releases only the barest of information about the subjects or conclusions of its investigations. Recently, thought, OPR teamed up with the DOJ Inspector General (IG) to investigate politicized hiring and firing at the Justice Department, producing four public reports.\textsuperscript{41}

B. Accountability Mechanisms that are Entirely External to the Executive Branch

Some accountability mechanisms are entirely external to the executive branch.\textsuperscript{42} While these include those located outside of government entirely, such as the press and nongovernmental organizations. But many of these accountability mechanisms are located in the legislative branch, and this section discusses some of those mechanisms.

Members of Congress have the ability to gather information about the executive branch, sometimes quite informally by writing a letter to an executive branch official and requesting answers to certain questions, sometimes quite formally as part of a Committee investigation with subpoenas for public testimony and the disclosure of documents. Other Congress-based accountability mechanisms include impeachment, the Government Accountability Office, and statutory causes of action against the executive branch or executive branch officials.\textsuperscript{43}

\textsuperscript{40} See discussion of DOJ Inspector General, infra.

\textsuperscript{41} An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division (July 2, 2008); An Investigation into the Removal of Nine U.S. Attorneys in 2006 (September 2008); An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General (July 28, 2008); An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program (June 24, 2008) (all available at http://www.usdoj.gov/opr/inv-rpts.htm).

\textsuperscript{42} In theory, elections could serve as a legal accountability mechanism for a first-term president, or even for a second term president who wishes to see his party continue to control the executive branch. See RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 45 (2003) (“Elections set the outer limits of acceptable government behavior . . .”). But their primary focus is political accountability rather than legal accountability. Id. at 41-44. In addition, “voters think of elections much more as opportunities to try to select good types” rather than as a method of holding elected officials accountable. James D. Fearon, Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 82 (Adam Przeworski, Susan C. Tokes & Bernard Manin, eds. 1999). See also Edward Rubin, The Myth of Accountability and the Anti-Administrative Impulse, 103 MICH. L. REV. 2073 (2005) (“[I]ntermittent, highly contested elections are simply very poor devices for holding a person accountable. Most electoral democracies present the voters with only two or three realistic choices, which means that a multitude of issues must map into a small decision set.

\textsuperscript{43} Congressional oversight can be divided into direct oversight, which refers to the review of executive branch activities by Congressional appropriations and authorizing committees, and indirect oversight, which refers to the many mechanisms by which Congress enables other actors to review executive branch activities, including establishment of the Government Accountability Office and Inspectors General, requirements that the executive branch disclose information about its activities and the authorization of private causes of action against the executive branch. See description of “fire-alarm oversight” in Mathew D. McCubbins and Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols versus Fire Alarms, 28 AM. J. POL. SCI. 165, 166 (1984).
Congressional committee oversight has been a key accountability mechanism since 1946, when Congress passed legislation that directed committees to engage in oversight activities. Committees launch investigations, hold hearings and issue investigative reports about the operation of the executive branch, including whether the branch has violated the law. The primary function of these oversight processes is for Congress to gather information about executive branch actions.

Congress is able to use its contempt power and court processes to obtain information from those outside the executive branch, but its ability to compel disclosure from the executive branch is more circumscribed. Every year, the executive branch issues thousands of reports of reports to Congress as mandated by statute, and provides additional information in response to specific Congressional requests. But at times, the executive branch successfully resists Congressional attempts to obtain sensitive information, such as that relating to intelligence or covered by a privilege. Where there is conflict between regarding Congressional information requests, Congress and the Executive branch usually come to an accommodation.

A related issue is whether executive branch officials are held accountable for misleading Congress. Several criminal statutes prohibit misleading Congress, but only the executive branch can bring criminal prosecutions. In the last 60 years, 19 executive branch officials have been prosecuted for misleading Congress. Most of those were brought by prosecutors that were not under the political control of President: Independent Counsels brought nine of those prosecutions, and Watergate Special Prosecutor Leon Jaworski brought three of them. This kind of politically independent prosecutor was available during only about a third of that time period. The disproportionate share of such prosecutions by politically independent prosecutors may indicate that the Justice Department is ordinarily disinclined to prosecute such executive branch officials for misleading Congress.

The executive has the opportunity to justify its actions through hearing testimony and letters to Congress, and Congress can evaluate its justification. Where Congress concludes that the executive has engaged in wrongdoing, it can, “with the support of the media, generate overwhelming political pressure” that can then motivate the executive branch to take corrective

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45 See Morton Rosenberg and Todd B. Tatelman, Congressional Research Service, CONGRESS’S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE (updated April 15, 2008).
46 See CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, REPORTS TO BE MADE TO CONGRESS, H.R. Doc. No. 110-4 (2007) (indicating that the Congress required the President and cabinet agencies to issue 3066 reports to Congress); Memorandum from Adam Hilkemann to Kathleen Clark, June 10, 2008 (on file with author).
48 See Appendix: Executive Branch Officials Prosecuted for Misleading Congress (1949 – present).
49 Id.
action, or by enacting statutory changes to constrain in executive action. For example, in the wake of the House Judiciary Committee’s investigation of the Bush Administration’s firing of 9 U.S. Attorneys, Congress enacted a new statute limiting the executive branch’s ability to replace U.S. Attorneys without consulting Congress. If Presidential wrongdoing is so extreme that it would constitute “high crimes or misdemeanors,” Congress has the option of impeaching and removing the President.

In general, Congressional committee oversight may be more robust or intensive when the political party that opposes the President controls Congress. The opposition Democrats took control of Congress after the 2006 mid-term elections. The level of Congressional oversight jumped significantly when congressional investigations); but see DAVI D R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002 (2005) (divided government does not increase the number of high profile Congressional investigations). Brendan Nyhan has conducted a particularly rigorous analysis of this empirical question, and noted that the Independent Counsel statute likely had a confounding effect on the question. Brendan Nyhan, Does Divided Government Increase Presidential Scandal?, (paper delivered at the Annual Meeting of the American Political Science Association, 2007).

Ordinarily, both appropriations and authorizing committees within the House and Senate review executive branch activities, and are informed of major initiatives through the budget process. This proposed budget is available not just to all members of Congress, but to the public generally, and can be an important source of information about the workings of the executive branch. An important exception, however, is the budget for intelligence operations. The intelligence budget is actually hidden within the Defense Department budget, and only the House and Senate Intelligence committees – not the appropriations committees -- receive information about the intelligence budget. Only the members and staff of the Intelligence Committees get to see the actual numbers for intelligence budget.

A key Congressional institution, the Government Accountability Office (GAO engages in three distinct activities that help to hold the executive branch accountable for complying with the law. It issues decisions in bid protests by government contractors claiming that the executive

51 RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 62 (2003); id. at 54-55 (2003) (“Legislative committees . . . lack the final power of rectification, except indirectly through the force of publicity and political pressure.”).

52 See HOUSE COMMITTEE ON THE JUDICIARY MAJ ORITY STAFF REPORT TO CHAIRMAN JOHN CONYERS, JR., REINING IN THE IMPERIAL PRESIDENCY: LESSONS AND RECOMMENDATIONS RELATING TO THE PRESIDENCY OF GEORGE W. BUSH 13 (January 13, 2009).


54 Matthew M. Dull and David C.W. Parker, Divided We Quarrel: The Politics of Congressional Investigations, 1947-2004, unpublished manuscript (divided government is associated with an increase in the number of Congressional investigations); but see DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002 (2005) (divided government does not increase the number of high profile Congressional investigations). Brendan Nyhan has conducted a particularly rigorous analysis of this empirical question, and noted that the Independent Counsel statute likely had a confounding effect on the question. Brendan Nyhan, Does Divided Government Increase Presidential Scandal?, (paper delivered at the Annual Meeting of the American Political Science Association, 2007).

55 Thomas E. Mann, Molly Reynolds, and Peter Hoey, A New, Improved Congress?, N.Y. TIMES, 26 August 2007 (chart showing approximately 50% increase in oversight hearings during first six months of 110th Congress (controlled by opposition Democratic party) in comparison with the first six months of 109th Congress (controlled by the President’s Republican party).


While the President nominates the head of the GAO, the Comptroller General, the Supreme Court considers the Comptroller General to be outside the Executive Branch because he can be removed not just by impeachment but also through a Congressional joint resolution. Bowsher v. Synar, 478 U.S. 714 (1986).
branch violated the law in awarding a contract to a competitor. And it conducts investigations of and issues reports about executive branch programs at the request of Congressional committee and subcommittee chairs and ranking members.  

GAO cannot directly rectify any wrongdoing it detects, but its reports can become part of the chain of accountability, enabling Congress to put pressure on agencies for rectification. By statute, if the Executive Branch decides not to follow a GAO bid protest recommendation, it must promptly report that to the Comptroller General, who then must inform the relevant congressional committees and recommend further action.  

While most of GAO’s reports focus on issues of financial efficiency, some of them address the executive branch’s compliance with the law. For example, a 1986 GAO report examined whether agencies were complying with FOIA’s requirement that agencies disclose in the federal register basic information about their organization and operations. The report found 20 instances of failure to make such disclosures, 14 of which were being remedied by the agencies themselves after discussions with GAO by the time GAO published its the report. Another example includes a 2001 GAO report examining whether Curt Hebert, Jr., the Chairman of the Federal Energy Regulatory Commission (FERC) violated federal statutes or regulations in his communications with Kenneth Lay, the chairman of Enron, and company regulated by FERC. A New York Times article had detailed a phone conversation between Hebert and Lay in which the Hebert requested the Lay’s political support and Lay asked that Hebert change his view on a FERC policy, raising the specter of possible solicitation to bribery. GAO interviewed Hebert, Lay and two FERC employees who overheard Hebert’s part of the conversation, and concluded that there was no violation of either criminal law or ethics regulations. If the Justice Department (rather than GAO) had conducted this investigation into possible wrongdoing, it probably would not have resulted in a public report.  

By statute, the GAO has the ability to extract information from the executive branch agencies, but that statute excepts from such mandatory disclosure any records related to intelligence activities. Since the early 1960s, the CIA has effectively shut the GAO out from conducting any oversight functions regarding its activities. Since the creation of the Senate and House Intelligence Committees in the 1970s, the executive branch has argued that those committees are the exclusive vehicles for Congressional oversight. More recently, the Director

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58 In fiscal year 2008, GAO produced over 1200 reports or written testimony, mostly at the request of Congressional committees or subcommittee chairs and ranking members.
59 See RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 87 (2003).
61 Telephone conversation with James Lager, Deputy Ethics Counselor, GAO (February 6, 2009).
62 GAO, FREEDOM OF INFORMATION: NONCOMPLIANCE WITH AFFIRMATIVE DISCLOSURE PROVISIONS (April 1986). This example illustrates the discovery, evaluation and rectification stages of accountability.
66 Cf. public report requirement of Independent Counsel statute.
69 Statement of Henry L. Hinton, Jr., Managing Director, Defense Capabilities and Management, GAO (July 18, 2001) (available at http://www.fas.org/irp/congress/2001_hr/071801_hinton.html) (“The CIA has maintained that
of National Intelligence has taken a similar approach, arguing that oversight of intelligence functions is beyond the purview of the GAO. In addition, the Executive Branch has argued that while GAO has authority to evaluate executive branch work that is done pursuant to statutes, it lacks authority to evaluate executive branch work done pursuant to the President’s constitutional authority, thus exempting wide swaths of foreign policy and intelligence-related activities from GAO scrutiny.

Members of Congress sometimes take action on behalf of individual constituents who have been aggrieved by executive branch agencies. This is accountability at the retail level rather than at the wholesale level. The concern is not whether an entire policy is legal, but whether the executive branch’s treatment of this particular constituent is legal (or just). In some ways, this process is similar to an individual lawsuit against the executive branch. The member (or her staffer) may initially seek more information from the agency (roughly analogous to the discovery process), and may eventually address legal arguments to the agency on behalf of the constituent (roughly analogous to legal argument addressed to a judge). Unlike litigation, the persuasiveness of the argument may be enhanced by the stature of the member of Congress, and the degree to which the agency is beholden to that member. Thus, intervention on behalf of a constituent may reflect an effort to rectify a legal wrong by the executive branch, or may instead reflect an effort to convince an executive branch official to reverse a legal decision that disfavored a constituent.

C. Accountability Mechanisms Located in Executive Branch but Based on Congressional Action

This section examines accountability mechanisms that are located in the executive branch, but that were created by congressional action. It divides these into two categories: those involving only executive branch actors, and those that also involve actors outside the executive branch.

1. Congressionally Created Mechanisms Within the Executive Branch

Two internal executive branch accountability mechanisms that were created by statute are Inspectors General (IGs), which conduct regular audits and investigate alleged wrongdoing in 60 executive branch agencies, and Ombudspersons, which mediate disputes and have a much lower profile. Congress created Inspectors General over the objection of the executive branch.
can receive confidential tips about waste, fraud and abuse, and can directly access all of an agency’s records in investigating those tips and other allegations.\textsuperscript{74} Every six months they issue detailed reports to the agency head and Congress.\textsuperscript{75} When IGs discover “particularly serious or flagrant problems” within the agency, they must report immediately to the agency head, who must forward that report to Congress.\textsuperscript{76} IG reports have become a particularly important source of information about executive branch problems for Congress committees and subcommittees investigating the executive branch.\textsuperscript{77} IGs can recommend sanctions against particular employees and changes in administrative processes, but cannot impose either.\textsuperscript{78} So IGs partake in the discovery, justification and evaluation stages of accountability, but not rectification. The publicity that accompanies the issuance of an IG report can result in rectification through legislative change.\textsuperscript{79} For example, after concern about the FBI’s extensive use of National Security Letters (NSLs) to collect information about Americans, Congress required the Justice Department IG to audit the FBI’s use of NSLs.\textsuperscript{80} Those audits revealed widespread problems in the FBI’s administration of NSLs,\textsuperscript{81} and helped spur legislation cutting back on the FBI’s authority to issue NSLs.\textsuperscript{82}

There are two different classes of statutorily created IGs. The President nominates and the Senate confirms IGs in all fifteen cabinet departments and in fourteen other federal agencies.\textsuperscript{83} Agency heads appoint IGs for the Office of the Director of National Intelligence and 31 smaller agencies.\textsuperscript{84} All IGs are to be selected on the basis of their expertise and without regard to political affiliation.\textsuperscript{85} They generally have independence in how they conduct their

\textsuperscript{74} Inspector General Act of 1978, § 6; but see §§ 8D, 8E (permitting Treasury Secretary and Attorney General to restrict IGs’ access to information relating to ongoing investigations, confidential sources, and other matters).

\textsuperscript{75} Inspector General Act of 1978, § 5.

\textsuperscript{76} Inspector General Act of 1978, §5(d).

\textsuperscript{77} PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 56 (1993) (quoting “a key legislative player” as stating that “IGs gave us . . . someone who would give us regular input through the semi-annual reports and irregular access [to information] through the development of good working relationships”)

\textsuperscript{78} For example, during the Reagan administration, the IG at the Department of Housing and Urban Development (HUD) discovered serious problems with the operation of a program related to Section 8 housing, and recommended suspending that program. HUD Secretary Samuel Pierce refused to suspend the program, which spawned a massive scandal and Independent Counsel investigation of criminal wrongdoing. PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 69 (1993)

\textsuperscript{79} In addition, something akin to rectification occurs when the agency adopts the IG’s recommendations.

\textsuperscript{80} USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119.


\textsuperscript{83} Inspector General Act of 1978, §§ 2 (creating two Inspectors General within the Treasury Department), 3(a) (Presidential appointment process), 11 (identifying the 29 agencies with Presidentially appointed IGs).

\textsuperscript{84} Inspector General Act of 1978, §8G (identifying 30 agencies with agency head-appointed IGs), 8K (authorizing Director of National Intelligence to create an office of Inspector General); Pub. L. 108-106, § 3001(c) (indicating that the Secretary of Defense in consultation with the Secretary of State appoints the Special Inspector General for Iraq Reconstruction).

\textsuperscript{85} Inspector General Act of 1978, § 3(a).
work, but on occasion, Congress has responded to specific allegations of wrongdoing by requiring IGs to investigate and report on the allegations. The President or agency head who appointed the IG can also remove the IG without cause, but must inform Congress of the reasons for removal.

In 1988, when Congress created an Inspector General for the Justice Department, the Department successfully resisted Congressional efforts to fold the Office of Professional Responsibility (OPR) into the Justice IG. Members of Congress and even the Justice Department IG himself have proposed giving OPR more independence by placing it in the Office of Inspector General, the Executive Branch has repeatedly resisted these proposals. The contrast between the Justice Departments IG and OPR demonstrate both the limitations inherent in a purely internal executive branch accountability mechanism and the greater independence that can accompany a Congressional mandate. Inspectors General are nominated by the President and confirmed by the Senate, whereas the head of OPR is appointed by the Attorney General and is subject to the Attorney General’s incentive awards. Inspectors General report to Congress as well as their agency head, whereas the head of OPR reports only to the Attorney General and Deputy Attorney General. Inspectors General issue public reports on their investigations, while OPR keeps its reports secret.

Inspectors General have sometimes succeeded in achieving accountability where other mechanisms have failed. For example, the Justice Department arrested more than 1200 aliens in connection with its investigation of September 11th, and there was concern that these prisoners were languishing in jail, unable to contact family or lawyers, and sometimes being abused. Despite requests by members of Congress and newspaper editorials, the government refused to

86 The heads of seven agencies (Defense, Homeland Security, Justice, Treasury, CIA, the Federal Reserve and the U.S. Postal Service) can prevent their Inspector General from pursuing an investigation in order to protect an ongoing criminal investigation or national security, but must report to the Congressional Committees. FREDERICK M. KAISER & WALTER J. OLESZEK (CRS), CONGRESSIONAL OVERSIGHT MANUAL 94 (May 1, 2007).
88 Inspector General Act of 1978, §§ 3(b); 8G(e). President Reagan’s second act as president was his decision to remove all of the Inspectors General who had been appointed by President Carter. PAUL C. LIGHT, MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY 102 (1993).
91 OPR does issue annual reports summarizing the kinds of cases it has investigated, but these reports provide few details about specific allegations and outcomes, and there are long delays in even this information being disclosed. As of February 2009, for example, the most recent OPR Annual Report available was for FY 2005 (a period ending on Sept. 30, 2005). See OPR Annual Reports listed at http://www.usdoj.gov/opr/reports.htm (last visited Feb. 15, 2009).
reveal the names of these prisoners, the reasons they were being detained, or their location.\textsuperscript{93} Several public interest organizations filed a Freedom of Information Act (FOIA) lawsuit in an attempt to force the government to reveal the identities of these prisoners, the dates of their arrests, and the nature of the charges against them, but the government convinced the D.C. Circuit that release of this information could help a terrorist group impede the government’s investigation of the September 11\textsuperscript{th} attacks and thus was exempt from disclosure under FOIA.\textsuperscript{94} Nonetheless, the Justice Department’s Inspector General initiated an investigation into the detention and treatment of these prisoners, and ultimately issued a report criticizing several aspects of this mass detention.\textsuperscript{95} That report described just how broadly the September 11\textsuperscript{th} investigative dragnet fell, and indicated that immigrants with no connection to terrorism were nonetheless classified as “of interest to the September 11 investigation.”\textsuperscript{96} If, for example, a landlord reported suspicious activity by an Arab tenant, the FBI would interview the tenant and determine his immigration status, and do the same for any other foreigners found in that same apartment.\textsuperscript{97} If they were out of status, they would be arrested and held until the FBI could investigate their backgrounds and confirm that they did not have any ties to terrorism.\textsuperscript{98} While the report did not provide all the information the public interest organizations had requested in the FOIA suit, it did provide aggregate information on the number of prisoners, their countries of origin, and their dates of arrest.\textsuperscript{99}

A second type of internal executive branch mechanism created by Congress is the ombudsperson, an official who receives and investigates complaints by individuals, businesses or others who have been aggrieved by an agency. The complaining party may be external, such as a small business complaining about agency regulations,\textsuperscript{100} or internal, such as an agency employee complaining about her treatment within the workplace.\textsuperscript{101} An ombudsperson has the authority to investigate and recommend action, and sometimes serves as a mediator between the agency and the complaining party. But ombudspersons lack the power to impose a solution or response on the agency.\textsuperscript{102} Ombudspersons make recommendations to the agency and/or

\textsuperscript{94} Center for National Security Studies v. U.S. Dept. of Justice, 331 F.3d 918 (D.C. Cir. 2003) (FOIA exception 7 for law enforcement documents applies to the information requested).
\textsuperscript{95} The DOJ IG report was not coextensive with the concerns expressed by the public interest groups, and in particular did not examine the treatment of prisoners who were held pursuant to material witness warrants rather than immigration violations. US DEPT. OF JUSTICE OFFICE OF INSPECTOR GENERAL, SEPTEMBER 11 DETAINEES 4 (APRIL 2003). While the report provided aggregate totals of the number of immigration detainees, their locations indicated that 491 were arrested in New York and 70 were arrested in New Jersey, but redacted the names of the 11 other states where individuals were arrested. Id. at 22.
\textsuperscript{96} The Small Business Administration’s Office of the National Ombudsman “receives complaints from small business[es] . . . and acts as a liaison between them and federal agencies.” http://www.sba.gov/aboutsba/subprograms/ombudsman/aboutus/OMBUD_ABOUTUS.html. It was created by Congress has the power “to receive, substantiate, and report to Congress complaints and comments from small business owners regarding regulatory enforcement actions taken against small businesses by federal agencies.” See http://www.sba.gov/aboutsba/subprograms/ombudsman/nationalombudsman/index.html
\textsuperscript{97} The report indicated that 491 were arrested in New York and 70 were arrested in New Jersey, but redacted the names of the 11 other states where individuals were arrested. Id. at 22.
\textsuperscript{100} The Small Business Administration’s Office of the National Ombudsman “receives complaints from small business[es] . . . and acts as a liaison between them and federal agencies.”
\textsuperscript{101} GENERAL ACCOUNTING OFFICE (G\textsuperscript{A}O), HUMAN CAPITAL: THE ROLE OF OMBUDSMEN IN DISPUTE RESOLUTION (April 2001) at 2 (identifying 10 agencies that had ombudspersons addressing employee complaints).
\textsuperscript{102} RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERNDEMOCRACIES 91 (2003).
Congress on needed reforms. Ideally, an ombudsperson is independent in that she is not subject to the control of the agency officials she investigates and is impartial in that she does not have conflicts of interest.

In the federal government, members of Congress have long served an ombuds-like role when they provide constituent service. In recent decades, Congress and the executive branch have created specific ombudsperson positions to take on this task in dozens of agencies. Some of these officials are called “ombudspersons,” but others have different titles while serving this ombuds function, such as the National Taxpayer Advocate, Office of Special Counsel, and Office of Government Information Services (OGIS).

Ombudspersons have two distinct functions relevant to executive branch accountability: assisting ordinary citizens or businesses that have been harmed by illegal government action, and providing Congress with information about problems within the executive branch. The executive branch sometimes chafes at the efforts of ombudspersons and attempted to limit their independence or close them down. For example, in 2007, Congress passed legislation to establish the Office of Government Information Services (OGIS), which would serve as an ombudsperson to those making FOIA requests. Congress placed this office within the National Archives (the same agency that houses ISOO), and mandated it to “offer mediation services to resolve disputes between” FOIA requesters and agencies as an alternative to litigation. While President Bush signed the bill that established this office, five weeks later he proposed abolishing the office and transferring its functions to Department of Justice. Open government advocates decried this move, arguing the move would destroy its independence because it would

103 See, e.g., GENERAL ACCOUNTING OFFICE (GAO), HUMAN CAPITAL: THE ROLE OF OMBUDSMEN IN DISPUTE RESOLUTION (April 2001) at 8 (Ombudspersons “bring[] to an entity’s attention chronic or systemic problems and makes recommendations for improvement.”); Congress created the Small Business Administration’s Office of the National Ombudsman.

104 See American Bar Association (ABA) Standards for the Establishment and Operation of Ombuds Offices (2004) (hereinafter ABA Ombuds Standards), (available at http://meetings.abanet.org/webupload/commupload/AL322500/newsletterpubs/115.pdf) (identifying independence, impartiality and confidentiality as “essential characteristics of all ombuds”). Id. at 2. The ABA indicates that an ombudsperson is “independent” if noone who is “subject to the ombuds’s jurisdiction or anyone directly responsible for a person under the ombuds’s jurisdiction or anyone directly responsible for a person under the ombuds’s jurisdiction (a) can control or limit the ombuds’s performance of assigned duties or (b) can, for retaliatory purposes, (1) eliminate the office, (2) remove the ombuds, or (3) reduce the budget or resources of the office.” Id. at 3.

105 Ronald M. Levin, Congressional Ethics and Constituent Advocacy in an Age of Mistrust, 95 MICH. L. REV. 1, 17 (1996) (“[C]ongressional casework covers much of the same terrain as might be handled through an ‘ombudsman’ system in other nations”).

106 The website of the Coalition of Federal Ombudsmen lists 34 executive branch agencies (or subparts) with ombudspersons. See http://www.federalombuds.ed.gov/membership.html.

107 The Internal Revenue Service (IRS) created the Office of Taxpayer Ombudsman in 1979, and Congress codified the position in 1988, eventually changing its name to National Taxpayer Advocate (NTA) and expanding its authority to protect the interests of taxpayers and to report to Congress. Unlike most ombudspersons, the NTA can issue orders requiring its agency (the IRS) to take certain actions in the interests of taxpayers. See Evolution of the Office of the Taxpayer Advocate (available at get html).

108 Pub. L. 110-175, § 10(a); 5 U.S.C. § 552(h)(1).

109 Pub. L. 110-175.

110 Pub. L. 110-175, § 10(a); 5 U.S.C. § 552(h)(1), (3).

place the office within the department tasked with defending agencies sued by FOIA requesters.\footnote{See, e.g., Testimony of Thomas Blanton, Executive Director, National Security Archive to the House Information Policy, Census, and National Archives Subcommittee. (Sept. 17, 2008) (available at http://informationpolicy.oversight.house.gov/documents/20080919140008.pdf)}

Agency officials have sometimes resisted the efforts of ombudspersons, and in one case the agency eventually dissolved the Ombuds office. The EPA’s National Ombudsman was created by Congress in 1984 to deal with public complaints related to the Resource Conservation and Recovery Act (RCRA), but when statutory authority expired in 1989, EPA retained the office, and expanded its mandate to deal also with Superfund and other EPA programs.\footnote{66 Fed. Reg. 365 (Jan. 3, 2001) “Draft Guidance for National Hazardous Waste Ombudsman and Regional Superfund Ombudsmen Program.”} In January of 2001, EPA issued new guidance for the National Ombudsman, clarifying that he could not play a role on issues that were the subject of litigation.\footnote{66 Fed. Reg. 365 (Jan. 3, 2001) “Draft Guidance for National Hazardous Waste Ombudsman and Regional Superfund Ombudsmen Program.”} The incumbent Ombudsman protested this limitation, as did several members of Congress.\footnote{Statement of Robert J. Martin before the U.S. Senate Comm. On Environment and public Works (June 25, 2002) (available at http://epw.senate.gov/107th/Martin_062502.htm).} Despite these protests, the EPA effectively diminished the office’s independence, transferring the incumbent Ombudsman to the Office of the Inspector General, an office that had allegedly interfered with earlier Ombudsman investigations.

2. Congressionally Created Mechanisms Within the Executive Branch That Involve Outside Actors

This section describes accountability mechanisms are located within the Executive but also involve actors outside the executive branch. These include the Freedom of Information Act, executive branch whistleblowers, and specially created investigative commissions.

The Freedom of Information Act and the 1974 Amendments were a radical departure that set the stage for a new era of increased transparency in government. Under the Act, anyone can request government for any reason.\footnote{Statement of Henry L. Hinton, Jr., Managing Director, Defense Capabilities and Management, GAO (July 18, 2001) (available at http://www.fas.org/irp/congress/2001_hr/071801_hinton.html) (“Almost 90 percent of our staff days are in direct support of Congressional requestors, generally on the behalf of committee chairmen or ranking members.”). In 2002, Congress limited the ability of foreign governments to seek information under the statute.} Requestors are not limited to seeking information about government wrongdoing, and most FOIA requests are entirely unrelated to allegations of government misconduct. Nonetheless, FOIA requests have been instrumental in revelations relating to numerous government scandals.

The process of seeking information can be cumbersome and may entail long delays. Where the request is initially denied, the requestor can administratively appeal, and even file a lawsuit if the administrative appeal is unsuccessful. The most successful use of FOIA is by a few nongovernment organizations (NGOs) who can take the long view in their investigations of government wrongdoing, sometimes receiving documents more than a decade after they initially requested them. These NGOs work with journalists to highlight their findings, and on occasion their discoveries lead to Congressional investigations and legislative change.

While Congress granted a general right to access government information, it limited that right by including broad exemptions to the FOIA. Two of those exemptions are particularly...
relevant to national security information: the (b)(1) exemption for information that is classified pursuant to executive order, and the (b)(3) exemption for information that is protected pursuant to statute. Several statutes instruct the executive branch to protect national security-related information, including the statutory protection for intelligence sources and methods, encryption, and atomic weapons information.

Whistleblowers serve as an accountability mechanism when they call attention to illegal executive branch actions. [Give a few examples of whistleblowers doing this.] Executive branch whistleblowers may report illegal activity internally within the executive branch official or externally to Congress or the press. Congress has provided some protection for executive branch whistleblowers, but has excluded significant portions of the federal bureaucracy (those who engage in intelligence work) from its protection.

Congress has recognized the importance of whistleblowers by enacting a series of legal protections for them. [mention Lloyd-LaFollette Act of 1912 as a statement of policy, with later legal protections] In theory, these legal protections prohibit managers from retaliating against whistleblowers and provide redress if that retaliation does occur.\footnote{117} Since 1978, Congress has repeatedly enacted measures aimed at protecting government employees who blow the whistle on fraud, waste abuse.\footnote{118} Congress created a new executive branch agency, the Office of Special Counsel, and tasked it with role of protecting whistleblowers. But the first head of that agency, a Presidential nominee, actually worked to subvert the agency’s purpose, and trained governmental managers on how they could fire whistleblowers with impunity. The court that hears whistleblowers lawsuits has repeatedly interpreted the whistleblower protection statute narrowly, excluding many whistleblowers from its protection. Employees who blow the whistle on illegal government action continue to suffer retaliation, including the loss of their jobs, security clearances and careers. Even apart from these weaknesses in implementation of whistleblower protection, the statutes themselves exclude from their coverage executive branch employees who do intelligence-related work. In addition, the statutes explicitly exclude from protection the public disclosure of classified information.

In addition, Congress has occasionally established particular committees that include members chosen by the House or the Senate as well as by the President. . . . Recognizing that Congress and the executive branch sometimes disagree about whether particular information should be classified, in 2004 Congress passed legislation that seemed to give an advisory group, the Public Interest Declassification Board, responsibility to review the disputed material and make a recommendation to the President on whether particular information identified by a Congressional committee should be classified.\footnote{119} The Board consists of five members appointed by the President and four members chosen by Congressional leaders.\footnote{120}

At times, these specially appointed committee conduct investigations of past government conduct. Richard Mulgan points out that these investigations “are often the key factor in provoking the executive into itself undertaking rectification.”\footnote{121} One example of this phenomenon is the Commission on the Japanese Internment, which investigated – 40 years after

\footnote{117} cite prohibited practice statute.
\footnote{119} Pub.L. 108-458, § 1102, 118 Stat. 3638. Congress had authorized the creation of the Public Interest Declassification Board in 2000, but its responsibilities were limited to making general policy recommendations on declassification efforts rather than reviewing specific disputed documents. Pub.L. 106-567 Title VII, 114 Stat. 2831.
\footnote{120} Pub.L. 106-567 § 703(c)(1).
\footnote{121} RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 47 (2003).
the fact – the Executive Branch’s internment of over 100,000 Japanese Americans during World War II. The internment was essentially approved by the Supreme Court in *Korematsu v. United States*,\(^{122}\) but the internment is now seen as unnecessary, unjust, and based on prejudice of certain military officials rather than on military necessity. President Ford officially withdrew the Executive Order, and eventually Congress passed legislation authorizing reparations, based in part on the work of the Commission.

On occasion, Presidents appoint commissions to investigate alleged wrongdoing: 9/11 Commission; the Rogers Commission to investigate the Challenger space shuttle disaster in 1986. Such commissions may or may not have subpoena power, and may be of short duration or limited staff. The purpose tends to be both retrospective and prospective: finding facts about past wrongdoing and making recommendations about future government action.

### III. A Case Study in Accountability: The National Security Agency’s Warrantless Surveillance Program

One might expect that the multiplicity of the accountability mechanisms described above would hold the executive branch in check. But the executive branch has used claims of national security secrecy to undermine or defeat many of the mechanisms. This section examines the role of these accountability mechanisms regarding the NSA’s warrantless domestic surveillance program, and the degree to which the Bush Administration’s claims of national security secrecy undermined those mechanisms.

#### A. The NSA’s Warrantless Surveillance Program

During the 1970s, Congress undertook extensive investigations of U.S. intelligence activities, and discovered that intelligence agencies had engaged in warrantless surveillance of U.S. citizens based on their political beliefs and activities.\(^{123}\) In response, Congress passed the Foreign Intelligence Surveillance Act in 1978, and in doing so it clarified that within the United States, electronic surveillance is legal only if it is authorized by statute. There are two statutory regimes that authorize and regulate electronic surveillance: Title III of the Omnibus Crime Control Act of 1968, authorizing a warrant where there is probable cause to believe that the communication would reveal evidence of a crime; and the Foreign Intelligence Surveillance Act (FISA), authorizing a warrant where there is probable cause to believe that one of the parties is the agent of a foreign power or an international terrorist organization. To enforce this new regime, Congress included in FISA a criminal prohibition on any electronic surveillance not authorized by statute so that government officials who engage in surveillance without a warrant have committed a felony.\(^{124}\) Congress also provided a private cause of action to anyone subjected to such illegal surveillance.\(^{125}\)

The Fourth Amendment’s warrant requirement does not reach individuals outside the country, and two statutes discussed above (Title III and FISA) do not limit the government’s ability to conduct electronic surveillance of communications that take place entirely outside of

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122 323 U.S. 214 (1944).
123 *Intelligence Activities and the Rights of Americans*, Final Report of the U.S. Congress, Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities (The “Church Committee”), Apr. 26, 1976.
the United States. The National Security Agency (NSA) routinely, legally and without any warrants monitors communications between individuals who are both outside the United States.

Soon after September 11, 2001, the Bush Administration decided to expand this surveillance to reach the content of telephone and e-mail communications where one of the parties is inside the United States and one of the parties is suspected of having a link to al Qaeda or a related terrorist organization. The traditional understanding is that because one of the parties is inside the United States, such surveillance requires a warrant, either under Title III or FISA. Nonetheless, the Bush Administration went forward with this surveillance without warrants, and without informing most members of the Congressional intelligence committees. In addition, news reports indicate that AT&T, Verizon and BellSouth gave NSA records of their customers’ phone calls, enabling NSA to use these records as part of a massive data-mining operation. Such disclosure of customer calling records may violate federal and state law.

Despite the multiple checks on executive branch illegality discussed in the previous section, this apparently illegal surveillance program continued from soon after September 11, 2001 until January of 2007, when the government brought it under the supervision of the Foreign Intelligence Surveillance Court (FISC).

How, if at all, did the accountability mechanisms operate in connection to this program? While much remains secret, it is possible to sketch out some of the ways that these accountability mechanisms failed to control this program.

B. Executive, Congressional and Judicial Checks while the Surveillance Program Remained Secret

One of the checks on this surveillance program was its automatic sunset provision. The President initially authorized the program for about every 45 days, and then renewed that authorization at the end of each 45-day period. This kind of automatic sunset constitutes an internal check on executive power in that it requires renewed attention to the program each time it expires. This sunset provision proved particularly important because it was tied to another

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126 After its revelation, the Bush administration started referring to this operation as the “Terrorist Surveillance Program.” President Bush initially asserted that one of the parties to the communication has “known links to al Qaeda and related terrorist organizations,” Transcript of President’s Radio Address, Dec. 17, 2005, available at http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html, but two days later Attorney General Gonzales clarified that “we have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.” Press Briefing by Att’y Gen. Alberto Gonzales and Gen. Michael Hayden, Principal Deputy Dir. for Nat’l Intelligence (Dec. 19, 2005) (emphasis added), available at http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html. If there were probable cause to believe that one of the parties were a member of al Qaeda, the government would be able to get a FISA warrant to monitor the communication, so “reasonable basis” must be less than probable cause.

127 Leslie Cauley, NSA has Massive Database of Americans’ Phone Calls, USA TODAY, May 11, 2006, at 1A (indicating that Qwest refused to turn over these customer records without a court order).

128 Leslie Cauley, NSA has Massive Database of Americans’ Phone Calls, USA TODAY, May 11, 2006, at 1A (citing § 222 of the federal Communications Act).


accountability mechanism: a requirement that the Attorney General certify the legality of the program each time that it was renewed.

Before the surveillance program could proceed, the Attorney General had to certify its legality. The Attorney General generally defers to the Justice Department’s Office of Legal Counsel (OLC) regarding legal opinions, and so it fell to OLC to analyze the legality of the surveillance program. At this time, Assistant Attorney General Jay Bybee and his Deputy, John Yoo, were in charge of OLC. The OLC surveillance opinion has not yet been made public, but there is evidence that it was problematic. In 2003, Jack Goldsmith replaced Jay Bybee as Assistant Attorney General, and began to review the opinions issued by his predecessor.

Goldsmith informed Attorney General John Ashcroft and Deputy Attorney General James Comey that he needed to withdraw the earlier opinion because of problems in its legal analysis, and they concurred. Because of the 45-day sunset period and the requirement that the Attorney General sign off each time on the legality of the surveillance program, withdrawal of the earlier OLC opinion would have the effect of halting the program in its then-current form.

The end of the 45-day period occurred at a time when Attorney General Ashcroft was hospitalized and had transferred his responsibilities to Deputy Attorney General Comey, who became the Acting Attorney General. When the White House learned that the Justice Department was withdrawing its imprimatur for the surveillance program, White House Counsel Alberto Gonzales went to Ashcroft’s hospital room, apparently to ask him to overrule Comey. In dramatic testimony before the Senate Judiciary Committee in 2007, Comey testified about the March 2004 confrontation between Gonzales and the Justice Department lawyers in Ashcroft’s hospital room. Ashcroft refused to re-approve the program, and the Bush Administration reauthorized the program without the Attorney General’s certification. In response, Comey and other high level Justice Department officials, including FBI director Robert Mueller, prepared to resign. Andrew Card expressed concern “that there were to be a large number of resignations at the Department of Justice.” Comey later explained that “I couldn’t stay, if the administration was going to engage in conduct that the Department of Justice had said had no legal basis.”

While the executive branch is statutorily required to keep the full congressional intelligence committees “fully and currently informed of all intelligence activities,” the Bush Administration informed only the chair and ranking members of those committees, along with the Speaker and minority leader of the House of Representatives, and the majority and minority

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131 Transcript of President’s Radio Address, Dec. 17, 2005, available at http://www.whitehouse.gov/news/releases/2005/12/print/20051217.html (indicating that the program had to approved “our nation's top legal officials, including the Attorney General and the Counsel to the President.”)
135 Transcript, Senate Judiciary Committee hearing on the U.S. Attorney Firings (May 17, 2007) p. 19. Comey later explained that “I couldn’t stay, if the administration was going to engage in conduct that the Department of Justice had said had no legal basis.” Id.
138 50 U.S.C. § 413a. This obligation extends only “[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” Id.
leaders of the Senate about the program.\(^{139}\) The Bush Administration used a claim of national security secrecy to prevent even this smaller group of legislators from effectively exercising any oversight regarding the program. It forbade these eight members of Congress from discussing this issue with other members of the intelligence committees or even their staffs. The powerlessness of these legislators is illustrated by the handwritten note that Sen. Jay Rockefeller sent to Vice-President Cheney, noting that Rockefeller is “neither a technician nor an attorney,” and decrying his “inability to consult staff or counsel” in order to evaluate the legality of the program.\(^{140}\)

Reports indicate that the Chief Judge of the Foreign Intelligence Surveillance Court was involved in overseeing this program, but it is unclear what role she played.

C. Congressional, Judicial, Executive and Public Responses to the Disclosure of the Program

On December 16, 2005, the New York Times published an article revealing the NSA domestic surveillance program.\(^{141}\) The Times had held off from publishing the story for more than a year, apparently at the request of Bush Administration officials who claimed the publication would harm national security.\(^{142}\) The Times’ decision to go ahead with publication was apparently motivated by its desire not be scooped on the story by its own reporter’s publication of his book covering the issue.\(^{143}\) So competition among publications was instrumental in ensuring that this program came to light.

The following day, President Bush acknowledged the existence of this program in his weekly radio address, and a few days later Attorney General Alberto Gonzales and General Michael Hayden convened a press conference to discuss the legal justification for the program. Within one week of the disclosure, the Justice Department released a 5-page letter to the Chairs and Ranking Members of the Intelligence Committees defending the legality of the program,\(^{144}\) and a month later, the Justice Department issued a 42-page white paper with more detailed legal arguments.\(^{145}\) Legal scholars and non-governmental organizations responded with their own critiques of the white paper.

\(^{139}\) This is the group of legislators (sometimes referred to as “the gang of eight”) to whom the Executive branch must disclose covert actions, 50 U.S.C. § 413b(c)(2), and the Bush Administration may have claimed that the surveillance program was a covert action, thus narrower disclosure. But covert actions are defined by statute as activities to secretly “influence political, economic, or military conditions abroad.” Furthermore, the statute excludes from the definition of covert action “any activities the primary purpose of which is to acquire intelligence” are excluded from the definition of covert action. 50 U.S.C. § 413b(e)(1).


\(^{142}\) James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, A1. The article did not include “[s]ome information that administration officials argued could be useful to terrorists” Id.

\(^{143}\) Gabriel Sherman, *Risen Gave Times A Non-Disclosure on Wiretap Book*, N.Y. OBSERVER, Jan. 22, 2006 (noting that Times executive editor Bill Keller denied that Risen’s book was a factor in the timing of the NSA story, but other sources said that Times editors pressed to publish the story prior to the book’s publication).


\(^{145}\) Office of Legislative Affairs, U.S. Department of Justice, December 22, 2005.

\(^{146}\) “Legal Authorities Supporting the Activities of the National Security Agency Described by the President,” Office of Legal Counsel, U.S. Department of Justice, January 19, 2006.
The Times article indicated that “[n]early a dozen current and former officials” discussed the program with the reporters “because of their concerns about the operation’s legality and oversight.”\textsuperscript{147} In response, the Justice Department began a criminal investigation to find out the identity of those who leaked the information.\textsuperscript{148}

The NSA domestic spying program appears to violate the FISA prohibition, and after the New York Times’ disclosure of the program, individuals and non-governmental organizations (NGOs) filed numerous lawsuits around the country contesting its legality.\textsuperscript{149} Five of these lawsuits were against a federal government agency or government official.\textsuperscript{150} Dozens of lawsuits were filed against AT&T, Verizon and MCI, telecommunications companies that allegedly worked with the NSA in intercepting these communications.\textsuperscript{151} In addition, the Connecticut, Maine and Vermont state public utility commissions, two individual commissioners in Missouri, and the New Jersey Attorney General attempted to investigate these companies, seeking information about whether the companies violated state privacy laws in assisting the NSA.\textsuperscript{152} The federal government sued these state entities and officials to prevent them from investigating the program.\textsuperscript{153}

A difficulty facing the plaintiffs in all these suits is proving that they actually were subjected to the surveillance program. While the government has confirmed the existence of the program, it has not provided specifics of who was targeted for surveillance, so the plaintiffs have had a hard time proving that they have standing. Some of the plaintiffs simply allege that they make international calls, and thus believe that they are subject to surveillance.\textsuperscript{154} Other plaintiffs seem to have a stronger claim that they were likely subject to this surveillance, such as the Center for Constitutional Rights lawyers representing Guantanamo prisoners who have communicated with those prisoners’ family and friends abroad.\textsuperscript{155}

\textsuperscript{148} Michael Isikoff, \textit{Looking for a Leaker}, NEWSWEEK, Aug. 13, 2007, at 8 (describing FBI raid on the home of a former Justice Department lawyer who had concerns about the legality of the surveillance).
\textsuperscript{149} For an excellent in-depth discussion of these lawsuits, see \textsc{Robert Timothy Reagan}, \textsc{Terrorism-Related Cases: Special Case-Management Challenges – Case Studies 124-59} (March 26, 2008)
\textsuperscript{150} ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007); CCR v. Bush (filed in Manhattan but transferred to N.D. California); Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007); Shubert v Bush, No. M:06-cv-01791 (N.D. Cal. May 11, 2007) (filed in Brooklyn, but transferred to N.D. California); Guzzi v. Bush (filed in Atlanta, but transferred to N.D. California). See \textsc{Robert Timothy Reagan}, \textsc{Terrorism-Related Cases: Special Case-Management Challenges – Case Studies 131-32} (March 26, 2008)
\textsuperscript{151} A federal judicial center report indicated that “[a]t least 45 suits” have stemmed from the NSA domestic surveillance program revealed by the New York Times and the data-mining program revealed by USA Today. \textsc{Robert Timothy Reagan}, \textsc{Terrorism-Related Cases: Special Case-Management Challenges – Case Studies 132, 125, n. 1090} (March 26, 2008) (indicating that 4 cases against the federal government and 35 cases against telecommunications companies have been transferred to the Northern District of California)
\textsuperscript{152} AT&T Michigan’s Motion to Dismiss at 9, In re ACLU of Michigan v. AT&T Michigan, available at http://efile.mpisc.cis.state.mi.us/efile/docs/15204/0066.pdf.
\textsuperscript{153} \textsc{Robert Timothy Reagan}, \textsc{Terrorism-Related Cases: Special Case-Management Challenges – Case Studies 128, 140} (March 26, 2008) (identifying the five states as Connecticut, Maine, Missouri, New Jersey and Vermont).
\textsuperscript{154} ACLU v NSA, 493 F.3d 644 (6th Cir. 2007); Amended Compl., Shubert v Bush, No. M:06-cv-01791 (N.D. Cal. May 11, 2007).
\textsuperscript{155} This lawsuit, Center for Constitutional Rights v. Bush, like almost all other lawsuits, was transferred to the Northern District of California. \textsc{Robert Timothy Reagan}, \textsc{Terrorism-Related Cases: Special Case-Management Challenges – Case Studies 129} (March 26, 2008).
In all of these NSA cases, the government filed motions to dismiss based on state secrets privilege.\(^{156}\) Up until recently, the government invoked the state secrets privilege to prevent a private party in civil litigation from accessing or putting into evidence specific items of information that the government asserted must be kept secret for national security or foreign policy reasons. In these NSA cases, the government invoked the state secrets privilege to dismiss the cases in their entirety, asserting either that the plaintiffs could not prove standing or that the defendant could not prove its defense without accessing information that is subject to the privilege. While this broad use of the state secrets privilege is not unprecedented, it is occurring on a larger scale than in the past. In the first case to reach a federal appellate court, \textit{ACLU v. NSA}, the Sixth Circuit ruled for the government on standing grounds, finding that the plaintiffs could not prove that they had been subject to the surveillance, and cannot get discovery because of state secrets privilege.\(^{157}\)

One group of plaintiffs seem to have some quite strong evidence that they were subject to surveillance – those connected with the Al Haramain Foundation, an Oregon charity. In 2004, the Treasury Department froze the foundation’s assets because of its alleged ties to al Qaeda.\(^{158}\) Al Haramain contested the government’s allegations, and as part of that proceeding, the government turned over to Al Haramain’s lawyer discovery material that documented private phone conversations between one of the foundation’s officers in Saudi Arabia and two of its U.S.-based lawyers.\(^{159}\) The government later asserted that it had provided this document in error, and retrieved it from al Haramain’s lawyers, but did not retrieve the copies in the hands of al Haramain itself.\(^{160}\) After the New York Times disclosed the NSA program in December of 2005, al Haramain concluded that this document indicated that it had been subject to the NSA’s warrantless surveillance, and filed suit in Oregon District Court, providing the court with a copy of the document in a sealed filing.\(^{161}\)

The Oregon District Court denied the government’s motion to dismiss based on state secrets grounds, and allowed plaintiffs to rely on their memories of the sealed document for evidence that they were subject to surveillance.\(^{162}\) The government appealed to the Ninth Circuit, which remanded the case on the issue of whether FISA preempts the state secrets privilege.\(^{163}\) While the al Haramain case was pending in the Ninth Circuit, all of the NSA-related lawsuits (except for \textit{ACLU v. NSA}) were transferred to the Northern District of California as part of the multi-district litigation protocol,\(^{164}\) so the \textit{al Haramain} case was remanded to Judge

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\(^{156}\) Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007); Hepting v. AT&T Corp., 439 F. Supp. 2d 974 (N.D. Cal. 2006); ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007); see also ROBERT TIMOTHY REAGAN, TERRORISM-RELATED CASES: SPECIAL CASE-MANAGEMENT CHALLENGES – CASE STUDIES (March 26, 2008) n. 1091 (listing state secrets-based motions to dismiss in additional cases).


\(^{159}\) Al Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007).


\(^{163}\) Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190 (9th Cir. 2007).

Vaughn Walker in San Francisco. In 2008, Judge Walker ruled that under certain conditions, FISA partially preempts the state secrets privilege.\(^{165}\)

The FISA statute provides a civil cause of action to some of those who have been subject to warrantless surveillance,\(^{166}\) and includes procedures allowing discovery that is not available under the state secrets privilege.\(^{167}\) Judge Walker ruled that where these procedures apply, they preempt the state secrets doctrine, but in order to benefit from that preemption, plaintiffs must first show they have been subjected to electronic surveillance.\(^{168}\) In making this preliminary showing, plaintiffs are subject to the state secrets privilege. Once they make this showing, the court will then turn to the issue of whether the surveillance was legal, and in making that legality determination, the state secrets privilege does not apply. Instead the court will use the procedures set forth in FISA. Those procedures allow the court to examine documents in camera and even to disclose materials to the plaintiffs “under appropriate security procedures and protective orders” if “such disclosure is necessary to make an accurate determination of the legality of the surveillance.”\(^{169}\)

The state secrets privilege prevents al Haramain from relying on the accidentally revealed document to show that it had been subject to surveillance, and so Judge Walker dismissed al Haramain’s case without prejudice, allowing them to re-file if they have non-privileged evidence showing that they were subject to electronic surveillance.\(^{170}\)

In early 2006, more than forty members of Congress requested that the Justice Department’s Office of Professional Responsibility (OPR) open an investigation into whether the department lawyers acted properly in approving the program.\(^{171}\) In response, OPR opened an investigation, and planned to interview Justice Department lawyers who had been involved in the approval process. The Bush Administration considered all of this information to be classified, and so in order to pursue the investigation, OPR officials would need security clearances. Such clearances had been granted to Civil Division lawyers defending the program in court and to criminal division lawyers investigating the leak to the New York Times.\(^{172}\) H. Marshall Jarrett, the head of OPR, requested that he and six OPR employees be given security clearances so that they could begin the investigation, but apparently on the advice of then Attorney General Alberto Gonzales, President Bush denied the clearances, blocking the OPR investigation.\(^{173}\) This was the first time in its history that OPR shut down an investigation because it was denied security clearances.\(^{174}\) Jarrett notified the members of Congress who had requested the probe, and they


\(^{166}\) 50 U.S.C. § 1810 provides a cause of action to those whose communications were intentionally subject to warrantless electronic surveillance as long as that person is not “a foreign power or an agent of a foreign power.”

\(^{167}\) 50 U.S.C. § 1806(f).

\(^{168}\) See 50 U.S.C. § 1810.

\(^{169}\) See 18 U.S.C. § 1806(f).


responded by writing the President and requesting that the clearances be granted. More than a year later, when Michael Mukasey replaced Gonzales as Attorney General, the Bush Administration granted OPR the clearances and the investigation began.

In January 2007, the Bush Administration changed the surveillance program and brought it under the supervision of the Foreign Intelligence Surveillance Court (FISC). This decision constitutes partial rectification by ceasing the most controversial aspect of the program: the lack of any judicial supervision. This decision to bring the program under court supervision may have been caused by pressure from the cooperating telecommunications companies or by the prospect of a less friendly 110th Congress controlled by the Democratic party.

This surveillance program appears to have violated FISA, and a knowing violation of FISA is a felony. Thus, those who authorized the program arguably may have committed a felony. A few Democratic members of Congress proposed impeaching President Bush for FISA violations, but there was little political support for such a move. Impeachment was advocated by those outside of the mainstream of the Democratic party: Cynthia McKinney, who introduced an impeachment bill at the very end of the 109th Congress, after she had lost reelection, and Dennis Kucinich. More powerful members of Congress, such as Judiciary Committee Chair John Conyers, refused to move forward with impeachment proceedings.

D. Implications for Executive Branch Secrecy Claims

Examination of how these mechanisms operated in connection with the warrantless surveillance program shows how the Bush Administration systematically used national security secrecy to prevent these accountability mechanisms from scrutinizing its program. This systematic undermining of accountability mechanisms through claims of national security secrecy suggests that courts and other accountholders may need to scrutinize more closely the executive branch’s secrecy claims where those claims would prevent evaluation of allegedly illegal conduct.

The need for enhanced scrutiny of secrecy claims is particularly pressing with respect to its use of the state secrets privilege. The Bush Administration succeeded in using the state secrets privilege to block dozens of lawsuits arising out of its controversial programs of domestic surveillance and rendition, and the Obama administration is continuing this practice. In persuading courts to dismiss these lawsuits, the executive branch prevents courts from serving as an accountability mechanism that could independently examine and evaluate the legality of these programs.

In other contexts where there is an allegation of criminal misconduct, courts have carved out exceptions to evidentiary privileges. At the end of the Nixon administration, the Supreme Court recognized that one type of executive privilege -- the presidential communications

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178 Cite 2 9th circuit examples february 2009.
privilege -- must give way to the needs of a criminal prosecution. Similarly, the attorney-client privilege gives way in the face of evidence that the client has attempted to use her lawyer’s services in a crime or a fraud. These wrongdoing-based exceptions show that even worthy privileges sometimes must give way to a competing public concern for the disclosure of wrongdoing. The disclosure of serious government wrongdoing may be just such a competing concern that should prevail over the national security interests protected by the state secrets privilege. This article has not attempted to make the case for a crime-based exception to the state secrets privilege. But one of the implications is that a crime-based exception to the state secrets privilege may be necessary to prevent the executive branch from doing an end run around the judicial branch cum accountability mechanism.

IV. Conclusion

This article is a first attempt to outline some of the myriad mechanisms that hold the executive branch and its officials accountable for violations of the law. This cataloging of accountability mechanisms reveals a distributed architecture of accountability, with mechanisms of varying independence and efficacy inside and outside the executive branch. In some situations, one mechanism interferes with the operation of another, as occurs when a congressional committee’s provision of witness immunity results in overturning of a criminal conviction of a wrongdoer. But in many situations, these diverse mechanisms actually build on each other, as occurs when a whistleblower’s revelation to a journalist results in news story, which then prompts congressional, inspector general, and sometimes even criminal investigations. So any attempt to assess the efficacy of an individual accountability mechanism must consider how it builds on and contributes to the work of other accountability mechanisms.

The article also analyzed in detail how these accountability mechanisms operated – or failed to operate – in connection with the Bush Administration’s warrantless surveillance program. The secrecy surrounding that program apparently undermined the ability of existing accountability mechanisms to operate, from Congressional committee oversight to Inspector General investigations. There has not yet been a thorough, transparent and independent evaluation of that controversial program. In light of this record, an independent commission investigation may be appropriate.

181 Come up with an example of cascading or interwoven mechanisms.
# Appendix

## Executive Branch Officials Prosecuted for Misleading Congress (1949 – present)

<table>
<thead>
<tr>
<th>Name</th>
<th>Official Position</th>
<th>Predicate Conduct</th>
<th>Result</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bennett E. Meyers</td>
<td>US Army Officer – Deputy Chief of Procurement of Aircraft and Aircraft Parts for the Army Air Force</td>
<td>After World War II, Meyer was implicated in possible war profiteering and fraud, because he had procured parts for the Army from his own company. In order to escape responsibility for his corrupt practices, Meyers told Bleriot H. Lamarre, the president of Aviation Electric Corporation, which Meyers owned, to lie to Congress about Meyer’s ownership of the company and two different gifts from the company to Meyers.</td>
<td>Convicted of three counts of subornation of perjury.ii</td>
<td>1949 (conviction affirmed)</td>
</tr>
<tr>
<td>Alger Hiss</td>
<td>Director of the Office of Special Political Affairs (Department of State)</td>
<td>Denied to the HUAC that he was a communist or had spied for the Soviets.iv</td>
<td>Convicted of perjury before Congress; sentenced to five years of prison.v</td>
<td>1950 (convicted)vi</td>
</tr>
<tr>
<td>Richard Kleindienst</td>
<td>Attorney General</td>
<td>Made false statements to Senate committee at hearing on his confirmation as Attorney General regarding White House interference in the Justice Department’s antitrust litigation against International Telephone and Telegraph. viii</td>
<td>Pleased guilty to withholding information from Congress; cooperated with prosecution; sentence suspended to one month imprisonment, $100 fine; and one month unsupervised probation; investigated and charged by Watergate Special Prosecutor.ix</td>
<td>1975 (convicted)</td>
</tr>
<tr>
<td>John Mitchell</td>
<td>Attorney General</td>
<td>Made false statements to Senate Select Committee on Presidential Campaign Activities regarding his approval of the funding for the Watergate break-in, as well as his later attempts to cover up the scandal.xi</td>
<td>Convicted of making false statements to Congress under 18 U.S.C. § 1621 and other related crimes; sentenced to 20-60 months imprisonment; investigated and charged by Watergate Special Prosecutor.xii</td>
<td>1975 (convicted)</td>
</tr>
<tr>
<td>H. R. Haldeman</td>
<td></td>
<td>Made false statements to Senate</td>
<td>Convicted of three</td>
<td>1975</td>
</tr>
<tr>
<td>White House Chief of Staff(^\text{xiii})</td>
<td>Select Committee on Presidential Campaign Activities regarding his and Nixon’s contemporaneous knowledge of the Watergate cover-up.</td>
<td>counts of false statements before Congress, and two related counts; sentenced to up to 25 years imprisonment and a $21,000 fine; investigated and charged by Watergate Special Prosecutor.(^\text{xiv})</td>
<td>(convicted)</td>
<td></td>
</tr>
<tr>
<td>Richard Helms CIA Director(^\text{xv})</td>
<td>Misrepresented the CIA’s covert involvement in Chile, which included attempts to influence the 1970 presidential election and assassination and coup attempts, contrary to the policies of the U.S. Government.</td>
<td>Pled guilty to two misdemeanor counts under 2 U.S.C. § 192 (refusal to testify); sentenced to two years in prison (suspended) and $2,000 fine.(^\text{xvi})</td>
<td>1977 (convicted)</td>
<td></td>
</tr>
<tr>
<td>Rita M. Lavelle EPA Assistant Administrator(^\text{xvii})</td>
<td>Testified falsely in a sworn statement submitted to a congressional subcommittee and repeated the falsehood under oath that she had recused herself from involvement in an investigation of a former employer.(^\text{xviii})</td>
<td>Convicted of making a false statement to Congress, obstructing Congress, and two counts of perjury; sentenced to six month imprisonment and fined $10,000.(^\text{xix})</td>
<td>1985 (conviction affirmed)</td>
<td></td>
</tr>
<tr>
<td>Robert C. McFarlane National Security Advisor(^\text{xx})</td>
<td>Initially denied and then gave partially false information about his role as organizer of the Iran/contra scheme; helped others, including his subordinate North, cover up the scandal and lied about doing so; kept certain parts of the affair secret from Congress.</td>
<td>Pled guilty to four misdemeanor charges that he unlawfully withheld information from Congress about contra-support activities; sentenced to two years probation, 200 hours community service, and $20,000 fine; charges brought by Independent Counsel Lawrence E. Walsh; pardoned.(^\text{xxi})</td>
<td>1988 (convicted); 1992 (pardoned)</td>
<td></td>
</tr>
<tr>
<td>Oliver L. North Deputy Director of Political-Military Affairs (NSC Staff)(^\text{xxii})</td>
<td>Helped to “draft a false chronology of the Iran arms sales and altered and destroyed documents in response to congressional inquiries into the Iran initiative.’(^\text{xxiii})</td>
<td>Found guilty of aiding and abetting obstruction of Congress; sentenced to two years probation and 1,200 of community service and fined $150,000; vacated on appeal; charges brought by Independent Counsel Lawrence E. Walsh.(^\text{xxiv})</td>
<td>1989 (convicted); 1990 (vacated)</td>
<td></td>
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<tr>
<td>Name</td>
<td>Allegations</td>
<td>Charges</td>
<td>Sentencing/Outcome</td>
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<td>--------------------------------------------</td>
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<tr>
<td>John M. Poindexter</td>
<td>Shredded and altered paper and computer trail regarding Iran/contra; repeatedly gave false version of Iran/contra transactions that exculpated himself and the President to Congress.</td>
<td>Convicted of one count of conspiring to obstruct official inquiries and proceedings, two counts of obstructing Congress, and two counts of false statements to Congress; sentenced to six months in prison; overturned on appeal; charges brought by Independent Counsel Lawrence E. Walsh.xxxvi</td>
<td>1990 (convicted); 1991 (vacated)</td>
<td></td>
</tr>
<tr>
<td>Alan D. Fiers, Jr.</td>
<td>Cooperated with Independent Counsel investigation after it came to light that he had made false statements regarding operational aspects of Iran/contra activities.</td>
<td>Pled guilty to two counts of withholding information from Congress; sentenced to 100 hours community service; charges brought by Independent Counsel Lawrence E. Walsh; pardoned. xxviii</td>
<td>1991 (convicted); 1991 (pardoned)</td>
<td></td>
</tr>
<tr>
<td>Elliot Abrams</td>
<td>“[W]ithheld from Senate Foreign Relations Committee and the House Permanent Select Committee on Intelligence (HPSCI) in October 1986 his knowledge of North’s contra-assistance activities . . . also admitted that he withheld from HPSCI information that he had solicited $10 million in aid for the contras from the Sultan of Brunei.”xxxix</td>
<td>Pled guilty to two counts of withholding information from Congress under 2 U.S.C. § 192; charges brought by Independent Counsel Lawrence E. Walsh; pardoned; publicly censured by DC bar.xxxi</td>
<td>1991 (convicted); 1992 (pardoned); 1997 (censured) xxxii</td>
<td></td>
</tr>
<tr>
<td>Duane R. Clarridge</td>
<td>Testified about role in Iran/contra but denied contemporaneous knowledge that weapons were being shipped or soliciting support from third countries.</td>
<td>Indicted on seven counts of perjury and false statements to congressional and presidential investigators; charges brought by Independent Counsel Lawrence E. Walsh; pardoned before trial.xxxiv</td>
<td>1991 (indicted); 1992 (pardoned)</td>
<td></td>
</tr>
<tr>
<td>Clair E. George</td>
<td>“[C]harged with falsely denying before Congress knowledge of who was behind the contra-</td>
<td>Convicted of one counting of making false statements before</td>
<td>1992</td>
<td></td>
</tr>
</tbody>
</table>

xxxv, xxxvi, xxxvii, xxxviii, xxxix, xxiv, xxviii, xxx, xxvi, xxv, xxiv, xxiii, xxxii, xxxi
<table>
<thead>
<tr>
<th>Operations xxxv</th>
<th>resupply operation and the true identity of Max Gomez, a former CIA operative whose real name was Felix Rodriguez and whom Hasenfus had publicly identified as part of the resupply operation. According to the charges, George also falsely denied contacts with retired U.S. Air Force Major General Richard V. Secord, who was involved in both the Iran and contra operations. xxxvi</th>
<th>Congress and one count perjury before Congress; charges brought by Independent Counsel Lawrence E. Walsh; pardoned before sentencing. xxxvii</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caspar W. Weinberger Secretary of Defense xxxviii</td>
<td>Testified, contrary to evidence, that was not a knowing participant in Iran/contra and withheld from Congress relevant personal notes indicating his participation.</td>
<td>Indicted on obstructing a congressional investigation, making false statements to Congress, and two counts of perjury before Congress; charges brought by Independent Counsel Lawrence E. Walsh; pardoned before trial. xxxviii</td>
</tr>
<tr>
<td>Deborah Gore Dean Department of Housing and Urban Development Official xl</td>
<td>Lied to the Senate Committee on Banking, Housing and Urban Affairs about her nomination to the position of Assistant Secretary for Community Planning and Development; “key-player” in the department’s use of funds to favor “developers willing to pay huge fees to lobbyists with whom she associated.” xli</td>
<td>Convicted of four counts of false statements to Congress under 28 U.S.C. § 1001, four counts of perjury under 28 U.S.C. § 1621 for the same statements, and four related counts; § 1001 convictions reversed on appeal, three of § 1621 convictions upheld; prosecuted by Independent Counsel Arlin M. Adams. xlii</td>
</tr>
<tr>
<td>Michael Horner Former U.S. Customs Service Inspector xliii</td>
<td>In retaliation against his former employers, Horner fabricated a memo on Customs Service letterhead that suggested the Customs Service was aiding Mexican drug smugglers; in order to convince Senator Diane Feinstein to pursue an investigation, Horner produced additional false affidavits from Customs Service officials which stated that the original document was legitimate.</td>
<td>Pled guilty to conspiracy to obstruct a congressional investigation xliv</td>
</tr>
</tbody>
</table>

| 1992 (indicted, pardoned) | 1993 (convicted); 1995 (appeal) | 2000 (convicted) |
| **John T. Korsmo**  
Federal Housing  
Finance Board  
Chairman  
[72](footnote) | Lied in a written response to the Senate Committee on Banking, Housing, and Urban Affairs, which was investigating the propriety of his being listed as a “special guest” on a campaign fundraising letter sent to banking officials he regulated. | Pled guilty to making false statements to Congress; sentenced to 18 months probation and a $5,000 fine. | 2005 |
| **David H. Safavian**  
Chief of Staff for the General Services Administration  
[72](footnote) | Accused of concealing information from a Senate investigator looking into Jack Abramoff’s activities. | Convicted for obstructing a Senate proceeding and making false statements to a Senate investigator, along with related crimes; all counts reversed and case remanded on appeal.  
[72](footnote) | 2006  
(convicted);  
2008  
(reversed)  
[72](footnote) |

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2. Convicted of three counts under Title 22, Sec. § 2501, D.C.Code (1940). *Id.*
3. United States v. Hiss, 185 F.2d 822, 824-25 (2d Cir. 1950).
6. Hiss was also charged and convicted of perjury for his later grand jury testimony to the same. *Hiss*, 185 F.2d at 824-25.
7. Id. at 147-50.
13. The related crimes were one count of conspiracy to obstruct the investigation into the Watergate cover-up and one count of obstruction of justice. *CONGRESSIONAL QUARTERLY, WATERGATE: CHRONOLOGY OF A CRISIS* 535, 836 (Mercer Cross et al. eds., 1975); United States v. Haldeman, 559 F.2d 31, 51 n.3 (D.C. Cir. 1976).
15. *Id.*; PUB. INTEGRITY SECTION, CRIMINAL DIV., U.S. DEP’T OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 1978, 4, http://www.usdoj.gov/criminal/pin/doc/arpt-1978.pdf. Investigators contemplated bringing other charges, such as perjury, but it was far from certain that they would be able to force Helms to disclose the classified information needed for such a conviction. Thus, they offered the two misdemeanor withholding of information counts in exchange for no jail time or sentencing. Helms accepted the deal, but the judge felt it necessary to impose a stronger sentence, resulting in the jail time and fine. Powers, *supra* note 15.
17. Lavelle, 751 F.2d at 1268-70.

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P. 32 of 34
Limitation of USC §1001 to the Executive Branch


Lawrence E. Walsh, Independent Counsel, Final Report of the Independent Counsel for Iran/Contra Matters, Volume I: Investigations and Prosecutions 79-104 (1994), available at http://history.liberatedtext.org/ic/01mcfarlane.html. Id. McFarlane was one of six Iran/contra defendants pardoned by President Bush. “In recommending the acceptance of this plea of guilty, Independent Counsel gave up the opportunity to prosecute McFarlane as a member of the conspiracy to defraud the United States by conducting an unauthorized covert activity, for making false statements to Congress, and for obstruction of a congressional investigation. The strength of such felony prosecutions would lie in the admissions of McFarlane and the documentary proof of memoranda from North to McFarlane. In addition, members of the NSC staff could have testified to North’s direct access to McFarlane, notwithstanding their difference in rank.” However, North and Poi ndexter both refused to testify without immunity, and McFarlane denied all other guilt. Additionally, the independent investigator was worried that McFarlane’s trial and testimony might disrupt their other prosecutions. McFarlane agreed to cooperate with the investigation as part of his plea agreement. Id.

Id. at 105-22, available at http://history.liberatedtext.org/ic/02north.html.

North was originally charged on twelve counts: two counts of obstructing Congress, three counts of false statements to Congress, an additional count of obstruction of Congress on an aiding and abetting theory, one count of obstructing a presidential inquiry, one additional count of false statements (to the presidential investigator), one count of shredding and altering official documents, accepting an illegal gratuity, conversion of traveler’s checks, and one conspiracy to defraud the United States. The major conspiracy charges had to be dropped due to information classification issues. In addition to the aiding and abetting obstruction count, North was also found guilty of shredding and altering official documents and accepting an illegal gratuity. North was not given prison time because the sentencing judge felt that probation and community service would be more effect, but this also gave North little incentive to cooperate with the ongoing independent investigation. On appeal, the D.C. Circuit Court of Appeals found that North’s trial had been tainted by the immunized congressional testimony he had given on national television and vacated the convictions. Id.

Id. at 123-36, available at http://history.liberatedtext.org/ic/03poindexter.html.

Poindexter was originally indicted on seven counts. Two conspiracy charges were dropped due to the confidential information required for conviction. His convicted was overturned on appeal because his trial had been tainted by earlier immunized testimony and other grounds. Id.

Id. at 263-86, available at http://history.liberatedtext.org/ic/19fiers.html.

Fiers’ plea was part of a testimony agreement. Id.

In re Abrams, 689 A.2d 6, 6 (D.C. Cir. 1997).

Id. at 6, 9.

Id. at 9, 19.

Id. at 6-9.


Id. “On November 26, 1991, a federal Grand Jury indicted Clarridge on seven counts of perjury and false statements to congressional investigators and to the President’s Special Review Board (the Tower Commission) stemming from his testimony about his role in the November 1985 arms shipment to Iran.” Counts one through three charged perjury before the Senate Select Committee on Intelligence under 28 U.S.C. 1621. Count four charged perjury before the House Permanent Select Committee. Count five charged false statements before the president’s Tower Commission. Count six charged perjury before the Select Iran/contra Committees. Count seven charged false statements in a deposition before the staff of the Select Iran/contra Committees. Pardoned before trial along with five others. Id.


Id.

Id. George was initially indicted by a grand jury on ten felony counts of perjury, false statements, and obstruction of Congressional and grand jury investigations. Three obstruction counts were then dropped after the narrow construal of the statute in the Poindexter case. Several months later, George was indicted by a grand jury of two supplemental counts. Nine counts were brought to trial: two counts of false statements to the Senate Foreign Relations Committee (SFRC), two counts of obstructing Congress, two additional counts of false statements to the House Permanent Select Committee on Intelligence (HPSCI), perjury before the Senate Select Committee on Intelligence (SSCI), obstructing a grand jury investigation, and perjury before a grand jury. The first trial resulted in a mistrial after the jury could not reach a unanimous verdict regarding any count. The independent investigator then dropped the two obstruction counts and some of the charged false statements where more than one statement was charged as false. The jury returned a guilty verdict as to one of the counts of false statements before the HPSCI and the perjury count before the SSCI. Pardoned, along with five others, a month before sentencing. Id.

Id. at 412-30, available at http://history.liberatedtext.org/ic/partviii.html#sect08.

Weinberger was also indicted on one count of perjury to the Office of Independent Council and the FBI. He was pardoned before his CIFA issues could be litigated. Id.

United States v. Dean, 55 F.3d 640 (D.C. Cir. 1995).
Dean, 55 F.3d at 644-45.

On July 7, 1992, a grand jury returned a thirteen-count indictment against Dean. The indictment charged Dean with three counts of conspiracy in violation of 18 U.S.C. § 371, one count of accepting an illegal gratuity in violation of 18 U.S.C. § 201(c)(1)(B), four counts of perjury in violation of 18 U.S.C. § 1621, and five counts of concealment and false statements in violation of 18 U.S.C. § 1001. The district court dismissed one of the counts brought under 18 U.S.C. § 1001. On October 26, 1993, a jury found Dean guilty of the twelve remaining counts. Before Dean’s appeal the Supreme Court decided Hubbard v. United States, 514 U.S. 695 (1995), which held that § 1001 did not apply to statements made before Congress. Thus, these convictions were overturned. The single § 1621 count which was reversed was reversed on factual grounds. Id. at 644, 658-66. Hubbard’s interpretation of § 1001 was later superseded by statute in 1996. United States v. Butler, 351 F. Supp. 2d 121 (2004).

Horner also pled guilty to giving false information to the FBI. Id.

Also convicted of obstructing a GSA inquiry, making false statements, or withholding information from, a GSA inspector general investigator and GSA ethics officials. Id; Public Integrity Section, Report for 2005, supra note 45, at 25-26, http://www.usdoj.gov/criminal/pin/docs/arpt-2005.pdf. The GSA counts were later reversed because it was not clear that Safavian had a legal duty to disclose his activities to the GSA. The counts before Congress were also reversed because the appellate court found that the district court abused its discretion in “excluding favorable expert testimony” regarding the meaning Safavian might have attached to jargon used in his testimony. United States v. Safavian, 2008 U.S. App. LEXIS 12691, *1, *15-26, June 17, 2008 (D.C. Cir. 2008).